IN THE HIGH COURT OF JUSTICE No. BL-2020-000735
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

[2021] EWHC 3414 (Ch)

Rolls Building

Fetter Lane

London EC4A 1NL

Monday, 1 November 2021

Before:

MR JUSTICE ADAM JOHNSON

BETWEEN:

(1) SAY CHONG LIM

(2) CITY SUCCESS INVESTMENTS LIMITED

(3) GREENACRE CAPITAL (HYSON HOUSE) LIMITED

(4) LAPLAND LIMITED Claimants

- and -

(1) CHEE KONG ONG

(2) GREENACRE CAPITAL LIMITED

(3) GREENACRE CAPITAL PARTNERS LIMITED

(4) GREENACRE PROPERTIES LIMITED Defendants

MR J. BAILEY QC (instructed by Withers LLP) appeared on behalf of the Claimants.

MR R. TAGER QC (instructed by Ince Gordon Dadds LLP) appeared on behalf of the Defendants.

JUDGMENT

(via Microsoft Teams)

(Transcript prepared without the aid of documentation)

MR JUSTICE ADAM JOHNSON:

Introduction & Background

1
These are complicated proceedings but the present application ultimately raises some straightforward issues.

2
The claimants are Mr Say Chong Lim, the first claimant, and various companies associated with him, including the second claimant, City Success Investments Limited ("CSI").

3
The defendants are Mr Chee Kong Ong, the first defendant, and various companies associated with him, including the second defendant, Greenacre Capital Limited ("GCL"), the third defendant, Greenacre Capital Partners Limited ("GCPL") and the fourth defendant, Greenacre Properties Limited ("GPL"). Mr Ong has been referred to in the hearing before me as Francis and, if I may, I will respectfully adopt that name for him in this judgment.

4
The claimants make allegations of fraud against the defendants arising out of their business dealings. Against that background, on 14 May 2020, Zacaroli J made both without notice freezing and disclosure orders against the defendants and, against Francis, a further order referred to as the quia timet injunction. The effect of the quia timet injunction was to restrain Francis from disposing of the assets of three specified companies, of which he was and is a director. That was in light of a concern that, unless otherwise restrained, he might take steps to dispose of such assets at an undervalue.

5
One of the companies concerned was Greenacre (Thanet) Limited ("GTL"). GTL is owned as to 50 per cent by the second defendant, GCL, and as to 50 per cent by another company, not associated with Francis, called Project Ten Limited ("Project Ten"). Project Ten is an investment vehicle owned by Mr Kevin Piper and his wife, Suzanna Piper. They are both directors of GTL, the joint venture company, together with Francis and a further individual, a Mr Arnold Hersheson, who is also chairman of GTL.

6
Zacaroli J's order was continued following an inter partes hearing on 3 June 2020. The application to continue the without notice order was not opposed. The order was later amended by consent on 21 July 2021, to increase the value of the defendants' assets affected by the freezing aspects of the order. Following that variation, the amounts frozen were and are as follows: Francis' assets up to the value of £5,941,140; GCL's assets up to the value of £2,175,000; and GPL's assets up to the value of £650,000.

7

It is convenient at this point to set out the terms of the quia timet injunction. This is contained in para. 8 of the order and is as follows:

“The First Respondent [i.e., Francis], in his capacity as a director of each of Greenacre (Thanet) Limited [i.e., GTL], Greenacre (Twerton Park) Limited and Greenacre Capital (Twerton High Street) Limited (together ‘the Intended Subsidiaries’) shall not permit or cause the misappropriation of any of the assets of the Intended Subsidiaries either by their being transferred away from the Intended Subsidiaries or otherwise encumbered or dealt with in any manner whatsoever, unless such transaction is for fair value. The First Respondent, in his capacity as a director of Greenacre (Thanet) Limited, shall not sell, market or otherwise deal with any interest in property that Greenacre (Thanet) Limited has pursuant to any option agreement or otherwise, save with the approval of the Board of Greenacre (Thanet) Limited taken in accordance with the provisions of Article 8 of its Articles as in force at 3 June 2020.”

8
An application is now made to vary that broad structure. I will explain shortly how it comes about, but first, I should mention several further aspects of the background relating specifically to GTL, the entity owned jointly by GCL (Francis’ vehicle) and Project Ten (Mr Piper’s vehicle).

9
GTL has a valuable asset. It has the benefit of an option agreement to purchase a large tract of farmland on which conditional planning permission has been granted to build 600 or more residential homes. The joint venture, as between GCL and Project Ten, is governed by the terms of a shareholders’ agreement dated 10 August 2016 (the “GTL SHA”). In the event that value is realised from GTL, there is a formula for the division of that value between GCL, on the one hand, and Project Ten on the other.

10
The claimants’ interests in GTL is as follows. It is part of their case that the second claimant, CSI, has invested some £3.5 million or thereabouts in the development project being pursued by GTL. They also claim an indirect shareholding in GTL in the sense that they say they were promised that the shareholding in GTL, presently held by GCL, would be transferred to another one of Francis’ companies, namely the third defendant, GCPL, in which the second claimant, CSI, was promised a 50 per cent shareholding.

11
The defendants accept part of what the claimants say about this but not the whole of it. They accept that there was an agreement that CSI would become a 50 per cent shareholder in GCPL, with Francis owning the other 50 per cent, but they deny that GCL’s shareholding in GTL was to be transferred to GCPL. They say, instead, that GCPL was only ever intended to be a funder of GTL and not an equity investor in it.

12
The upshot of all this is that it is common ground that CSI has a contractual entitlement to a share of the value flowing into GCPL, but a dispute as to the interest CSI was to have in the project company, GTL.

13
As to the nature of CSI’s contractual entitlement, that is to be found in a further shareholders’ agreement (I will call it the “GCPL SHA”) dated 30 November 2017. Rather like the GTL SHA, the

GCPL SHA contains a formula for the division of value flowing into the joint venture company, i.e. a formula for the division of such value as between CSI on the one hand and Francis on the other. Some issues arise as to detail of the operation of that formula but they are relatively limited. For present purposes, what is important is that there is agreement that CSI has at least a contractual entitlement to a material proportion of the value flowing into GCPL from its involvement in supporting GTL's commercial plans, but some disagreement as to the precise extent of that entitlement. The amount due to CSI under the GCPL SHA was referred to by the claimants in their skeleton argument as the "CSI entitlement", and I will adopt that description.

The Issue

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Now comes the issue. The claimants say it came to their attention during the early part of this year that efforts were being made to realise value from the GTL development project. By late May or early June, the claimants say their perception was that this would likely be achieved by a sale of the shares in GTL held by GCL and Project Ten to a buyer, named Standen Land and Developments Limited. The claimants refer to a potential sale price in the region of £65 million.

15
The claimants became concerned that the possibility of a share sale was not sufficiently catered for by Zacaroli J's order. That is because the quia timet injunction affecting Francis restrained any sale of the assets of GTL, otherwise than for fair value and with the approval of GTL's Board, but that did not obviously restrain a sale of the shares in GTL held by GCL. Relatedly, the quia timet injunction made no provision for what was to happen to any proceeds of sale derived from a sale of GCL's shareholding to a third party. That was a matter of concern to the claimants because of their contractual entitlement to a share of any such proceeds by means of the CSI entitlement I have referred to.

16
The claimants thus maintained that there was a lacuna or gap in Zacaroli J's order and proposed that the lacuna needed to be filled, and urgently so, in light of the intelligence they had received as to the possibility of an imminent sale. They proposed a number of detailed additions to the existing order.

17
Correspondence with the defendants' former solicitors, Chan Neill, prompted Chan Neill, in a letter dated 20 May 2021, to say that there was no real urgency because there was no binding contract with Standen Land or with any other purchaser. At some point in late May, Chan Neill were replaced by the defendants' present solicitors, Ince Gordon Dadds LLP. In a letter of 1 June, they said that there was no imminent sale of shares in GTL contemplated but instead there would most likely be a phased sale or sales of land plots over time and, thus, no "big bang". They also said that there could be no sale of Thanet (that is GTL) without some form of variation to the existing order and then went on to say as follows:

"Having made those observations we do not see any harm in exploring with you, at this stage, a protocol by which the Thanet Project may be taken outside of the scope of the Order and the net proceeds of sale ring-fenced until trial or further order; however, we consider your proposals unnecessary and over-engineered. It seems to us that what would be required would be for the Respondents to the Order to give to the Court an Undertaking that this firm has been given irrevocable instructions to act on the sale of the Thanet Project, whether in whole or by tranches or phases, and that the Order be varied to permit such sales on the basis that the net proceeds of the sale are retained by this firm in our client account until trial or further order."

The June Application and draft Order

18
On the same day, 1 June 2021, the claimants issued an application to vary Zacaroli J's order. The application was supported by a detailed witness statement of Mr Lyndon-Skeggs, of the claimants' solicitors, Withers. He identified the source of the intelligence as to an imminent sale to Standen Land as Mr Piper, Francis' co-investor in GTL, and he said that the most recent information was that the sale was "expected to complete in mid-June".

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As to the substance of the relief sought, the position may be summarised as follows.

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By a proposed new para. 8A to Zacaroli J's order, the claimants sought information as to the anticipated sale. As a matter of drafting, this was sought to be achieved by a proposed recital to the order setting out a description of the anticipated sale structure as the claimants then understood it to be. The scheme of para. 8A was then to require Francis to provide an affidavit confirming whether the description in the recital was accurate and, if not, then giving a description of what was in fact intended to happen.

21
By a new para. 8B, the claimants proposed a structure intended to ring-fence, in effect, an amount corresponding to the value of the CSI entitlement, anticipated to arise on the prospective sale of shares to Standen Land. I need not, I think, recite the detailed wording. It is more important to understand the logic behind it. The logic was as follows. A sum totalling about £65 million was expected to be achieved on sale of the shareholdings in GTL and that amount, the "Gross Proceeds", was expected to be paid into an account at Travers Smith, whom the claimants understood to be acting for the project company, GTL. From the Gross Proceeds, Project Ten were to be paid their share, calculated by reference to the formula in the GTL SHA. That would leave the remainder of the Gross Proceeds to be fought over between the claimants and the defendants. Two proposals were made in that regard.

22
The first, and most important, was to ring-fence a sum corresponding to the value of the CSI entitlement, calculated according to the claimants' construction of the terms of the GCPL SHA and assuming a sale value for the shareholdings in GTL of roughly £65 million. Mr Lyndon-Skeggs set out very detailed calculations in his witness statement of what that figure was likely to be, which he calculated as £13,054,761.40. The proposal was that that sum be set aside in an escrow account held in the joint names of the claimants' and the defendants' solicitors.

23
The second proposal was that, as regards the final rump of the Gross Proceeds, amounts corresponding to the sums frozen by means of Zacaroli J's order, i.e., £5,941,140 as regards Francis, £2,175,000 as regards GCL, and £650,000 as regards GPL, should be transferred to a further escrow account and then the freezing order discharged.

The Ongoing Correspondence

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Unfortunately, as a review of the evidence demonstrates, from at least this point on the correspondence between the parties became very strained. The difficulties began immediately. Also on 1 June, it seems after receipt of the variation application, Mr Cohen, the solicitor at Ince with carriage of the matter for the defendants, sent an email in which he said as follows:

“Dear Sir,

We acknowledge receipt and consider your conduct abusive.

Following receipt of a constructive letter from us that sought to address the mischief you say you are concerned about, instead of engaging with that letter, which invited your response, you fell over yourselves in your haste to send us an unissued draft of an unnecessary application, to which there was no urgency, because the existing Order is also sufficient to restrain the activities you say your client is concerned may happen. You say you were seeking an Order preventing the dissipation of assets but your client already has the benefit of such an Order.

What you were actually seeking is not a variation to the Order but an early cashing up for your client by way of summary judgment dressed up as a variation to the Order.

Before we incur considerable costs responding to your application, we would invite you to withdraw it forthwith and instead respond to our letter which provides your client with all the additional comfort he can reasonably require.”

25
In response, on 3 June, Withers explained that the documents they provided on 1 June were not drafts but finalised documents which they had sent to the Court for issuing, before receipt of Ince’s letter mentioned at [17] above. They also referenced further discussions with Mr Piper, who apparently had confirmed that “the sale negotiations are well advanced and are expected to be completed shortly”. Withers also said as follows in relation to the proposal contained in Ince’s letter of 1 June:

“We welcome the opportunity to discuss measures ‘by which the Thanet Project may be taken outside of the scope of the [Freezing Injunction] and the net proceeds of sale ring-fenced until trial or further order’. We understand therefore that your clients are, at least in principle, willing to agree the proposed variation to the Freezing Injunction. Indeed, your proposal appears to be wider than ours, in that you are suggesting that the entire net proceeds due to GCL be ‘ring-fenced until trial or further order’, whereas the draft order seeks only that the following sums be transferred into a third party escrow account.”

Withers then summarised the intended operation of the provisions I have already mentioned above at [20]-[23]. Finally, Withers said that they would consider any counter-proposals the defendants might wish to make and suggested a lawyers-only call to discuss matters the following day.

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That proposal was not taken up. Mr Cohen’s email response of 7 June was largely concerned with the question of the perceived urgency of the application and the alleged imminence of any sale of the GTL shareholdings. By this time, the defendants had made enquiries of Travers Smith and, in light of that, Mr Cohen reported as follows:

“We are attaching to this email, a sequence of emails passing between Pitmans, acting for Standen, and Travers Smith, from which it is apparent that the various funders who came together to express an interest in the project, have not even entered into Heads of Terms with one another yet, and there

is no imminent sale to them from our client. According to the email from Travers Smith's head of property, Simon Rutman, to Greenacres Capital Limited [i.e. GCL], dated today, the possible transaction hasn't even started yet. No data room has been established. No terms have been agreed, and Mr Rutman considers that the parties would be doing very well indeed if the transaction were to complete within 3 months of such terms being agreed. This is all information that was readily available to you and which you should have ascertained either at the outset or as a response to the repeated advice that you have received from our clients' side that the information you are apparently being fed is without foundation."

The Defendants' Undertakings

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The claimants' application was listed for hearing in October 2021. Given the view they took of the urgency, however, the claimants considered that something had to be done to hold the ring in the meantime. Thus, they issued a further application for what has been called interim relief pending the October hearing. That application was settled on undertakings given by Francis, GCL and GPL.

28
The scheme of the undertakings is briefly as follows. They assume a sale of the entire issued share capital of GTL under a structure which involves the sale proceeds being paid into an account at Travers Smith, and the undertakings effectively authorise that sale but prohibit any other sale of GCL's shareholding in GTL. As to what should happen to the proceeds of sale, provision is made for dealings with the "GCL Proceeds", meaning the amount due to GCL under the GTL SHA as distinct from the amount due to Project Ten. As to the GCL Proceeds, Francis, GCL and GPL undertook, at undertaking 1(c), that they:

"Will not cause, procure or permit the dissipation of any of the GCL Proceeds in the event that they might arise (whether in the Travers Smith Account or the Ince Gordon Dadds LLP client account or otherwise) either by their being transferred away, subjected to deductions, or otherwise encumbered or dealt with in any manner whatsoever such that the residual amount of the GCL Proceeds in the Travers Smith Account or the Ince Gordon Dadds LLP client account, is less than the Amount (unless otherwise agreed by the Claimants' solicitors in writing)."

29
The phrase "the Amount" means that part of the GCL Proceeds due to CSI under the terms of the GCPL SPA and is stated to be £13,054,761.40 - i.e., it is the sum calculated by Mr Lyndon-Skeggs in his witness statement on the basis of an assumed sale price for the entire issued share capital of GTL of roughly £65 million. (In other words, the Amount is the same as the CSI entitlement).

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Thus, the broad structure agreed was that, if the shareholdings in GTL were sold, a sum of roughly £13 million would be ring-fenced, corresponding to the claimants' calculation of the amount due to them under the agreed arrangements for the division of value flowing into GCPL.

Information from Travers Smith

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I will not deal in detail with the remaining correspondence but instead will highlight just a few key points.

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One line of correspondence concerned efforts by Withers to obtain information from Travers Smith. They wrote to that firm on 1 July and then also on 5 August, with a detailed list of questions, but Travers Smith were reluctant to disclose information without consent from their clients, who appear to have been GTL. In any event, they declined to provide any information until Mr Cohen sent an email on 21 September saying that the defendants had no objection. Mr Rutman, of Travers Smith, then emailed on 29 September. He confirmed that there had been discussions earlier in the year with Standen but about an asset sale, i.e., a sale of land. The description he gave, however, was that the discussions were only ever embryonic or, at least, had not reached the stage of detailed legal work having been required. Thus, although a basic Heads of Terms had apparently been agreed and there had been some limited work done thinking about a data room, matters had not progressed beyond that. Mr Rutman of Travers Smith said that many of Withers' questions contemplated "the transaction being at a materially more advanced stage than it is".

October draft Order

33
As to the pending application to vary Zacaroli J's order, the Defendants' solicitor Mr Cohen sent an email on 24 September in which he said the following:

"Our further understanding is that it is your client's case that he is entitled to 50% of the net proceeds of sale of Thanet [i.e., GTL] (this contention not being accepted by our client). However, our client would be willing to agree a Variation to the effect that out of any net proceeds of sale that come into Travers Smith's hands on a sale of Thanet, either outright, or as individual phases in a phased sale or on a sale of shares, Travers Smith would undertake to hold 50% of any and each such net proceeds of sale in a suitably ring-fenced account until trial, agreement or further order, the net proceeds to include all fees due to Travers Smith.

The costs of the variation will be costs in the case."

34
In reply, on 1 October, Withers said that it was not their case that the claimants were entitled to 50 per cent of the net proceeds of sale of GTL. They were interested only in preserving the CSI entitlement. On the question of ring-fencing any amount derived from such proceeds of sale, they doubted whether it would be feasible for this to be done by Travers Smith but indicated, instead, that it could be done by Withers and Ince jointly, as proposed in the variation application.

35
Withers also enclosed a further version of their proposed draft order. This was amended to take account of the possibility of any realisation of value by GTL being by way of an asset sale rather than by way of sale of the issued share capital of GTL by its shareholders. A further application notice was later issued seeking relief in the form of this October draft. This contains the same recital (referring to the anticipated sale structure) I have already mentioned, and the same provisions at proposed paras 8A and 8B, but contained also a new proposed para. 8C.

36
Paragraph 8C is designed to deal with the possibility of GTL making distributions to its shareholders from asset sales or other realisations of value. Broadly, it works as follows. If distributions are made in accordance with the GTL SHA to GCL, the second defendant, then they are added to the sum presently frozen in the hands of GCL by the existing freezing order (i.e. £2,175,000), but up to a total

additional value of £13,054,761.40. Such additional amounts are referred to as the “R2 Additional Sum”.

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The draft further provides that in the event any such sums are not paid to GCL but instead are diverted to other parties under Francis’ control, then they are instead added to the sums presently frozen in Francis’ hands, i.e., they are added to the sum of £5,941,140 presently frozen in respect of Francis’ assets. Such additional amounts are referred to as the “R1 Additional Sum”. The draft provides that the total of the R1 and R2 Additional Sums shall not exceed the figure of £13,054,761.40.

38
Overall in terms of the relief sought, the upshot is effectively as follows. The claimants seek to restrain any disposals by the defendants of value flowing to them from GTL, either in the event of a share sale or in the event of asset sales. In either case, an order is sought either affirming or correcting the anticipated sale structure described in the proposed recital. In the case of a share sale, orders are sought for the ring-fencing of the relevant sale proceeds in a joint account up to a total value of £13,054,761.40 plus orders freezing additional amounts corresponding to the sums already frozen by means of Zacaroli J’s order. In the case of an asset sale or sales, orders are sought freezing any sums distributed by GTL, either in the hands of GCL or in Francis’ hands, up to a total value of £13,054,761.40. In either case, the figure of £13,054,761.40 represents the claimants’ calculation of the maximum amount due to them assuming that, in one way or another, value of about £65 million is realised from GTL.

39
Ince responded on 11 October to Withers’ letter and draft order. The response is a long one but it seems to me that broadly two points were made. The first was an objection to the form of the proposed order, as follows:

“Whereas the previous variations and the proposed undertaking we have offered you to ring-fence any legitimate claims your client may have as to Thanet [i.e. GTL], contemplate that our clients will preserve assets to the maximum value of your clients’ claim, the latest proposed variation that you seek, requires our client to render those assets in a liquid form, and provides for the subsequent freezing of those liquid assets so that our clients are strait-jacketed from going about their business and using their working capital in the ordinary course of their business.”

40
The second point was effectively that Withers had entirely misunderstood the state of progress of the efforts to realise value from GTL and, in fact, had been misinformed by Mr Piper on that issue. Reference was made to the report from Travers Smith in early June, to the effect that any possible transaction had not yet started, as pointed out by Mr Cohen in his email of 7 June. Reference was also made to Travers Smith’s email of 29 September, in which they said that Withers’ questions assumed any transaction to be at a more advanced stage than it actually was.

The Hearing & the Parties’ Submissions

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I then come to the hearing before me. The defendants’ evidence, which included certain very late witness statements, was all served after the deadline set by Fancourt J by means of his order dated 28 September 2021. Although Mr Bailey QC registered his objection at the late service of the defendants’

evidence, he did not object too strongly and, indeed, sought to rely on the emails exhibited to the witness statement of Mr Jones, a partner at Ince, which refer to an intended Zoom call with an investor to take place in late October or early November. In the circumstances, it seems to me that I should permit the defendants to rely on this further evidence. It goes directly to one of the points which separates the parties, namely the stage of development of the efforts to realise value from GTL.

42
As to the hearing itself, Mr Bailey QC pressed me to make an order in the form of the revised draft order as circulated in October, i.e., the draft covering both the possibility of a share sale and the possibility of an asset sale or sales resulting in distributions made by GTL. Mr Bailey QC referred me to the guidance on the making of quia timet injunctions given in Papamichael v National Westminster Bank Plc [2002] 2 All ER (Comm) [60], in which the court emphasised that the threat of infringement of the claimant's right in such cases does not have to be great in order for the discretion to be properly exercised. As it was put in that case: "A cloud has to be clearly visible but it did not have to be especially ominous."

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When pressed in submissions, Mr Bailey QC accepted that he was not pushing too hard for the relief contained in paras 8B(c) and (d) of his proposed draft order, i.e., those provisions which, in the event of a sale of the shares in GTL, would require not only an amount corresponding to the CSI entitlement but also additional sums corresponding to the amounts already frozen by Zacaroli J's order to be transferred into an escrow account. I think Mr Bailey QC was correct to make that concession because the effect of such an order would be to require security to be provided for the claimants' claim, and it is well settled that a freezing order is not intended to provide security. It is an inhibition on the defendant's ability to dissipate his assets, not on his ability to make use of them at all.

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Mr Tager QC, for the defendants, resisted the making of any order in the form sought by the claimants, although he accepted, on the basis of the evidence put forward to Zacaroli J, that the claimants have a good arguable case on the merits and that there is a real risk of dissipation. His main points were as follows. First, he said that the proposed recital and information disclosure order, at draft para. 8A, are erroneously based on an anticipated sale structure which simply does not exist. Thus, although Mr Tager QC accepted that efforts were being undertaken to realise value from GTL, he said that the plans were at best embryonic and, if there was any cloud on the horizon, it was at present no more than an innocuous white wisp in the distance and there was nothing remotely ominous about it.

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Second, Mr Tager QC said that the proposed new paras 8B and 8C are unwarranted and inappropriate, with the key figure of £13,054,761.40 being wholly irrelevant since it is calculated by reference to the alleged price to be paid for the GTL shareholding which is the very transaction which will not happen.

46
During his oral submissions, Mr Tager QC emphasised the offers made in the letter from Ince dated 1 June 2021 and in the email from Mr Cohen of 24 September 2021. I have already referred to these. The first proposed that "the net proceeds of sale", it seems of any asset sales effected by GTL, should be held in Ince's client account. The second proposed that, whether on the basis of the share sale or

an asset sale, “Travers Smith would undertake to hold 50% of any and each such net proceeds of sale in a suitably ring-fenced account until trial.”

47
When pressed in submissions, however, Mr Tager QC also accepted two further points. The first was that, somewhat ironically, the proposals made by Ince are, on examination, somewhat less generous to the defendants than the proposals contained in the claimants’ June and October drafts, at least if one takes out of account the operation of subparagraphs 8A(c) and (d), which Mr Bailey QC has said he would not press for. That is because on that basis, the claimants’ drafts seek only to freeze or ring-fence that proportion of any overall amount flowing to the defendants as corresponds to the CSI entitlement, i.e., as corresponds to the amount said to be due to CSI under the GCPL SHA.

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As I understood Mr Tager QC’s submissions, however, they were to the effect that in Mr Cohen’s email of 24 September his proposal was to ring-fence all such sums as may be received by the defendants from any realisations of value from GTL, excluding only those amounts which are due to Project Ten. Mr Tager QC justified this on the basis that in one way or another the claimants’ drafting is all premised on the calculation in Mr Lyndon-Skeggs’ witness statement and, at its heart, that calculation is based on an anticipated sale value for the shareholdings in GTL of roughly £65 million, whereas Mr Tager QC described that anticipated sale as a fantasy.

49
There is this further point, however, which is that Mr Tager QC also accepted in submissions that his clients would be willing in principle for the undertakings given to Michael Green J to continue until trial or further order. His logic was that the undertakings were a more straightforward device for protecting the claimants’ position than the elaborate provisions in the two draft orders. He accepted that, on reflection, there was a lacuna in the order of Zacaroli J but said that it should be plugged more simply and straightforwardly. I am sympathetic to that basic idea but, as I pointed out to Mr Tager QC, it is also true to say that the undertakings given to Michael Green J have embedded within them reliance on the calculations contained in Mr Lyndon-Skeggs’ witness statement, because the undertaking recorded at para. 1(c) of the relevant order is an undertaking not to dissipate any sale proceeds below the Amount, that being the figure of £13,054,761.40 taken from the claimants’ calculation. As I understood Mr Tager QC’s response to this, it was to the effect that he had no particular objection to the figure as such, to the extent it represented an estimate of the maximum value likely to be achieved from GTL on any view. What he objected to was any inference being drawn that a sale of the shares in GTL at that value was imminent or, indeed, at all realistic.

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Before drawing the threads together, I should deal briefly with the question of what the present plans are vis-à-vis GTL. As to this, it seems to me clear on the evidence that the original idea of a sale of the shares in GTL to Standen Land did not progress. This is clear from the information provided by Travers Smith on about 7 June and then again on 29 September. Although discussions of some type do appear to have been conducted, they did not proceed to the stage of any detailed legal work being required and did not come to fruition.

51
As to more recent events, there is some evidence of discussions with a possible new investor now developing. The possible new investor is Kingsbridge Partners. It is rather difficult for me to decode

precisely how matters presently stand but I have been shown a letter from Kingsbridge's solicitors, Howard Kennedy, dated 12 October 2021, in which they say as follows:

"Kingsbridge are very experienced real estate investors and we have every confidence in them progressing to complete on their proposed acquisition of this site, given the opportunity."

It seems to me that, as Mr Bailey QC put it, there is evidence here of movement and discussion towards at least a potential transaction. It seems to me it is relatively early days and, for the moment, it is not clear precisely who the counterparties will be (there is evidence of some other interested parties besides Kingsbridge), or what the intended deal structure will actually be.

Analysis & Conclusions

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Having recited the history, how then to respond to this rather messy situation? To begin with, it seems to me that unfortunately the parties have been at cross-purposes for some time when actually, if one seeks to examine the substance of the problem, there is not really much between them. The claimants seek to protect their interests in the event that value is realised in one way or another from GTL. The defendants, in principle, now appear to accept that there is a gap or lacuna in the existing order which needs to be filled. In my view, that is in any event plainly correct because the existing quia timet injunction is not apposite to cover a share sale and neither does it provide for the treatment of any proceeds of the sale however derived.

53
The parties have been at loggerheads about how the gap or lacuna should be plugged but, ironically, a major point of departure between them seems to have been that the claimants wanted more modest relief than the defendants were willing to give, in the sense that the claimants wanted only to freeze or ring-fence the CSI entitlement and the defendants said that they were willing to ring-fence or freeze all value flowing to them from GTL, once Project Ten's interest was taken care of.

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The reason for this unfortunate and somewhat illogical disagreement seems to have been that the formula put forward by the claimants was based on the calculation in Mr Lyndon-Skeggs' witness statement, which in turn was founded on the original anticipated sale structure which the defendants viewed as a fantasy and which, in point of fact, has failed to materialise. The defendants have consequently spent considerable effort seeking to make good their case that the anticipated sale structure was a fantasy and challenging the intelligence from Mr Piper on which Mr Lyndon-Skeggs' evidence was based. The claimants have sought to defend their position on the evidence, including by reliance on the witness statement from Mr Piper served shortly before the hearing. But, in a sense, on both sides, all this was something of a distraction because all the while an agreed structure was easily within reach given that, on the substance, there was a great deal of common ground.

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In these circumstances, in my judgment, the proper approach for the court to take is as follows. I will make an order designed to fill the gap or lacuna in the earlier order made by Zacaroli J. As to the legal basis for making an order, I am satisfied on the evidence that sufficient is happening in terms of efforts to realise value from GTL to warrant the conclusion that a cloud is visible on the horizon.

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As to the form of order, I propose the following, which is effectively a simplified version of the defendants' October draft. I have considered as an alternative whether to use the undertakings given to Michael Green J as the model, but in the end it seems to me that would not be appropriate because those undertakings contemplate a realisation of value by means of a share sale and it is not clear that any deal will, in fact, be structured in that way even if one materialises. It is equally plausible that there may be a sale of land, or parcels of land, or perhaps some other structure.

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My suggested approach is, therefore, as follows.

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First, the claimants' proposed recital referring to their anticipated sale structure can be dispensed with. In my judgment, this is unnecessary as it seems to me clear, on the basis of the information received from Travers Smith, that the sale transaction, as originally envisaged, is not likely to materialise.

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Second, I consider that there should be some form of requirement for the provision of information by Francis as to ongoing negotiations. As to this, as I understand it, authorisation has now been given to Travers Smith which should enable that firm to provide informal updates from time to time to the claimants' solicitors upon request. If my understanding is incorrect, I should be amenable to an order which requires such authorisation to be given. Beyond that, I would propose making a simplified version of the order at para. 8A of the claimants' draft as follows:

"The First Respondent [i.e., Francis] must, at least 7 days prior to completion of any transaction, by which the sale of Greenacre (Thanet) Limited [i.e. GTL] is anticipated to be effected, and/or by which the value of its Option or any part thereof is anticipated to be realised, inform the Applicants' legal representatives of such expected completion and provide copies of the documentation relating to the relevant transaction."

This revised language is intended to cover either a sale of shares or any other transaction designed to realise value, in circumstances where the originally anticipated sale structure never really developed. However, I see no purpose in requiring Francis to make an affidavit confirming the accuracy or otherwise of the claimants' understanding about it.

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My third proposal is for a revised and simplified para.8B as follows:

"In the event of any sale of shares in Greenacre (Thanet) Limited [i.e. GTL] –

(a) Neither the First nor the Second Respondent [i.e. neither Francis nor GCL] shall permit or cause any dissipation of such share of those sale proceeds as the Second Respondent shall be entitled to pending further order of the Court. Liberty to the parties to apply as to the further treatment of such sale proceeds pending trial herein.

(b) Nothing in paragraph (a) above shall prevent the distribution of funds to Project Ten Limited under the terms of the shareholders' agreement relating to Greenacre (Thanet) Limited dated 16 August 2016."

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The intention underlying the simplified language I hope is obvious. As will be apparent, I would exclude the claimants' proposed subparagraphs (b), (c) and (d). Subparagraph (b), in my judgment, is unnecessary in the sense that detailed arrangements as to the holding of the sale proceedings can be worked out if and when they are received and, under my formulation, the parties are given liberty to apply as to such arrangements when it becomes necessary to do so. Subparagraphs (c) and (d) fall away in light of the exchanges I had with Mr Bailey QC during the course of the hearing, which I have summarised at [43] above.

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Fourth and finally, I would propose to adopt the claimants' draft para. 8C as it stands, including the consequential amendments to paras 5 and 7 of the existing order. Mr Tager QC challenged para. 8C during the hearing before me on the basis that it was too elaborate. It is somewhat elaborate but, as I have sought to explain in my summary of it above, it is intended to provide a flexible procedure for the protection of value realised from GTL in ways other than by a share sale, up to the claimants' estimated value of the CSI entitlement based on an overall value figure of some £65 million or thereabouts.

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I realise that the relevant figure is thus the £13,054,761.40 that has its origin in Mr Lyndon-Skeggs' witness statement, and I do not wish it to be inferred that I am assuming anything in relation to the originally anticipated sale structure as the claimants' saw it. Instead, I am adopting it on the pragmatic basis proposed by Mr Tager QC, namely as a representation of what is likely to be the outer limit of the amount the claimants are entitled to under the GCPL SHA. It is, as I have pointed out, a figure that the defendants were happy to live with on that basis, given their apparent willingness to continue until trial the undertakings given to Michael Green J.

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That, it seems to me, is sufficient to dispose of the claimants' application. I am open to hearing further from the parties as to possible refinements to the language I have proposed and will send that language to them by email or by some other appropriate means once this judgment has been delivered. I will also need to hear from the parties in relation to costs and will hear submissions as to how costs are best dealt with in light of the approach I have taken in this judgment.
