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Case No: CL-2016-000392

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
Fetter Lane, London
EC4A 1NL

2 July 2018

B e f o r e :

MR JUSTICE POPPLEWELL

Between:

Phoenix Group Foundation (a Private Interest Foundation existing under the laws of Panama),
Minardi Investments Limited (a company incorporated in the British Virgin Islands) **Claimants**

- and -

(1) Dr Gail Alison Cochrane
(2) Gerald Martin Smith
(3) Dawna Marie Stickler
(4) Anthony Paul Smith
(5) Litigation Capital Limited,
(a company incorporated in the Marshall Islands)
(6) Chepstow Property Co. Limited, (7) Brynna Property Co. Limited (1) Llanharan Property Co. Limited SCDS Corporation, Inc.,
(a company incorporated in the State of Delaware)
(8) Dunedin Holdings Limited,
(a company incorporated in the Marshall Islands)
(9) Coegi Properties Limited
(10) Burtonwood Dev. Limited **Defendants**

Mr D. Lord QC and Mr S. Kokelaar (instructed by Richard Slade and Company Plc) appeared on behalf of the Claimants.
Mr P. Sinclair QC (instructed by Wallace LLP) appeared on behalf of the Defendants.

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Popplewell:

1. This is an application by the 6th to 12th defendants, to whom I shall refer generically as "the non-cause of action defendants", for further fortification to be provided by the claimants in support of the cross-undertaking in damages, which was given under two freezing orders which I stated: first, a freezing order of 8 June 2017 against the 6th to 9th non-cause of action defendants, and, secondly, a freezing order of 12 June 2017 against the 10th to 12th non-cause of action defendants. In each case injunction orders froze the property of the non-cause of action defendants up to a value of £145 million, and identified within those orders particular property to which the restraint applied.

2. The procedural context in which those orders were made is an action brought by the first claimant, Phoenix, and the second claimant, Minardi, in which Phoenix claims £73.75 million plus interest from the first defendant, Dr Cochrane, under the terms of a loan note dated 29 April 2016. The loan note was part of a series of agreements under which there was a settlement of complex multi-party litigation in respect of which I have given a number of judgments. I do not propose to set out the history of that litigation which is set out in my previous judgments. The proceedings were commenced against Dr Cochrane on 24 June 2016, and on that date I granted a worldwide freezing order in the sum of £145 million against Dr Cochrane. There was then added, by way of amendment to the contractual claim against Dr Cochrane, a claim against the 2nd to 5th defendants - they are respectively Dr Smith and Ms Stickler, Mr Smith and LCL, as I shall refer to them - on the grounds that they had participated in an unlawful conspiracy to deprive Phoenix of the value of its rights under the loan note by, in effect, putting assets beyond its reach. On 15 December 2016, sitting in Truro, I granted a further freezing order in the same amount against the 2nd to 5th defendants, and joining them to the proceedings. That order included disclosure provisions pursuant to which Mr Smith, the fourth defendant, identified limited assets said to be owned by him.

3. The orders which I made on 9 and 12 June 2017 were on the basis that the assets held by the various non-cause of action defendants were assets which were sufficiently connected with Mr Smith that it was arguable that they were Mr Smith's assets and/or available to satisfy a judgment which would be obtained against him. It was on the basis of that *Chabra* jurisdiction - see *TSB Private Bank International v Chabra* [1992]1 WLR 231 - that the two freezing orders with which I am concerned today were made against the non-cause of action defendants.

4. The usual cross-undertaking in damages was given in those orders. The original order which I made against Dr Cochrane on 24 June 2016 required limited fortification of the cross-undertaking in damages so far as she was concerned, comprising charging of a receivable in favour of Minardi. When I extended the freezing order to cover the 2nd to 5th defendants, I required fortification to be provided in the sum of £1 million. That is the sum which is currently available by way of fortification in relation to the cause of action defendants and the non-cause of action defendants, there having been no further fortification required at the time I made my orders against the non-cause of action defendants in June 2017.

The non-cause of action defendants and their assets

5. The 6th defendant, Chepstow Property Company Ltd, is an English company. It is wholly owned by Chepstow Holdings Ltd ("Chepstow"), a Marshall Islands company, which in turn is wholly owned by another Marshall Islands company, London Property Holdings Ltd, of which Mr Smith is a director. Mr Smith is also a director of Chepstow. Chepstow is the owner of four parcels of land located in a development known as Severn Quays, which it has been in the process of developing into 35 residential flats. It financed that development by entering into finance agreements in November 2015 in two ways. The majority of the funding, some 87.5 per cent, was provided by Hyde Park Finance Ltd. under a loan facility of £5 million, secured by a legal mortgage over Chepstow's property assets, and a legal mortgage over property owned by the 8th non-cause of action defendant, Llanharan, and I will come to that further below. The balance of the funding was provided by a loan facility of £10 million with a Delaware corporation, SCDS Corporation Inc, as the lender. The evidence about SCDS on the applicants' side is that it is an independent company funded by a collection of private arm's length investors in UK property who are entirely unrelated to these proceedings. It is, according to the applicants, wholly owned by a Mr Stephen Sinclair, the company's sole director, and was an independent vehicle formed for the purpose of pursuing investment opportunities in UK property, including, but not necessarily limited to, the properties held by the 6th, 7th and 8th non-cause of action defendants. The evidence of the applicants' solicitor, Mr Thompson, is that the amounts loaned by SCDS stand at £10,778,026, plus interest, under the terms of the SCDS loan agreement. The claimants do not accept this characterisation of SCDS. It is their case that Mr Sinclair is a close friend and associate of Dr Smith (Mr Smith's brother) and, on the basis of materials referred to in Mr Slade's 13th affidavit, Mr Sinclair ran Dr Smith's family trusts as a nominee trustee. It is the claimants' case that he

and SCDS are not to be treated as independent or at arm's length, and the claimants' concern is that the money which SCDS has advanced is not (as it asserts) *bona fide* third party money but, rather, may well be the recycled frozen proceeds of the Isle of Man settlement. I shall return to say a little more about SCDS' position as a financing institution and its relevance to the issues in the application later in this judgment.

6. The 7th defendant, Brynna Property Company Ltd ("Brynna"), is incorporated in England and Wales. It is wholly owned by Brynna Holdings Ltd, a Marshall Islands company, which in turn is wholly owned by LPHL. Mr Smith is a director of Brynna. Brynna owns a parcel of land in a development known as Naturally Woodlands, which it purchased in 2011, with the benefit of the SCDS loan agreement funding, and it is said to be in the process of developing that land into some 22 residential properties. In Brynna's case, unlike Chepstow, the funding is said to have come solely from SCDS.

7. The 8th defendant, Llanharan Property Company Ltd ("Llanharan"), is another English company, again owned by a Marshall Islands company, Llanharan Holdings Ltd., in turn wholly owned by LPHL. Mr Smith is a director of Llanharan. Llanharan, like Brynna, owns a parcel of land in the Naturally Woodlands development, and is also developing that land into residential properties. It too has been financed by the SCDS loan agreement, which was its sole source of funding in relation to the development.

8. The 11th defendant, ("Coegi"), is an English company. It is jointly owned by a Mr Eddolls and a Ms Rodrigues, and owns a number of investment properties in and around London, and a further property in Manchester. To finance the purchase of those properties, it entered into a loan agreement with the 10th defendant, Dunedin Holdings Ltd ("Dunedin"). Dunedin, like SCDS, is a company which is financed by a number of private investors who are said, on behalf of the applicants, to be unconnected to any other parties in these proceedings. Dunedin loaned Coegi a sum of a little over £4.75 million for the purposes, it is said, of building its portfolio of assets.

9. All the lending which I have identified was secured over the underlying properties.

10. The 12th non-cause of action defendant ("Burtonwood") is an English company wholly owned by Dunedin, of which Mr Smith is a director. That is said to own an industrial estate in Cheshire which it plans to redevelop and convert into residential property units. It is said that it had been intended that Dunedin, backed by investors, would finance that development, but it is alleged that that financing has not taken place as a result of the freezing order.

11. The case on behalf of the non-cause of action defendants is that the freezing order has caused various losses in connection with the ability to pursue the development projects, and it is those losses which will form the subject matter of an order for damages under the cross-undertaking. It is those potential losses which I have to examine for the purposes of determining whether there should be fortification of the cross-undertaking.

12. Before I identify those losses, I should say one or two things about what has happened since. There were negotiations which commenced on 8 September 2017, in relation to the Severn Quays development which involved the claimants, Hyde Park, Chepstow, Llanharan and SCDS, with a view to reaching agreement as to how sales of the completed residential properties, could be effected, and what was to happen to the proceeds of sale. In the end, a protocol was executed on 19 April 2016 which provided a mechanism for the sale of those units. I need not deal with the detail. It provided, by way of a first step, that the claimants were to be given notice five days in advance of exchange such that they would have the opportunity to object to the price if it was regarded as being otherwise than at fair market value. There was then a further series of steps for the monitoring and execution of the sale process. The proceeds of the sales were to be dealt with in the same way as was already provided for under the *Angel Bell* exception in the orders. Each of the freezing orders which I granted against the non-cause of action defendants contained a proviso that the order would not prohibit the non-cause of action defendant from dealing with or disposing of any of its assets in the ordinary and proper course of business, subject to some particular provisos whose effect was essentially this. First, there was an absolute bar on any dealing where the dealing was to any of the defendants, including the non-cause of action defendants or entities controlled by them. Secondly, there was a complete bar on any dealing or disposal where full value was not given for such dealing or disposal. Thirdly, there was a requirement to give the claimants' legal representatives five business days prior written notice of any proposed transaction. Fourthly, the proceeds of any sale, subject to one exception, would have to be paid to the enforcement receivers who were to hold them pending the outcome of proceedings or further order of the court, which, for reasons I do not need to explain in this judgment, may not be for some considerable period of time, possibly from 2020 onwards. The normal course of business proviso was itself subject,

as indeed all the terms of the order were, to the ability to reach agreement for a variation of the order and therefore for disposals to be made outside the terms of the proviso itself.

13. In addition to the protocol under which sales of properties within the Chepstow development have taken place, there has also been a relatively recent request for a sale in relation to the properties held by Coegi, Mr Slade's 18th affidavit suggests that that had been dealt with without any dispute arising so as to enable those sales to take place.

The law

14. The relevant law was not substantially in dispute before me, and is summarised in *Energy Venture Partners Ltd. v Malibu Oil and Gas Ltd*. [2014] EWCA Civ 1295, [2015] 1 WLR 2309 , and the authorities there referred to. In particular, an applicant for fortification must satisfy three requirements. First, that the court can make an intelligent estimate which is informed and realistic, although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant by reason of making the freezing order. Secondly, that the applicant has shown a sufficient level of risk of loss to require fortification, that is has shown a good arguable case to that effect. Thirdly, that the making of the interim order is or was a cause without which the relevant loss would not be, or would not have been, suffered. In relation to that third requirement, whilst it is open to the respondent to the application to demonstrate that there is no causal link between the granting of the injunction and the loss in question, if disproving that asserted causal link, as to which a good arguable case is shown, requires the deployment of extensive contentious evidence and argument, then that is not an exercise to be attempted at the interlocutory stage.

15. The court in that case, and indeed the Court of Appeal in the later case of *JSC v Mezhdunarodniy Bank and Anr. v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 , approved a passage in the judgment of Floyd J (as he then was) in *Bloomsbury International Ltd. v Holyoake* [2010] EWHC 1150 (Ch) at paras. 24 and 25. Floyd J said:

> "In many cases the fact that there is a risk of loss will be obvious merely from the general situation, and while it may not be possible to put anything like a precise figure on the loss, the court will, if necessary, do what it can on the evidence before it to reach an appropriate figure. The courts are well accustomed to assessing the appropriate value to be given to things whose valuation is difficult. In some cases it will be possible to make a more precise or confident assessment than in others. The mere absence of particularised evidence does not [of itself necessarily] mean that there is no evidence of a risk of loss."

16. The second point of relevance made by Floyd J is that it is not an answer to say that a respondent to a freezing order would always be able to apply for permission to deal with or dispose of assets in the first instance by seeking the claimant's consent and, if that were denied, by coming to court. Floyd J observed that delay in obtaining that consent might well be damaging or make it not worth selling the assets at all.

The Potential Losses

17. I turn to the particular heads of loss which are put forward on behalf of the applicants. The first is that it is said that in relation to the Chepstow properties there are a number of purchasers who had previously entered into agreements reserving properties which they wished to purchase, and who, Mr Thompson on behalf of the applicants asserts, have withdrawn from those purchases and have not proceeded to exchange. Mr Thompson asserts that that is so in relation to 12 of the Chepstow properties, and there are exhibited the reservation agreements for those 12 purchasers. And he asserts that that is also so for two purchasers of properties in the Brynna development.

18. I am not satisfied that the necessary requirements are established in relation to those alleged losses. There is no evidence, to support the assertion that there has been a loss of a sale as a result of the freezing order. There is no underlying material recording the position of any of those customers. There is no document evidencing when they withdrew and why they withdrew, or whether they gave any reasons for it. In the particular circumstance of this case, I have reason to be careful about the weight I can attach to what is no more than assertion, on Mr Thompson's part, about losses which have been caused by the freezing order, because there are a number of inaccuracies - admitted inaccuracies - in his evidence and in particular in relation to financing in relation to Coegi. What he said at para.37 of his witness statement by reference to financing arrangements being lost as a result of the freezing order has been shown to be demonstrably unsound as a result of the particular timing. Moreover, even if I were to assume that some or all of the customers have withdrawn as a result of the freezing order, that

gives rise to the question as to what, if any, loss has been suffered. On behalf of the applicants, Mr Sinclair QC submitted that that was straightforward. It was simply the value of the properties which would have been bought, which totals, over the 14 residential properties, a sum of approximately £4.7 million. But that, as it seems to me, would not be the relevant measure of any loss. The properties have been completed and, if and insofar as they have not been the subject matter of a subsequent sale, they remain held by the property-owning companies and they have the market value that they currently have which may be more than, or no less than, the price at which they would have been sold to the withdrawing customers. If they have subsequently been sold the proceeds of sale would price ??? to be brought into account, although I accept, that would not necessarily preclude a loss having arisen because it is possible that a subsequent purchaser has bought one of those properties, and the property that that purchaser would otherwise have bought has not been sold. However, that is a matter of complete speculation because the evidence before me does not identify whether any of the properties which have been sold were properties which had previously been reserved by the customers who withdrew. The important point, as it seems to me, is that the withdrawing by the customers leaves the property-owning companies with the properties having whatever market value they have. That market value may, so far as the evidence before me is concerned, be the same or higher or lower than that which the customers had agreed to pay. Unless it is lower and/or is likely to be lower in the future, then the withdrawal by the customers simply does not give rise to any capital loss.

19. I am therefore unable to say, on the evidence before me, that there is a good arguable case that any capital loss has been suffered or will be suffered as a result of customers who had previously reserved properties withdrawing from the purchase. It is true that there might be said to have been a loss in any event in the form of the time value of money by a delay in those properties being sold, but it is still a question which falls to be addressed by reference to the market value of the properties. Put shortly, whether the result of those customers withdrawing has been to cause a loss depends upon whether, when those properties when sold render more or less than that which the customers had agreed to pay.

20. In *Harley Street Capital Ltd. v Tchigirinksi* [2005] EWHC 2471 (Ch), Mr Briggs QC, sitting as a Deputy High Court Judge (as he then was) laid down the principles which were subsequently approved and adopted by the Court of Appeal in the *Energy Venture Partners case*. That was a case in which dealings in shares were restrained, and it was alleged that, in consequence, they fell in value. The shares had indeed fallen in value, but Mr Briggs found the evidence of a significant and lasting fall caused either by the proceedings or by the making of the freezing order very thin, and in the light particularly of the price volatility of the shares in question and levels of trading over a wider period, he declined to order fortification. The position is analogous in this case, albeit that what one is dealing with is fluctuating values in a property market rather than fluctuating value of shares.

21. Accordingly, I am of the view that the applicants have to failed to show, in respect of this head, a good arguable case of risk of loss with a sufficient causative connection in an amount of which the court can make any sensible estimate.

22. The second alleged head of loss arises in relation to the Llanharan development. Mr Thompson says in his witness statement that he has been told by Mr Mills, who is an employee of Chepstow, that Llanharan entered into negotiations with the Kier Group to sell the entire development, at its then developed stage, at a profit of approximately £1.6 million, compared with Llanharan's purchase price, but that deal that had collapsed as a result of the freezing order. The only documentary material to support that averment is material which shows an interest on behalf of the Kier Group to proceed in principle. That interest preceded the 8 June order, but if continued after the 8 June order, and it is rested with an email from Kier's business development manager of 20 July 2017, suggesting that she was pleased that there was a desire to proceed with the sale; that Kier were eager to progress matters quickly; and that a six-month exclusivity period should be documented by the lawyers. There is no documentary evidence as to what happened thereafter. There is no suggestion in the documentation whether Kier was notified of the freezing order, and if so when. There is no documentation as to what occurred after the 20th July email or evidence, why Kier did not go ahead with the proposed purchase. Again, there is no more than assertion on the part of Mr Thompson on information and belief from someone, not from Chepstow but from Llanharan, and that, in my view, is not sufficient to establish a good arguable case where there is no support in the documentation which one would expect to exist if there were indeed a good arguable case that the freezing order was causative of a collapse of that purchase.

23. The next potential head of loss which is put forward is the increased cost of funding, which is said to arise in this way. In his first witness statement, Mr Thompson says, at para.18, that as a result of the freezing orders Chepstow came under "an inability to draw down further monies under the SCDS Facility Agreement". Accordingly, it was said that Chepstow was compelled to enter into a further facility agreement with Hyde Park, which increased the facility available to Chepstow from a sum a little over

£5.2 million to a figure a little over £7.2 million, the difference being £2.012 million. Mr Thompson asserted that the interest and arrangement fees charged by Hyde Park are over £550,000 alone, and that interest continued to accrue at a rate of over £300,000 per annum.

24. The original facility agreement with Hyde Park is not in evidence, but the new facility agreement (as restated) is in evidence. Mr Thompson, both in his first witness statement and in his second witness statement referred to the amount outstanding under the SCDS facility agreement as having been the £10.7 million figure I have already identified. He explained that there were arm's length investors, as I have mentioned, and in his second witness statement he set out a list of the names of those investors. It is simply a list of individual names and, at the end of it, it identifies a total figure of, again, some £10.7 million. There is also, rather belatedly, an affidavit from Mr Sinclair of SCDS's assets. I say "rather belatedly" because the original freezing orders required prompt disclosure of assets by all the NCADs, and SCDS did not comply. They did not comply until 22 June 2018. The explanation from Mr Sinclair was that the matter had been overlooked, which seems difficult to accept given that the other NCADs had indeed provided the asset disclosure, and given that the NCADs had the benefit of legal advice, and the legal advisers would no doubt have made clear to SCDS and Mr Sinclair in particular the importance of complying with court orders.

25. However that may be, it is the content of the evidence, rather than the fact that it was so late, which is of particular relevance on this application. Mr Sinclair, in identifying the assets of SCDS, makes clear that he is the sole shareholder and asserts that the only assets are the secured development loan to Chepstow, Llanharan and Brynna, which he says has an outstanding value on that loan of £7,311,359. It is very difficult to reconcile that with Mr Thompson's evidence, and the inconsistencies to which Mr Lord QC, on behalf of the claimants, drew attention could not be explained by Mr Sinclair QC in response. For example, here is the important discrepancy between Mr Thompson's evidence, both in his first and second witness statement that some £10.7 million was drawn down from the facility, and the evidence of Mr Sinclair that the value of the loan is only some £7.3 million. The significance of the inconsistency is this. If, as appears from Mr Sinclair's affidavit, SCDS has no other assets, either by way of its own funds or an existing right to draw any funds from its investors, then it follows that at the time the additional funding occurred, it was funding which was required for the purposes of development of the project and which would have had to have been found from SCDS as additional funding, had it not been provided by Hyde Park Finance. The difficulty, however, that that causes on this application is that there is simply no evidence on which the court can conclude that there is an arguable case that but for the freezing order the investors in SCDS would have been prepared to provide the additional funding, and would have been prepared to do so on terms which were cheaper than the financing which was in fact provided by Hyde Park Finance. There is no evidential basis for that. Mr Sinclair QC relied upon what was said by Mr Thompson in his second witness statement at para.26: "For very obvious commercial reasons SCDS is unwilling to advance any further funds into developments which are subject to the freezing orders". Even if that is taken at face value, it says nothing about what the investors would have done but for the freezing orders. There is simply no reason to assume that the investors had an appetite to invest larger sums than those which they had already invested, or that they would have done so absent the freezing orders.

26. In any event, the quantification of any losses is not established. The way it was put on behalf of the applicants was that the interest payable under the SCDS facility was 12 per cent per annum compounded annually, whereas the interest payable under the Hyde Park facility was 1.25 per cent per month compounded monthly, i.e. 15 per cent per annum but compounded monthly, amounting to a sum of something in excess of £60,000 per annum in additional interest, and that one can see from the face of the restated Hyde Park Finance agreement that there were arrangement fees in the sum of approximately £275,000. But the relevant comparison is not between the rate which was payable for the existing finance under the SCDS agreement and the cost of the additional finance under the Hyde Park Finance. The relevant comparison is between the cost of the additional financing under the Hyde Park Finance restatement and what the cost would have been had the SCDS investors been called upon to provide additional funding. As I have said, there is simply no basis in the evidence before me for thinking that those investors would have been prepared to invest additional funds at all, and in any event at a more favourable rate.

27. The last potential head of loss which is put forward, and is much the largest, is a head which might be described as general losses resulting from the disruption to the development projects and the delay in their completion, including a number of aspects. One aspect is the alleged delays in sale of properties which will give rise to additional legal costs of dealing with them under the protocol and, in any event, losses of the time value of money by reason of delays. Another aspect is said to be the general losses which will arise from delays in the pursuit of the development which will undoubtedly, it is said, be put back as a result of the freezing orders. And moreover, it is said, losses will arise out of the inability to use the proceeds of sale of already-completed residential apartments to fund further stages in the

development. On behalf the non-cause of action defendants, it is said that whilst this may be difficult to quantify, because one is speaking hopefully of delay rather than complete abandonment of the projects, some point of reference can be found in what Mr Thompson describes as the residual land values and profit of the projects, i.e. the projection of what the proceeds of sale, including profit but after expenses, would be. He says that in relation to Chepstow that had been budgeted at something just under £2 million; in the case of the Brynna development, that had been budgeted at almost £5.3 million, and in relation to the Llanharan project, that had been budgeted at almost £7.7 million. In addition, he points to a figure of more than £1 million for the Burtonwood project at an early stage, although that was a gross development value figure, and therefore took no account of expenses, and it is not therefore a profit figure. Nevertheless, Mr Sinclair QC submitted that those figures give a good point of reference as to the sort of profits which would be made and that a significant proportion of those could properly be said to be sufficiently referable to losses likely to be caused by the freezing orders. He submitted that the court did not need any very specific evidence to conclude that it was likely in general terms that entities which were involved in property development were likely to suffer disruption and loss as a result of freezing orders of this nature.

28. Mr Lord QC, on behalf of the claimants, pointed to the negotiation of the protocol, pointed to the existence of the normal course of business proviso, and pointed to the fact that the evidence suggested that there had not been any particular problem with agreeing sales as and when they were available, so that the proviso, and the protocol which had been negotiated pursuant to it, really provided adequate protection against any losses of this nature. I am unable to accept that submission in its full width. First, because, as Floyd J indicated, such a proviso does not exclude be possibility of damage arising out of delays. If nothing else, the protocol took a good deal of time to negotiate. I appreciate that it can properly be said that by no means the whole period between September and April was the result of any fault on the part of the claimants, and indeed it can cogently be said that the majority of it was not. Nevertheless, one can identify periods of at least weeks which were involved on the claimants' side in relation to the properties, and it is not difficult to envisage that there might be similar delays in the future. Moreover, the operation of the protocol or the normal course of business proviso does not result in the proceeds of sale being made available to the non-cause of action defendants for use in further development of the properties, but involves them being frozen potentially for a considerable period of time in the hands of the enforcement receivers.

29. However, this head of loss also depends upon the assumption that the freezing order has had a causative effect on the cessation of funding. The case is, and must be, that the freezing order has caused the inability to secure necessary funding. But there is no evidence as I have indicated, that the freezing order has had that causative effect. I have addressed that in relation to SCDS but the position is exactly the same so far as Dunedin is concerned in relation to the Coegi properties. I accept that there is a possibility of some additional cost by way of the administrative costs in dealing with sales, and it is possible that there may be some small detriment in relation to the time value of money in delayed sales, although, as I have indicated, that is entirely speculative because it depends on fluctuations in the market.

30. However that may be, it must always be borne in mind that the £1 million of fortification which in form is currently available to all the defendants, not only the non-cause of action defendants, will wholly or very largely in practice be available to the non-cause of action defendants. The reason for that is that the 1st to 4th defendants have, by way of their asset disclosure, revealed that they have no assets which are likely to be caught by the freezing order. The claimants do not accept that that is necessarily truthful disclosure, but the cause of action defendants would not be in a position to seek to call on the cross-undertaking in relation to an allegation of an inability to deal with or dispose of assets which have not been disclosed. The 5th defendant, LCL, was directed, by an order I made on 7 December 2017, to transfer the shares which it held to the enforcement receivers, who were endowed with powers to manage and realise the properties in relation to the 5th defendant. It is therefore the case, and Mr Sinclair QC did not really dispute this, that there is fortification currently in place for the benefit of the non-cause of action defendants of approximately £1 million.

31. In those circumstances, I am not persuaded that there is a good arguable case of any loss or risk of loss under this fourth head with a sufficient causative connection in an amount which one can make any sensible estimate about, which would exceed the £1 million already available. For all of those reasons, the application will be dismissed.