Neutral Citation Number [2023] EWHC 807 (Ch)

Claim No: **BL-2021-001176**

Appeal Ref: **CH-2022-000194**

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

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 6 April 2023

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

SANTINA LIMITED

Claimant/Respondent

- and –

RARE ART (LONDON) LTD
(trading as KOOPMAN RARE ART)

Defendant/Applicant

Daria Gleyze (instructed by **Adams & Remers LLP**) appeared on behalf of the **Claimant/Respondent**

Tom Morris (instructed by **Teacher Stern LLP**) appeared on behalf of the **Defendant/Applicant**

Hearing dates: **23 and 30 March 2023**

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 am on Thursday 6 April 2023 by circulation to the parties or their representative by email and by release to the National Archives

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Mr Justice Marcus Smith:

A. THE CLAIM

1. By a claim form dated 16 July 2021, the Claimant, Santina Limited ("Santina"), a company domiciled in the Republic of Seychelles, began proceedings against the Defendant, Rare Art (London) Ltd, which trades under the name Koopman Rare Art ("Rare Art").

2. Santina, acting by its agent, Mr Jonathan Leaver, had purchased a pair of silver-gilt soup tureens (the "Tureens") from Rare Art. The Amended Particulars of Claim (I shall refer to these as the "Particulars of Claim") allege that the sale was induced by a number of representations, which are said to have been false. It is alleged that the representations were made innocently, alternatively negligently, alternatively fraudulently.

3. The remedy claimed is primarily that of rescission. Santina seeks an order for the repayment of the purchase price, £181,500, and in return "is ready and willing to make the Tureens available for collection by [Rare Art]".

4. The allegations advanced by Santina are denied by Rare Art. Rare Art's defence is pleaded in an Amended Defence (which I shall refer to as the "Defence").

5. It is unnecessary to say more about the substantive allegations between the parties.

B. A HISTORY OF THE PROCEEDINGS

(1) The trial date

6. As is clear, the value at risk in these proceedings is not enormous: the Tureens were purchased for £181,500. Nor is the claim particularly complex, although I accept that the allegations advanced by Santina are extremely serious, and the level of factual controversy is high.

7. It was, therefore, pleasing to note that the trial of these proceedings was listed to begin on 11 November 2022, just under 18 months after the claim was commenced.

(2) The application for security for costs

8. By an application dated 25 May 2022, Rare Art made an application for security for costs against Santina, which was heard by Deputy Master Glover on 13 October 2022. By an order of that date, Deputy Master Glover ordered (amongst other things) that:

    (1) Santina give security for Rare Art's costs in the amount of £130,000 by paying that sum into the Court Funds Office by 4:00pm on 27 October 2022.

    (2) Unless Santina comply with this order, the proceedings be stayed without further order of the Court, save that Rare Art have liberty to apply to:

        (i) Strike out or dismiss the proceedings; and

        (ii) Immediately write to the Court advising it that the payment in security for costs had not been made and asking that the trial be vacated.

    (3) Santina pay the costs of the application, in the amount of £14,000 by 4:00pm on 3 November 2022.

9. Santina did not pay the amount ordered by way of security for costs; nor did Santina pay the costs they had been ordered to pay in respect of the application.

10. The failure to provide the security ordered by Deputy Master Glover resulted in the trial being vacated.

(3) Permission to appeal the order of Deputy Master Glover; and the stays that preceded it

11. Santina sought permission to appeal the order of Deputy Master Glover. By an order dated 16 March 2023, Michael Green J granted the application on the papers. The reasons why the application for permission to appeal was granted are immaterial.

12. Prior to the question of permission to appeal being determined, Rare Art sought to have the claim struck out (as envisaged by the order of Deputy Master Glover). Such application (which was made on 31 October 2022) was stayed by order of Zacaroli J dated 8 November 2022 pending determination of Santina's

application for permission to appeal and – if permission to appeal was granted – pending determination of the appeal itself.

(4) The application for a freezing order

13. On 14 March 2023, Edwin Johnson J was applied to (in the Applications Court in the Chancery Division) for an *ex parte* freezing order on behalf of Rare Art. The application was made without any notice at all to Santina, and was acceded to by Edwin Johnson J.

14. Before I come to the order made by Edwin Johnson J, I should set out the headline points of what the Judge was told on this application:

(1) The Judge was told about the state of the proceedings, and in particular was informed of:

(i) The order for security for costs that had been made by Deputy Master Glover;

(ii) The fact that this order had not been complied with;

(iii) The strike out application that Rare Art had commenced pursuant to the order of Deputy Master Glover;

(iv) The stay of that application that had been imposed, pending Santina's application for permission to appeal, and the fact that Rare Art would resume its application to strike out as soon as it could; and

(v) The costs order of £14,000 that had been made in favour of Rare Art.

(2) The criteria for the granting of a freezing injunction, namely that:

(i) An applicant must show a good arguable case;

(ii) There were objective facts from which it could be inferred that a respondent was likely to move assets or dissipate them;

(iii) There was a real risk that a future judgment would not be met because of an unjustifiable disposition of assets.

(3) The basis for the application was that "[Rare Art] will not be able to recover what is owed to it under an unsatisfied judgment for costs". This is a point of some importance, to which I will come. For the present, I should note that the jurisdictional basis for the freezing order was the costs order of £14,000, and that this quotation comes from paragraph 2 of the written submissions of Mr Morris, who appeared for Rare Art. The point was put a little differently later on in the same written submissions at paragraph 10:

> [Rare Art] has a good arguable case. It successfully obtained an order that the [Santina] put up security for its costs and, under that order, was entitled to apply to strike out [Santina's] claim if security was not put up. An application for strike out has been made but is stayed pending [Santina's] application for permission to appeal. If permission is refused or the appeal is dismissed, [Rare Art's] strike out application will be resurrected. There is no credible defence to that application and an order that [Santina] pay [Rare Art's] costs of the litigation will follow. [Rare Art] moreover already has a costs order in its favour in respect for the security for costs application which has not been satisfied.

I should stress that this is only a statement of the headline points addressed to the Judge. It is quite clear from the note of the judgment of Edwin Johnson J that the Judge heard detailed submissions from Mr Morris and gave a carefully considered *ex tempore* judgment giving the reasons for the order he was going to make. I have also seen and read a note of what Mr Morris said to the Judge in oral submissions; I have already referred to Mr Morris' written submissions.

15. Turning to that order, Edwin Johnson J granted an *ex parte* freezing injunction under a penal notice. The injunction was a worldwide one, in that Santina must not:

(1) Remove from England and Wales or in any way dispose of, deal with or diminish the value of any of its assets which are in England and Wales up to the value of £200,000; or

(2) In any way dispose of, deal with or diminish the value of any of its assets whether they are in or outside England and Wales up to the same value.

16. These prohibitions extended, in particular, to the Tureens, as paragraph 6 of the order made clear.

17. The return date of the injunction was 23 March 2023. I was the Judge on this return date sitting in the Applications Court.

C. THE RETURN DATE

18. On the return, it was clear from the written submissions of Santina and Rare Art that this was not a matter fit for the Applications Court. The points raised would clearly take more than two hours (not including reading and the time for giving judgment), partly because of the complexities concerning the grant of the freezing order (which I shall come to), but also because the grant of the freezing order was (to an extent at least) related to the appeal of the security for costs order of Deputy Master Glover.

19. Accordingly, I determined (after hearing the parties on this) that I would hear the parties' submissions on the continuation or setting aside of the freezing order made by Edwin Johnson J, but not determine the matter. I would hear the appeal from the order of Deputy Master Glover on 30 March 2023. I would seek to determine all matters on that day – or as shortly as possible thereafter – including (if arising) the continued prosecution of these proceedings, with a view to managing them not only fairly, but with a view as to cost. In the meantime, I would continue the freezing injunction of Edwin Johnson J.

20. I should say now that costs are a troubling matter in this case. In addition to the costs before Deputy Master Glover and before Edwin Johnson J, the costs incurred on the return date were in and of themselves substantial. I do not know whether the costs of each side now exceed the value at risk (see paragraph 6 above), but it will be a close run thing if they do not.

D. POINTS CONSIDERED IN THIS JUDGMENT

21. It has been necessary to set out in some detail the background to these proceedings. The remainder of this Judgment considers:

    (1) First the appeal from the order of Deputy Master Glover.

    (2) Secondly, the question of whether the freezing injunction ordered by Edwin Johnson J should be continued or set aside.

    This, of course, is not the order in which I was addressed on these issues, but it is the correct order for considering them. If the appeal against the order for security for costs succeeds, and the obligation on Santina to provide security or have the proceedings struck out falls away, the freezing order cannot be maintained – certainly not on its present terms, and probably not at all.

(3) Thirdly, and finally, in light of my conclusions on these two points, I consider the directions that are needed for the further disposition of these proceedings.

E. THE APPEAL AGAINST THE ORDER OF DEPUTY MASTER GLOVER

(1) The order under appeal

22. I have described the order that the Deputy Master made at paragraph 8 above. The order made by the Deputy Master was consequential upon a very detailed *ex tempore* judgment, running to some 110 paragraphs.

23. Santina rightly recognised that the order made by the Deputy Master was a discretionary one, which could only be interfered with if plainly wrong. Put another way, the Deputy Master had a generous ambit in which to make his decision, within which reasonable disagreement was possible. The mere fact that I might disagree with the Deputy Master is not enough to permit the setting aside of his order. In *Dhillon v. Asiedu*, [2012] EWCA Civ 1020 at [33(d)], Baron J stated:

> …unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible…, the decision at First Instance must prevail.

24. It is always difficult to avoid re-traversing the individual facts that informed the judge below's discretion, but doing so inevitably involves the risk of improperly re-visiting a discretion that has already been exercised. In seeking to avoid that course, I am very grateful to Ms Gleyze, counsel for Santina, in articulating precisely those grounds on which it was said that the Deputy Master had appealably erred.

25. The grounds of appeal are eight in number, but in the course of argument they came to be distilled as follows. Santina's contentions were that the Deputy Master erred in making an order for security for costs at all or, in any event, in the amount of £130,000, because:

(1) The application for security had been made late by Rare Art, and without justification. The general principle was that security for costs should be made promptly after the commencement of proceedings so that the party having to provide security could make a meaningful choice between providing the security (allowing the proceedings to continue) and not

doing so (resulting in the proceedings being stayed and ultimately struck out as a consequence).

(2) Additionally, the Deputy Master had failed properly to consider the implications of the interrelationship between two applications before the court: the first such application being the application for security; and the second, an application for expedition of the trial. Although expedition was never formally ordered, a trial timetable consistent with expedition was ordered. The consequence of this was that, when security for costs was ordered, Santina needed to provide security very quickly, otherwise the trial would be lost. This is, in fact, precisely what occurred.

(3) Thirdly, the Deputy Master erred in considering what amount of security he should order. There are a number of strands to this contention:

(i) The Deputy Master should have determined the level of security by reference to the budgeted costs (not the actual incurred costs) of Rare Art.

(ii) The Deputy Master failed to take account of the costs order made in favour of Rare Art on the successful application for security when assessing the level of security to be ordered.

(iii) The Deputy Master assessed the level of security by reference to the indemnity basis, and not the standard basis.

(iv) The Deputy Master failed to assess the level of security by reference to Rare Art's costs going forward, which would have resulted in an order for security of at most £55,000.

(2) Analysis

26. A surprising amount of authority was cited to me on what is – as both parties accepted – a matter of discretion. For that reason, I am not going to set out the authorities that were cited to me at any great length, as they all turn on their facts. The judgment of Mr Millett, QC, sitting as a Deputy Judge of the High Court, in *Hniazdzilau v. Vajgel*, [2015] EWHC 1582 (Ch) at [28] is worth citing, not because it articulates any particular rule of law, but because it articulates the question of discretion in delay cases (where the matter at issue is one of security for costs) particularly neatly:

> Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to

> collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs…The question of delay must be assessed at the moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in *Prince Radu of Hohenzollern v. Houston*, [2006] EWCA Civ 1575…, the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain speedy summary judgment without a trial.

27. Clearly, it would be going too far to say that there is a rule that applications for security should be made as soon as possible. It is a factor be taken into account, whose weight will vary from case-to-case. In this case, the order for security (made on 13 October 2022, although the application was made months earlier, in May 2022) sits unhappily with an expedited trial beginning on 11 November 2022. A gap of just under a month is not a "generous" amount of time in which to comply given the risk to the trial date, and in the event Santina were given two weeks to provide substantial security for costs. That being said, what is or is not "generous" will depend on the amount of security ordered. A limited time to provide "forward-looking" security is likely to be more defensible than the same amount of time to provide security in relation to costs already incurred.

28. All this serves to underline two points:

    (1) The grounds of appeal are interconnected. Lateness of application is linked to the consequences of ordering security at that time; which is itself linked to the amount of security ordered.

    (2) There is a difference, to my mind, between a judge at first instance failing altogether to consider a matter going to their discretion and a judge considering that matter, and reaching a view that is different to that of the appellate court. As a broad-brush test, the former (not considering a matter at all) is a more serious failing than disagreement about how a matter going to discretion should be weighed.

29. This is a case where the Deputy Master did, on the face of his judgment, consider the matters raised in the grounds of appeal. It is not a case where the Deputy Master failed to consider these matters altogether. More specifically:

    (1) The question of lateness in making the application was considered from [41]*ff*, where the Deputy Master set out the long procedural history. He

noted (at [42]) that there was an indication from Rare Art that an application for security for costs would be made in August 2021, yet – despite a lot of correspondence – the actual application was only precipitated by the application for expedition (at [47]).

(2) The Judgment of the Deputy Master demonstrates a clear awareness of the delay in making the application. The Deputy Master's view was that there was fault on both sides, as he noted at [46]:

> …it is clear in my judgment that the claimant was prevaricating in correspondence, and could have been considered to have been so prevaricating by [Rare Art]. It is clear in my judgement that [Rare Art] might have reasonably formed the view that [Santina] was prevaricating in its correspondence by October 2021. It is surprising that a figure was not provided by [Rare Art] to [Santina] for security, to bring [Santina] to heel. Alternatively, that [Rare Art] did not progress matters and issue the security for costs application.

From this, it is clear that the Deputy Master concluded that Santina had caused delay in making the application until October 2021 by appearing to constructively engage in correspondence on the question of security. The Deputy Master allocated a degree of blame to Rare Art for failing to bring matters to a head in the period between October 2021 (when it was clear that Santina was prevaricating) to May 2022 (when the application was made), but did not consider this enough to warrant refusing the application altogether. The delay in the hearing of the application (May 2022 to October 2022) was not something the Deputy Master regarded as being the fault of either party. These were all reasonable conclusions for the Deputy Master to reach.

(3) The Deputy Master did not consider that the fact of expedition, per se, should prejudice Rare Art's application for security for costs (at [54]). That, as it seems to me, is a defensible conclusion (indeed, it is one that I agree with), provided the question of prejudice to the other party (here: Santina) is considered. This is a matter the Deputy Master expressly considered at [55]*ff*. The Deputy Master took the view that Santina was the author of its own misfortunes, having at one and the same time prevaricated in acceding to the giving of security whilst seeking expedition (at [59]). That is a robust conclusion, but one that the Deputy Master was entitled to reach. The Deputy Master could identify no prejudice to Santina in the application being made late (at [62]). In particular:

(i) The application for security had been "heralded" to Santina at an early stage (at [59]).

(ii) Santina had nevertheless sought expedition (at [59]).

(iii) There was no evidence from Santina regarding inability to pay or offer up security in some acceptable form (at [62]).

(4) The Deputy Master concluded that an order for security for costs should be made (at [65]). He accepted that the delay in making the application needed to be factored in when assessing the amount of the security (at [63]). I can see nothing in the judgment to impeach that conclusion. The question as to whether I would have reached the same conclusion is, for the reasons I have given, not relevant.

(5) In terms of the amount of the security ordered, it seems to me that I must be even more assiduous to pay regard to the decision of the primary decision-maker, the Deputy Master. I will, therefore, deal with the points taken against his decision relatively briefly:

(i) So close to trial, I consider that the Deputy Master could appropriately – although he was not obliged to – look to actual incurred costs, not budgeted for costs, particularly when the matter had been expedited.

(ii) The Deputy Master's use of the indemnity costs basis was justifiable because of the fact that Santina has, quite consciously, pleaded a dishonesty case against Rare Art. Although a dishonesty claim that fails does not inevitably result in an order for indemnity costs against the party making the allegation, it is certainly an outcome that is "on the cards", particularly so here where the dishonesty case does not have to be pleaded in order for Santina's case to succeed.

(iii) It is true that the Deputy Master made a costs order in Rare Art's favour in the amount of £14,000. The Deputy Master was perfectly entitled not to adjust the level of security ordered in light of this order (although, equally, he could have taken it into account). It was a matter well within his proper discretion.

(iv) The most critical question was whether the security should be "forward-looking" only. Although the Deputy Master gave a limited discount, he declined to base his order for security on Rare Art's likely future incurred costs only. In this, he was informed by his judgement of the parties' respective conduct, which I have described. I can see no basis for interfering in his decision: it was a decision that it was open to him to make.

30. For all these reasons, I dismiss the appeal against the Deputy Master's order for security for costs.

F. THE FREEZING ORDER OF EDWIN JOHNSON J

(1) Challenges to the freezing order

31. Santina's challenge to the freezing order made by Edwin Johnson J was twofold. First, it was said that the order should be set aside on grounds of non-disclosure. This having been an application made *ex parte* without notice, there was no dispute that Rare Art was under an obligation of full and frank disclosure when making the application.

32. Secondly, it was said that there was no jurisdiction to make the freezing order.

(2) Failure to make full and frank disclosure

33. The written submissions of Santina rehearsed the law in this regard in considerable detail: see paragraphs 31 and 32 of Santina's written submissions. Since the principle was not in dispute, I shall confine myself to the statement from paragraph 25.3.5 of *Civil Procedure*:

> It is well-established that on all applications without notice it is the duty of the applicant (including an applicant in person) and those representing the applicant to make full and frank disclosure of all matters relevant to the application; this includes all matters of fact or law which are or may be adverse to the applicant. An applicant must disclose to the judge "any fact known to him which might affect the judge's decision whether to grant relief or what relief to grant" (*Fitzgerald v. Williams*, [1996] QB 657 (CA) at 667 (*per* Sir Thomas Bingham MR). It has been stated that it is a "high duty" requiring the applicant to make "full, fair and accurate disclosure of material information to the court" and to draw the court's attention to significant factual, legal and procedural aspects of the case" (*Memory Corporation plc v. Sidhu (No 2)*, [2000] 1 WLR 1443 (CA) at 1460 (*per* Mummery LJ)."

34. In this case, it was contended that Rare Art had failed to make proper full and frank disclosure in the following respects:

(1) *Rare Art had failed to address the fact that the proceedings were stayed, and that that stay applied to the very application for injunctive relief that was being made before Edwin Johnson J.* It is clear that the stay ordered by Deputy Master Glover and extended by Zacaroli J applied (at least technically) to the application that was made before Edwin Johnson J. I say technically, because the primary purpose of the stay ordered by Deputy Master Glover was to prevent Santina from progressing the

proceedings and so causing Rare Art to incur costs. In this, the stay was very different from that granted by Zacaroli J, which was explicitly to prevent a strike out application by Rare Art pending the appeal of the order of Deputy Master Glover. In other words, one would expect the threshold for lifting the stay imposed by Deputy Master Glover so as to enable Rare Art to apply to make an application for a freezing order to be low. Of course, that does not absolve Rare Art from making the position clear to the Judge, but it does affect the context in which such disclosure is made. In this case, it is absolutely clear from the written submissions of Rare Art and the note of the Judge's judgment that Edwin Johnson J was well-aware of both the stay ordered by Deputy Master Glover and the stay ordered by Zacaroli J.

(2) *Rare Art had failed to address the jurisdictional difficulties arising out of the application for a freezing order.* I accept that there are interesting questions arising out of the application made *ex parte* by Rare Art. The difficulty of these questions was one of the reasons that caused me to reserve the question of the continuation of the freezing order made by Edwin Johnson J. I determine those issues below, and here consider only the question of full and frank disclosure. It is fanciful to suggest that Edwin Johnson J was not apprised of the point by Rare Art. The written submissions (see paragraph 14(3) above) made the basis of the application clear beyond doubt, as does the judgment of the Judge himself. Drawing from the note of his judgment (which, I appreciate, has not been approved by him, and which should not be taken as anything more than a note):

> …So far as the application for permission to appeal is concerned, as I understand it a decision on that application is still awaited and it is said by Mr Warren [Rare Art's solicitor] in his affidavit that if permission to appeal [the order of Deputy Master Glover] is granted that the applicant will apply for an order for security for the costs of the appeal. However, the current application is made on this basis. If permission is refused, the position of the applicant is as follows. The applicant already has the benefit of a costs order in its favour – [Santina] was ordered to pay its costs summarily assessed in the sum of £14,000. As I understand it, those costs have not been paid. There are then the costs of the action itself. If permission is not granted or it is but the appeal fails, then [Rare Art] will be able to resume its application to strike out the action and on the assumption that the claim is then struck out because of a failure to comply, [Rare Art] will be entitled to its costs of defending the action. I am told that those costs are not far short of £200,000. So the concern of [Rare Art] in a nutshell is that assuming that the claims are struck out, it won't be able to recover from [Santina] either its costs of the action or the sum of £14,000 it was awarded by Deputy Master Glover. For the reasons which Mr Warren explains in his affidavit,

> there is considerable concern that [Santina] will not have the resources to meet the cost liability if matters turn out as [Rare Art] anticipates.
>
> …
>
> So the first question is whether a good arguable case has been demonstrated. For the purposes of this hearing, I am satisfied that it has been demonstrated. As matters stand, [Rare Art] has the benefit of a cost order in its favour of £14,000 and on the assumption that the order of Deputy Master Glover for security stands, then [Rare Art] will be entitled to resume its application to strike out the action pursuant to the terms of that order and, at least as matters stand, it is difficult to see what answer there could be to that application. On the assumption that the claims are struck out, it is reasonable to suppose that [Rare Art] will be entitled to recover the costs of the action subject to assessment, but it appears to be the case that those costs, even following assessment, will be substantial and as matters stand the costs incurred by [Rare Art] are put at a figure not far short of £200,000. There is, of course, the possibility that the application for permission is successful and permission is granted and the subsequent appeal successful and the order set aside – but here one is concerned with a good arguable case. One is not required to make final determination of what will happen – there is ample material to satisfy me at least for the purposes of this hearing for saying that [Rare Art] will be entitled to recover a substantial sum by way of costs. So, for that reason, I am satisfied that there is a good arguable case.

The Judge obviously had the clearest understanding of the issues the application gave rise to. A suggestion was made that explicit reference should have been made to the decision of Morgan J in *Cooke and Cooke v. Venulam Property Investments Ltd*, [2013] EWHC 4288 (Ch). This is an authority – of persuasive effect only – that may not assist Rare Art and Mr Morris candidly acknowledged that had he been aware of the decision, he would have drawn it to the Judge's attention. But the decision was neither binding on the Judge nor widely known: it is not cited in *Civil Procedure*, although it is cited (a number of times) in Gee's *Commercial Injunctions* (7th ed) 2021. I do not regard the failure to cite this decision – when the substance of the point was before the Judge – as a breach of the duty of full and frank disclosure.

(3) *A misleading picture of Mr Leaver's probity was painted.* This is not a matter to which the Judge was referred in either written or oral submissions, but points against Mr Leaver were made (in support of the risk of dissipation) in the evidence in support of the application. If and to the extent that this evidence was misleading or incomplete, it would have been Mr Morris' duty to correct the record. But, having considered the passages complained of, and having read them in context, it is simply wrong to say that a "misleading picture" was painted.

(4) *The usual provisions regarding the enforcement of a worldwide freezing order were omitted.* It is true to say that the worldwide parts of the freezing order are not in completely standard form. It may be necessary to revise the order, should I continue it, to take account of these points. In the meantime, Mr Morris offered an undertaking not to enforce the injunction, pending further hearing. These points are all material to the framing of an appropriate order, but they are not points going to the question of full and frank disclosure. The Judge knew the order that he was making, and was under no misapprehension.

(5) *Delay in applying.* This point was not pursued in the written or oral submissions made by Santina, and it is not clear to me where the point goes. The freezing injunction was applied for – *ex parte* – when Rare Art's concerns as to dissipation reached such a point that an application *ex parte* was thought to be advisable.

(3) Jurisdiction

35. I turn, then, to the question of jurisdiction. I should, at once, acknowledge that I am using the term inaptly. Neither party contended that Edwin Johnson J lacked jurisdiction to make the order that he did: given the unlimited discretion to grant injunctive relief where it appears to be just and equitable to do so (section 37 of the Senior Courts Act 1981) that would be a bold submission. Rather, the point made on behalf of Santina was that the order made by Edwin Johnson J was so far outside the discretion to grant freezing order relief, as normally understood, as to amount to a discretion that should not be exercised. It is in that sense that I use the term "jurisdiction" in this Judgment.

36. It is important, therefore, to understand the basis upon which a freezing order will be made. As to this:

(1) Interim injunctions can often be granted in support of a claim where the claimant seeks to recover their own property over which the claimant has a proprietary claim. Such an injunction is based on the claimant's alleged ownership of the asset and not – as is the case with the freezing order – on preventing the risk of dissipation to avoid a judgment or order adverse to the dissipator.

(2) The purpose of a freezing order, in general terms, is well described in McGrath, *Commercial Fraud in Civil Practice*, 2nd ed (2014):

> 20.09 Apart from a very early flirtation with something akin to foreign attachment, English law has, traditionally, not favoured the provision of security for judgment. A claimant is not entitled to ask

> the court to secure assets belonging to the defendant simply and solely to enable them to be available should the claimant obtain a judgment against the defendant. This principle remains unaltered notwithstanding the strength of the merits of the claim. There always remains a risk, therefore, that a claimant might find, at the conclusion of the trial, that there are few valuable assets against which enforcement of the judgment might take place. Such is considered the normal risk of litigation and something which can be factored into the decision-making process when the applicant considers whether to commence litigation in the first place.
>
> 20.10 What is not tolerated by English law is where a defendant may take certain steps, outside his usual business activities, in order deliberately to dissipate or transfer his assets so that they will not be available to meet any judgment the English court might award. Such a defendant is not playing by the rules. He is attempting to subvert the judicial process, in the event that judgment is obtained against him. Such conduct is exactly what attracts the attention of the English court…

(3) This *rationale* explains the factors that render it "just and convenient" to grant freezing order relief. Essentially, a claimant must show:

(i) That the claimant has a good arguable case on the merits against the defendant.

(ii) That there is a real risk the judgment will go unsatisfied by reason of the unjustified disposal by the defendant of his assets, unless he is restrained by the court order from disposing of them.

(iii) It is just and appropriate as a matter of discretion to grant the injunction.

(This uncontroversial statement of the relevant factors is taken from Gee, *Commercial Injunctions*, 7th ed (2021), [3-002].)

(4) The reference to claimant in this description of what an applicant for a freezing order must show is quite deliberate. Because the point of the jurisdiction is to prevent a defendant from subverting the judicial process by rendering a judgment, properly obtained, practically speaking unenforceable when once it has been obtained, it follows that the applicant must also be a claimant with a cause of action vested in them.

(5) That this constituted the limit to the freezing order jurisdiction was made clear in *Siskina v. Distos Compania Naiera SA (The Siskina)*, [1979] AC 210 and the cases that followed this decision, notably *Veracruz Transportation Inc v. VC Shipping Co Inc and Den Norske Bank A/S (The Veracruz)*, [1992] 1 Lloyd's Rep 353. A freezing order will not be granted unless a claimant has an accrued right of action (demonstrated to the standard of a good arguable case). See, further, Gee, *op cit*, [1-032] and McGrath, *op cit*, [20.35]*ff.*

(6) This line of authority ought, therefore, to be fatal to Rare Art's application for freezing order relief. Rare Art is not a claimant nor a counterclaimant. Rare Art cannot point to nor have they pleaded any cause of action. How, then, can the good arguable case requirement be met? On the face of it, it clearly cannot.

(7) In *Jet West Ltd v. Haddican*, [1992] 1 WLR 487, the Court of Appeal considered whether freezing order relief could be granted to a party who had the benefit of a costs order – such order to be "taxed if not agreed" (i.e. to be the subject of a detailed assessment, unless agreed by the parties) – in circumstances where the party the subject of the adverse costs order otherwise satisfied the requirements for freezing order relief. It is obvious that the party that is the beneficiary of a costs order (whether interlocutory or not) may be either the claimant or the defendant: a costs order can be made in favour of either. At first instance, in *Jet West*, Wright J held that whilst he would have wanted to make a freezing order, he had no jurisdiction to do so. The Court of Appeal disagreed, and overruled him, holding that precisely the same *rationale* as applied to causes of action also applied in support of any judgment or order of the court for the payment of money, whether or not the exact sum that would be payable had been quantified at the date of the order and the date on which the freezing order was sought: *Jet West* at 490.

(8) Lord Donaldson MR put the point thus (at 489):

> In terms of principle, the *Mareva* injunction [as freezing orders used to be known] was introduced in the 1970s because the courts held that they must necessarily have jurisdiction and did have jurisdiction to prevent parties to actions frustrating their orders by moving assets out of the jurisdiction, or dissipating assets in one way or another, with a view to making themselves proof against a future judgment. Where you have someone who is already subject to a money judgment, including an order for costs, the same principle applies, namely that the courts will not allow people to set their orders at nought simply by removing assets from the jurisdiction…

(9) Clearly, this represents a substantial widening (if only by way of clarification) of the freezing order jurisdiction. As to this:

(i) Provided a cause of action had accrued, and it passed the good arguable case test, there was jurisdiction to make a freezing order. Naturally, the other requirements would have to be met also – but Edwin Johnson J found that they were met in the present case, and I agree. Assuming jurisdiction, Edwin Johnson J was entirely right to make the order that he did, and I would be minded (this being the judgment on the return date for the injunction) to continue it. The question is whether there is in fact jurisdiction.

(ii) Clearly, a costs order in favour of a defendant (as well as a claimant) is sufficient to found jurisdiction to make a freezing order. No-one before me sought to contend the contrary, and (in the case that Santina placed reliance on, *Cooke and Cooke v. Venulam Property Investments Ltd*, [2013] EWHC 4288 (Ch)), Morgan J accepted in terms that the jurisdiction existed in this regard: at [13].

(10) Rare Art, of course, has a costs order in its favour, assessed and payable: see paragraph 8(3) above. Whilst this order brings Rare Art into a stronger position than pertained in Jet West – the order is assessed (not to be assessed), and payable (and has been so for some months now) – I do not think that it can properly found the jurisdiction for the order made by Edwin Johnson J. The costs order is only in the amount of £14,000. Edwin Johnson J based the freezing order he made on the security for costs order made by the Deputy Master and unsatisfied by Santina as well as the likely costs Rare Art would recover if awarded its costs of the entire proceedings. That is the only explanation for the extent of the freezing order (£200,000); and indeed this is clear from the note made of Edwin Johnson J's *ex tempore* judgment.

(11) The question, therefore, is whether the failure to comply with the order of Deputy Master Glover, resulting in an automatic stay of these proceedings and a right in Rare Art to apply to strike out the proceedings is capable of triggering the freezing order jurisdiction. In my judgement, it is. Rare Art would – but for the appeal of the Deputy Master's order and the stay imposed by Zacaroli J – by now have struck out the proceedings and obtained an order in their favour of their costs of the entire proceedings. The subject of an adverse costs order – even if it is a contingent one – cannot be allowed to thwart the order of the court by putting beyond reach asserts that might be used to satisfy that order. The

test I must apply is whether the unsatisfied security for costs order made by the Deputy Master is the essential equivalent of a cause of action which may – or may not – in due course convert into a money judgment. In this case, it clearly is. The proceedings brought by Santina are already stayed automatically; the only barrier to the strike out of the proceedings is the stay, which only exists because of the appeal launched by Santina. But for that appeal, the strike out would follow, and a costs order in favour of Rare Art would follow from that.

37. I conclude that there was jurisdiction (in the sense I am using it) to make the order made by Edwin Johnson J; and, having considered the material before Edwin Johnson J – supported, I must say, by the additional information that has come to light since the freezing order was made – I consider that Edwin Johnson J was right to make the order that he did, and that I should substantially continue it.

G. DISPOSITION

38. It follows that:

(1) The appeal against the Deputy Master's order fails and must be dismissed. The costs order made by the Deputy Master stands. There should be a further order for costs in favour of Rare Art as regards the costs of the appeal. I am minded: to assess these costs summarily; and order that they be paid by Santina to Rare Art in short order.

(2) The stay of Zacaroli J is lifted.

(3) I could direct that a strike out application be heard (perhaps even determined on the papers) in short order, and – if successful – an order that Rare Art recover its costs of the proceedings be made. However, I do not consider that this would be fair to Santina. I consider that Santina should have a short opportunity to comply with the order of Deputy Master Glover, if Santina wishes to avail themselves of that opportunity. Accordingly:

(i) I am minded to order that the time for complying with the order of Deputy Master Glover is extended to 4:00pm on 21 April 2023. Until that time, the stay remains in place. If, before that time, the security ordered is paid and all outstanding costs orders discharged by Santina, then the action may proceed to trial, and I will make appropriate directions to that end.

(ii) If, on the other hand, the security for costs order is not paid and any costs order remains outstanding, then the claim should be automatically struck out and an order for the costs of the proceedings be made in favour of Rare Art, such costs to be the subject of a detailed assessment, if not agreed.

(4) The freezing order of Edwin Johnson J continues until judgment or further order. I consider that Rare Art are entitled to the costs of both the application before Edwin Johnson J and of the return date before me, and that those costs should be summarily assessed and paid in short order by Santina to Rare Art.

(5) I should make clear that I consider that the order of Edwin Johnson J prevents Santina from using the Tureens as a means of raising money for any purpose – including satisfying any costs order or order for security for costs – and that I am specifically continuing this aspect of this order. If the order is not clear enough in this regard (I think it is, but doubt should be avoided) then the wording should be clarified.

39. Santina has not said that the requirement to provide security would stifle the proceedings. Any such contention should have been made to the Deputy Master on the hearing of the application for security for costs; and it was not. It would be very late in the day for such a contention to be made now. It is a matter for Santina – and those who control Santina – to decide their course of action, but I should make the following points clear:

(1) Santina cannot be precluded from seeking a variation of either the security for costs order or the freezing injunction on the ground that either or both will stifle these proceedings.

(2) However, clear evidence in support of any such application would be required and – as both parties will appreciate – it is not enough to say that Santina themselves have no assets beyond the Tureens. These proceedings are being funded somehow. Any application to vary the order of Deputy Master Glover or the injunction will have to be supported by clear and detailed evidence as to financial means and support in a very broad sense.

(3) Furthermore, any such application will likely require an explanation as to why it was not made sooner. I am not going to prejudge whether this is a case requiring formal relief from sanctions: but a late application along these lines would have to be explained and justified.

(4) If such an application is to be made, it must be made before 4:00pm on 21 April 2023.

40. I should be grateful if the parties could produce a form of order for my approval. I appreciate that paragraph 38 above contains a number of provisional views (particularly as to costs). If a consequentials hearing is required, then I will find the time to enable it to take place. However, my preferred course is that to the extent that either party wishes to push back on what I have said provisionally, they should do so in writing at the time when submitting a form of order disposing of these various matters. I can then decide such controversies on the papers, to the extent they arise.

41. I should also express my gratitude to both counsel for the very helpful and clear way in which these matters were argued before me.