Neutral Citation Number: [2025] EWCA Civ 986

Case No: CA-2025-000783

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)**
**Mr Justice Richard Smith**
**[2025] EWHC 962 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2025

**Before :**

**LORD JUSTICE ARNOLD**
**LORD JUSTICE NUGEE**
and
**LORD JUSTICE SNOWDEN**

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**Between :**

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| **MOLD INVESTMENTS LIMITED** | **Claimant/ Appellant** |
| **- and -** | |
| **MATTHEW JOSEPH HOLLOWAY** | **First Defendant/ Respondent** |
| **- and -** | |
| **JEREMY HAZLEHURST** | **Intervener** |

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**Jonathan Crow CVO, KC and Tom Gentleman** (instructed by **Mishcon de Reya LLP**) for the **Appellant**
**Andrew Sutcliffe KC and Steven Fennell** (instructed by **Horwich Farrelly Ltd**) for the **Respondent**
**Ryan Hocking** (instructed by **Lewis Silkin LLP**) for **the Intervener**

Hearing date : 22 May 2025

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 29 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Arnold:

Introduction

1. The issue on this appeal is whether an application made by the First Defendant, Matthew Holloway, to set aside a freezing order and its extension obtained by the Claimant ("Mold") on the ground that they were obtained by means of fabricated evidence should be heard at a stand-alone hearing estimated at (at least) five days (plus one day's judicial pre-reading) with oral evidence from 12 witnesses of fact and four expert witnesses, as Mr Holloway contends, or together with the trial of Mold's substantive claim, as Mold contends. Richard Smith J directed a stand-alone hearing of the application for the reasons given in his judgment dated 18 March 2025 [2025] EWHC 961 (Ch). At the conclusion of the oral argument on Mold's appeal, the Court announced that the appeal would be allowed. This judgment sets out my reasons for reaching that conclusion.

The procedural history

2. In order to put the issue on the appeal into its proper context, it is necessary to set out a regrettably lengthy history of these proceedings and two related sets of proceedings. Even this account is necessarily an incomplete one, partly because not all of the history is relevant and partly because the parties sensibly did not burden this Court with all of the relevant documentation. The parties did, however, provide the Court with a helpful agreed chronology.

*Mold's substantive claim*

3. Mold is the owner and occupier of Parry's Quarry in Flintshire, North Wales ("the Quarry"). Between May 2020 and December 2021 ("the Relevant Period") Mold had a permit from Natural Resources Wales for certain types of waste management operation and temporary waste storage at the Quarry, but it had no permit for the permanent disposal of waste at the site. Large volumes of waste were unlawfully dumped at the Quarry during the Relevant Period. The remedial costs are said to exceed £50 million.

4. Mr Holloway and the Second Defendant, Andrew Jacques, were the directors of Mold from 10 June 2015 and 12 March 2015 respectively until (on Mold's case) 20 December 2021, when their appointments were terminated by resolutions passed by Mold.

5. Mold claims equitable compensation and damages against Mr Holloway and Mr Jacques for causing or permitting the permanent disposal of controlled waste at the Quarry contrary to the terms of its permit in the Relevant Period. This is alleged to have involved breaches by Mr Holloway and Mr Jacques of their directors' duties under the Companies Act 2006.

6. Mr Holloway and Mr Jacques both deny liability. Mr Holloway denies that he caused or permitted the disposal of waste at the Quarry during the Relevant Period. He denies that he was involved in the day-to-day activities at the Quarry, saying his role was limited to that of a non-executive director, who rarely visited the Quarry. He says that the Quarry was run by others, including Steve Amos, and that he understood from those involved in day-to-day management that the Quarry was being properly run. (Mr Holloway's case as to Mr Amos' role is further explained below.) He denies that he

knew about the alleged illegal dumping operations. He says that any control he had over Mold's activities at the Quarry ended in late November 2021, when he alleges that control of Mold was seized by its current director Sean O'Grady.

7. Mr Jacques also denies that he caused or permitted illicit dumping at the Quarry during the Relevant Period. He too denies he was involved in day-to-day activities at the Quarry. His case is that he was forced to relinquish his rights and powers as a director of Mold in February 2021, following threats allegedly made by and/or arson attacks allegedly orchestrated by the Second Third Party, Patrick Hughes, who is the current owner of 99.9% of the shares in Mold and whom Mr Jacques alleges was a shadow or *de facto* director of Mold from April 2016 onwards.

8. Although Mold's claim was originally brought solely against Mr Holloway and Mr Jacques, Mold subsequently joined Ellie-Mae Holloway (Mr Holloway's daughter), Jack Holloway (Mr Holloway's son), Adam Holloway (Mr Holloway's brother), Ian Fenny and Thorncliffe Building Supplies Ltd ("TBS") as defendants to the claim. Ellie-Mae, Jack and Adam Holloway are all alleged to have worked for Mold during the Relevant Period, as is Mr Fenny. TBS is a building supply and waste management company which was a customer of Mold and is alleged to have been involved in the illegal waste disposal. Mold's claim against these Defendants is for dishonest assistance. Among other allegations, Mold alleges that Adam Holloway accepted payment for the illicit dumping of waste at the Quarry. Adam Holloway denies this.

9. The dumping of waste at the Quarry has resulted in a criminal prosecution against Mold, Mr Holloway and Mr Jacques. Mold has pleaded guilty to the charges against it. Mr Holloway and Mr Jacques pleaded not guilty, and the charges against them have yet to be determined.

*Mold's application for a freezing order*

10. On 8 August 2023 Mold applied without notice for a freezing order against Mr Holloway and Mr Jacques. Mellor J heard the application and granted it on 9 August 2023 ("the Freezing Order"). The principal affidavit in support of the application was an affidavit sworn by Mark Whelan of Mold's then solicitors, Rosenblatt, on the basis of instructions from Mr O'Grady. Much of this affidavit was concerned with the merits of Mold's clam. As evidence of a risk of dissipation of assets by Mr Holloway and Mr Jacques, Mold relied upon an affidavit sworn by Jeremy Hazlehurst exhibiting four screenshots of WhatsApp messages said to have been exchanged between Mr Hazlehurst and each of Mr Holloway and Mr Jacques on 26 July 2023 ("the WhatsApp Messages").

11. In his affidavit Mr Hazlehurst said that, sometime in July 2023, he had been made aware of a large claim that Mr O'Grady and Mr Hughes were about to submit against Mr Holloway and Mr Jacques. He knew Mr Holloway and Mr Jacques through an unidentified friend. Although the affidavit is not very clearly drafted in this respect, it appears from it that the same friend had informed Mr Hazlehurst about the claim. Mr Hazlehurst said that he "felt the need to tip off" Mr Holloway and Mr Jacques "about the fact that a claim was coming because they let me tip at the site years ago". It had now come to his attention, however, that "the reason for this claim is much more serious than I first thought and it is actually [Mr Holloway and Mr Jacques] that have caused

this problem to begin with and therefore I feel I have a duty to provide what I now know".

12. The WhatsApp Messages do not themselves identify the other persons with whom Mr Hazlehurst exchanged the messages, but only give their telephone numbers. Mr Hazlehurst said that the telephone numbers were those of Mr Holloway and Mr Jacques. I shall therefore refer to the other persons by those names.

13. In the first set of WhatsApp Messages Mr Hazlehurst says to Mr Jacques:

> "Hi Andy,
>
> It's Jez we used to do some tipping with you at Parry's Quarry through a friend of mine. Just giving you and the Holloway brothers a tip off OGrady and Hughes are going sticking a big claim in against you two for tipping on site, I've only just been told by someone close to them. But there's some big numbers floating about 50 plus million. Be careful."

14. After a couple of exchanges Mr Jacques says:

> " … I'm not letting them pair of [expletive] have my money they can go and [expletive] themselves. I have a mate in Dubai he can have it before they have. I'd rather burn the whole lot and [expletive] it up the wall before they have it. Mate you're a life saver I'll get on with moving my [expletive] now …".

15. In the second set Mr Hazlehurst says to Mr Holloway:

> "… Been speaking to Andy Jakes and told him what I found out about Mold/Parry's Quarry. Apparently O'Grady and paddy are sticking in a big claim against you personally and Andy for tipping in Mold there's been some 8 digit numbers like £50M floating about!!! …"

16. Mr Holloway replies that Mr Jacques has been on already. After a couple of exchanges Mr Holloway says:

> "Over my dead body am I giving a single Penny away to them pair of [expletive]. [expletive] it the lot can go for auction. Let me know if you know anyone that wants some property half cash half on books. …"

17. Although neither Mr Hazlehurst nor Mr Whelan mentioned the point in their respective affidavits, it can be seen from the WhatsApp Messages that the sender's phone has the "disappearing messages" function of WhatsApp activated, so that new messages will disappear after seven days unless specifically kept.

18. Mr Hazlehurst said in his affidavit that he decided to hand over the WhatsApp Messages on 3 August 2023, but not to whom. Mr Whelan said that Mr Hazlehurst had disclosed them to Mold.

19. In the section of his affidavit dealing with full and frank disclosure Mr Whelan mentioned that Joseph Holloway (Holdings) Ltd ("JHHL") had brought a claim in 2022 against Mold in the Business and Property Courts at Leeds ("the Leeds Proceedings") for repayment of an alleged loan of around £950,000 which Mold was defending. (Mr Whelan did not explain the relationship of JHHL to the parties to these proceedings, but it is jointly owned by Mr Holloway and Adam Holloway.) Although Mold contended that it would be able to meet any claim on its cross-undertaking in damages, Mold had transferred the sum of £100,000 to Rosenblatt's client account to hold against that cross-undertaking.

20. In addition to Mr Whelan's and Mr Hazlehurst's affidavits, Mold relied upon an affidavit sworn by Jordan Davies saying that from January to March 2021 he had tipped material at the Quarry and had been requested by Mr Holloway and Mr Jacques to do so on Sundays when other employees of Mold were not on site and to blend the material into other material. Mr Davies paid cash for this and no receipt was given. Mold also relied upon a witness statement made by Mr O'Grady in which he said that he had spoken to Mr Holloway and Mr Jacques on the telephone numbers shown in the screenshots of the WhatsApp Messages.

*Commencement of the claim*

21. The claim form was issued and served on 11 August 2023. Particulars of Claim were served on 24 August 2023.

*Mr Holloway's application for an imaging order*

22. On 14 August 2023 Mr Holloway applied without notice to Mellor J for an imaging order against Mr Hazlehurst. Mr Holloway swore an affidavit in support of the application, his second, in which he said that he did not know Mr Hazlehurst, had not received or sent any of the WhatsApp Messages and believed them to be forgeries. He also said that he had taken legal advice as soon as served with the Freezing Order on 10 August 2023, had attended a meeting with his solicitors and counsel on 11 August 2023 and had delivered up his phone to a firm of forensic IT experts called MD5 the same afternoon. Mr Jacques made an affidavit in support of the application, again his second, in which he also said that he did not know Mr Hazlehurst, had not received or sent any of the WhatsApp Messages and believed them to be forgeries. He also said that the police had his phone. Mellor J duly made an order for imaging of Mr Hazlehurst's phone by a firm of forensic IT experts called CYFOR under the supervision of a solicitor called Steven Morris ("the Imaging Order").

23. There were problems serving the Imaging Order on Mr Hazlehurst because he is a self-employed truck driver and site supervisor working long hours away from home, which led to further orders being made by Trower J on 24 August 2023 and by Leech J on 29 August 2023. This led to Mr Morris being replaced by Daniel Williams.

24. In the meantime the Freezing Order was continued in varied form pursuant to orders of Mellor J dated 16 and 18 August 2023 and of Leech J dated 31 August 2023. The last of these orders made it clear that the assets frozen did not include certain companies in which Mr Holloway and Mr Jacques were interested.

25. On 14 September 2023 the Imaging Order was served on Mr Hazlehurst and he delivered up his phone to CYFOR in the presence of Mr Williams. As explained below, it subsequently emerged that this was a different phone to the one Mr Hazlehurst had had on 26 July 2023.

*Mr Holloway's request for evidence to be preserved*

26. On 4 September 2023 Mr Holloway's solicitors wrote to Rosenblatt serving the Imaging Order and associated documents and stating that Mr Holloway intended to apply for an order requiring Mold and Mr O'Grady to preserve evidence relating to communications with Mr Hazlehurst. On 5 September 2023 Rosenblatt replied that neither Mold nor Mr O'Grady had any objection to a preservation order being made with respect to Mr O'Grady's phone. In the event Mr Holloway did not apply for such an order.

27. As explained below, it subsequently emerged that, according to Mr O'Grady, his phone was stolen from his car, together with other items, on 12 September 2023.

*Amended Particulars of Claim and Defences*

28. On 30 October 2023 Mold served Amended Particulars of Claim. The amendments pleaded allegations based on messages exchanged between the participants in a WhatsApp group referred to in the proceedings as "the Mold WhatsApp Group", including Mr Holloway and Mr Jacques. There is no dispute as to the authenticity of these messages. Mold contends that these messages provide strong support for its case against Mr Holloway and Mr Jacques. Mr Holloway and Mr Jacques dispute this.

29. Mr Holloway served a Defence on 4 December 2023 and an Amended Defence on 13 December 2023. Mr Jacques served a Defence and a Part 20 Claim against George Taylor and Mr Hughes on 12 January 2024. Mr Taylor's involvement in the proceedings is explained more fully below, but at this stage it is sufficient to note that Mr Jacques alleges that he was a *de facto* director of Mold from February 2021 onwards.

*Mold and Mr O'Grady's application for a* Norwich Pharmacal *order*

30. On 13 December 2023 Mold and Mr O'Grady applied in separate proceedings for a *Norwich Pharmacal* order against Vodafone seeking account details and other information relating to two mobile phone numbers. The application was not opposed. The order was duly made by Deputy Master Bowles on 14 December 2023.

31. The application was supported by a witness statement made by Mr Whelan based on instructions from Mr O'Grady. This alleged that, between 16 October 2023 and 13 December 2023, text messages were sent and calls made to Mr O'Grady from the two mobile phone numbers in question making threats of violence and of dissipation of assets ("the Malicious Communications"). Mold contends that the nature and content of the Malicious Communications strongly suggests that they were made by Mr Holloway and Mr Jacques. For example, one of the text messages, which was sent on 6 December 2023, says "Listen you little [expletive] you think your smart in the court room laughing. I'm going to drain every company I have …". Mr Whelan's evidence was that Mr O'Grady and Mr Holloway were both in court on 6 December 2023 for a costs hearing in another set of proceedings between JHHL and Mold in the Business

and Property Courts at Birmingham ("the Administration Proceedings"), in which JHHL had applied for an administration order in respect of Mold based on the alleged debt owed by Mold to JHHL.

32. Vodafone complied with the *Norwich Pharmacal* order. It disclosed that the phone numbers in question were assigned to "pay-as-you-go" accounts purchased with cash and not registered to named individuals. It also disclosed cellular mast data relevant to the Malicious Communications.

33. The Vodafone data was analysed by MDR Cyber (the cyber security and investigations practice of Mold's current solicitors Mishcon de Reya). It produced a report dated 20 December 2023 ("the MDR Cyber Report"). That report indicated that the Malicious Communications from one number were sent using mobile phone masts close to Mr Holloway's home or close to the café where Mr Holloway's wife Vicky Holloway worked, while those from the other number were sent using masts close to Mr Jacques' home.

*Mold's application for extension of the Freezing Order*

34. On 4 January 2024 Mold applied without notice for the Freezing Order to be extended so as to cover the assets of certain companies in which Mr Holloway and Mr Jacques are interested, including JHHL. The application was supported by a second affidavit sworn by Mr Whelan based on instructions from Mr O'Grady. In this affidavit Mr Whelan repeated what he said about the Malicious Communications in his witness statement against Vodafone, and exhibited and summarised the MDR Cyber Report. He also said that, on 26 December 2023, Mr O'Grady had been confronted by an unknown individual who threatened Mr O'Grady with violence unless he pulled out of the case ("the Boxing Day Incident"). Although he had reported the matter to the police, Mr O'Grady was so concerned by the Boxing Day Incident that he left the UK the following day (and did not return until 2 March 2024). In the full and frank disclosure section of his affidavit Mr Whelan disclosed that Mr Holloway and Mr Jacques had alleged that the WhatsApp Messages were forgeries, but stated that Mold was not aware of any evidence that that was the case. In that context he noted that, although Mr Hazlehurst's phone had been imaged, no application for permission to analyse the data had yet been made by Mr Holloway. It is evident that Mr Whelan was not then aware that the phone delivered up by Mr Hazlehurst was not the one he had been using on 26 July 2023.

35. On 5 January 2024 Richard Smith J heard Mold's application and made the order sought.

36. Mold subsequently served an approved draft affidavit of Mr O'Grady confirming his instructions to Mr Whelan. By the time that Mr O'Grady came to swear the affidavit on 23 February 2024 the last paragraph was out of date and so he omitted it. On 11 March 2024 Mr O'Grady swore a second affidavit correcting his first affidavit: he said that the court hearing referred to in the 6 December 2023 message had not been in Leeds that day as he stated in the first affidavit, but in Birmingham on 27 November 2023. (As noted above, Mr Whelan had said that the hearing in question was in Birmingham on 6 December 2023.)

37. On 19 January 2024 Bacon J made an order by consent continuing and further varying the Freezing Order as extended on 5 January 2024, and directing Mold to allow Mr Holloway to inspect or take copies of the Vodafone data upon provision of an undertaking. That undertaking was not provided by Mr Holloway until 28 March 2024.

*Mr Holloway's application to search and review the data from Mr Hazlehurst's phone*

38. Also on 19 January 2024 Mr Holloway applied for an order permitting him to search and review the data imaged from Mr Hazlehurst's phone using keywords proposed by Mr Holloway's solicitors to Mr Hazlehurst on 29 December 2023. This application was originally listed for hearing on 22 March 2024, but it was not until after Mr Hazlehurst was able to instruct solicitors in April 2024, as explained below, that agreement could be reached with respect to it. Eventually a consent order was made on 6 June 2024 which provided for CYFOR to carry out the search.

*Mr Holloway's application to vary the Freezing Order*

39. On 14 February 2024 Mr Holloway applied to vary the order dated 5 January 2024 and for other relief, including a declaration that Mold had failed to comply with its duty of full and frank disclosure when applying to extend the Freezing Order. In his fifth affidavit in support of this application Mr Holloway denied that he or his wife had anything to do with the Malicious Communications.

40. Mr Holloway later withdrew his application for much of the relief sought. The remainder of the application was dismissed by Richard Smith J on 22 March 2024. Richard Smith J noted in his judgment that Mr Holloway and Mr Jacques vehemently denied the genuineness of the evidence on which the Freezing Order and its extension had been obtained.

*The Bankers' Books application*

41. On 7 March 2024 Mold applied without notice for an order pursuant to the Bankers' Books Evidence Act 1879 for five banks to provide information concerning accounts linked to Mr Holloway and Mr Jacques and businesses in which they had an interest. Master McQuail granted the order sought ("the Bankers' Books Order").

*Mr Jacques' application to set aside the Freezing Order and the Bankers' Books Order*

42. On 20 March 2024 Mr Jacques made an application to set aside the Freezing Order as extended and the Bankers' Books Order. As part of this application Mr Jacques applied for an order permitting cross-examination of Mr Whelan, Mr O'Grady and Mr Hazlehurst, and providing for expert evidence.

43. In an affidavit sworn in support of this application, his fourth, Mr Jacques said that "[t]his litigation arises out of a bitter campaign of hatred perpetrated by Mr Hughes and Mr O'Grady against me, Mr Holloway and others associated with us". He went on to say that he knew that the evidence relied by Mold to obtain the Freezing Order and its extension had been fabricated. He repeated that he did not know Mr Hazlehurst and not been involved in the WhatsApp Messages. He said that, at the time he was supposed to be exchanging messages with Mr Hazlehurst, he was fuelling a lorry wearing large gloves and exhibited CCTV footage which he said confirmed this. He raised certain

questions about Mr Hazlehurst's affidavit. He denied the allegations made by Mr Davies, who he claimed was a long-standing friend of Mr O'Grady's. He said that, on 29 July 2023, he had been arrested by police on an allegation of raping a former girlfriend. "Clearly", he said, "the date is no coincidence". The police had taken his mobile phone and retained it until 16 February 2024. In about late July 2023 he had ordered a replacement sim card which he put into a replacement phone. His partner had downloaded his contacts and data from the cloud, but this data did not include the period up to 26 July 2023 and hence the data for that date had been lost. The phone returned by the police was "now blank". He claimed that Mr O'Grady had admitted manipulating a screenshot of a bank statement during the Administration Proceedings. He denied any involvement in the Malicious Communications. He challenged Mr O'Grady's account of the Boxing Day Incident, suggesting among other things that Mr O'Grady had taken two weeks to report the alleged incident to the police. He returned to the subject of the "long-running feud" between himself and Mr O'Grady and Mr Hughes, and in particular Mr Hughes. The last time he had seen Mr Hughes was on 27 May 2020 when the latter was angry, threatening and abusive. Since then there had been a number of incidents which he believed were related to this, including a series of arson attacks in the period between 2 June 2020 and 12 February 2022. Finally, he challenged the reliability of the MDR Cyber Report.

44. The application notice was served on Mr Hazlehurst as well as on Mold. Following service of that application, on 19 April 2024, Mr Hazlehurst's solicitors disclosed that the mobile phone he had been using at the time of the WhatsApp Messages on 26 July 2023 had been broken by his young daughter while he was on holiday between 7 and 11 August 2023.

45. On 18 April 2024 Mr O'Grady made a witness statement, his second in these proceedings, in opposition to Mr Jacques' application. He explained that he had known Mr Hazlehurst for a few years. They had done some business together, but were not friends. He had met Mr Hazlehurst through Ian Collier. He had known Mr Collier for about 15 years. Again, they had done some business together, but were not friends. The first that Mr O'Grady knew that Mr Hazlehurst had "tipped off" Mr Holloway and Mr Jacques was when he was called by Mr Collier. Mr Collier had spoken to Mr Hazlehurst, who had told Mr Collier about tipping off Mr Holloway and Mr Jacques. Mr Collier had told Mr Hazlehurst that Mr Hazlehurst was helping the wrong people. Mr Hazlehurst had agreed to share the screenshots of the WhatsApp Messages with Mr O'Grady. Shortly after this call, Mr Collier sent copies of the screenshots to Mr O'Grady. Mr O'Grady immediately sent them to Mr Whelan. Although Mr O'Grady could not recall the exact date of the telephone call from Mr Collier, he believed that it was on 3 August 2023. Mr O'Grady's phone had been stolen on 12 September 2023, a crime he had reported to the police the same day. Mr O'Grady did not have any data on his current phone from that time, and in any event he had used the "disappearing messages" function in many of his chats on WhatsApp. Mr O'Grady had not received any request from Mr Jacques for disclosure from his mobile phone relating to the Malicious Communications, but it had been imaged by Mold's solicitors. Mr O'Grady confirmed that Mr Davies was a friend of his. He disputed that he had manipulated a screenshot as alleged by Mr Jacques, saying that what he had done was openly to demonstrate how a bank account name could be changed using an online banking application. As for the Boxing Day Incident, his solicitors had reported this matter to

the police on 29 December 2023 and he had formally done so himself on 11 January 2024. He disclosed that Mold was paying Mr Hazlehurst's legal costs.

46. On 12 May 2024 Mr Hazlehurst made a witness statement in response to both Mr Holloway's application for permission to search the data from the image of his mobile phone and Mr Jacques' application to set aside the Freezing Order and its extension. Mr Hazlehurst said that he had known Mr Collier for roughly two years. In mid to late July 2023 he had met Mr Collier while working together on a job. Mr Collier told him about Mold's intended claim against Mr Holloway and Mr Jacques. He decided to share the information with Mr Holloway and Mr Jacques "as they had previously helped me out by allowing me to tip at [the] Quarry". He therefore sent them his side of the WhatsApp Messages. He could not recall when or how he had obtained their numbers. He had taken screenshots of the WhatsApp Messages sometime between 26 July and 2 August 2023. He could not recall exactly why, but it was probably because he wanted to keep a record and knew that he had the "disappearing messages" function activated for all his chats on WhatsApp. Shortly after the WhatsApp Messages he had spoken to Mr Collier and told him what he had done. Mr Collier said that he should not have done this because Mr Holloway and Mr Jacques were in the wrong. Mr Hazlehurst agreed to inform Mold about the WhatsApp Messages, and for this purpose Mr Collier sent him the contact details of a solicitor at Rosenblatt. Mr Hazlehurst sent the screenshots to Rosenblatt on 3 August 2023 and subsequently made his affidavit. Between 7 and 11 August 2023 he went on holiday with his partner and their two young children at a holiday park in North Wales. On the first or second day their 18 month-old daughter threw his phone beside the pool. This smashed the screen, and the phone was already in a poor state. He had an arrangement with the company he was contracted to for it to pay for his phone, so he asked it to replace the phone. It authorised him to buy two new phones, one for himself and one for another contractor whose phone also needed replacing. He did so on 8 August 2023, and received reimbursement subsequently. He received the replacement phone on 14 August 2023. He had not retained any backup of the old phone, and set up the replacement phone as a new device. He disposed of the broken phone.

47. The first Mr Hazlehurst knew about the Imaging Order was when he received a message from Mr Holloway's solicitors on 30 August 2023 with a copy of Leech J's order. Mr Hazlehurst agreed to meet with representatives of CYFOR and Mr Williams on 14 September 2023. Mr Hazlehurst was unable to obtain legal advice in advance of the meeting due to the expense. At the meeting he handed over his current phone. He was not asked any questions about it, such as whether it was the device used to send and receive the WhatsApp Messages. The imaging process took two-three hours. After that Mr Hazlehurst had not thought about the matter any further until after receipt of Mr Holloway's and Mr Jacques' applications. Mr Hazlehurst denied the allegation that the WhatsApp Messages were fabricated, saying that he was shocked by the allegation since he had no interest in the proceedings and so had no reason to make things up. He also lacked the technical ability to do so. He had discussed the applications with Mr Collier and explained that he could not afford legal advice. Mr Collier spoke to Mr O'Grady, which led to Mold agreeing to pay Mr Hazlehurst's legal costs. This enabled him to instruct solicitors on 15 April 2024. It was as a result of their advice that he had instructed them to inform the parties on 19 April 2024 that the device handed over to CYFOR was not the device used to send and receive the WhatsApp Messages.

48. At a hearing for directions on 23 May 2024, at which Mr Hazlehurst was represented and opposed the orders sought, Richard Smith J dismissed Mr Jacques' applications for cross-examination and for expert evidence. Having expressed concern (at [22]-[23]) at the delay in bringing the application, the judge noted (at [24]) that he was "now being asked to order what would, as presently framed, amount to a mini trial at the hearing of the discharge application as to the genuineness or otherwise of the original WhatsApp messages and, it would seem, the later malicious communications". So far as expert evidence was concerned, analysis of the screenshots of the WhatsApp Messages was unlikely to help, and there had been no explanation as to why no analysis of Mr Holloway's phone had been undertaken by MD5. Mr Jacques had failed to explain with clarity and precision what expert evidence was required and why it was likely to be helpful ([25]). As for cross-examination, the judge concluded (at [28]) "the suggested need for cross-examination for which permission is sought comes nowhere close to the very exceptional requirement for an application such as this".

49. Mr Jacques eventually consented to an order dismissing his application to set aside the Freezing Order on 22 November 2024, shortly before it was due to be heard on 26 November 2024.

*The CYFOR report*

50. At some point Mr Holloway's phone was transferred from MD5 to CYFOR. On 8 July 2024 CYFOR produced a report in respect of a forensic analysis of both Mr Holloway's and Mr Hazlehurst's phones. The exhibit to the report was subsequently withdrawn due to issues with privilege.

*Joinder of the Third to Seventh Defendants*

51. On 5 August 2024 Mold was granted permission to join the Third to Seventh Defendants to its claim. The amended claim form was issued and served on 7 August 2024. Mr Holloway served a Re-Amended Defence, Mr Jacques an Amended Defence and the Third to Seventh Defendants Defences on 7 and 11 October 2024.

*Developments in the Leeds Proceedings*

52. On 8 or 9 August 2024 Mold admitted JHHL's claim in the Leeds Proceedings and purported to accept a Part 36 offer made by JHHL. This led to a series of disputes concerning Mold's entitlement to accept the offer, enforcement and stays, the details of which do not matter for present purposes. At some point an order was made for the transfer of the Leeds Proceedings to London to be case managed together with these proceedings.

*The contempt application*

53. On 21 August 2024 Mold issued an application for committal of Mr Holloway and Mr Jacques for contempt of court on the grounds of alleged breaches of the Freezing Order. On 12 December 2024 Richard Smith J gave directions for the determination of this application, but it remains to be determined.

*Mr Holloway instructs CCL*

54. On 24 October 2024 Mr Holloway's solicitors instructed a firm of forensic IT experts called CCL. As result of the issue concerning the exhibit to the CYFOR report, they instructed CYFOR to transfer Mr Holloway's phone to CCL. This led to a cell mast analysis report being produced by Anne Marie Dainty of CCL on 31 October 2024 (revised on 3 February 2025) and a report concerning Mr Holloway's phone being produced by Lucy Crane of CCL on 19 November 2024 (revised on 28 January 2025).

*Mr Holloway's application to set aside the Freezing Order*

55. On 6 December 2024 Mr Holloway applied to set aside the Freezing Order and its extension. It is this application which led to the order under appeal. The application notice requested that the application be dealt with at a hearing estimated at five days. The application notice did not set out the grounds of the application, but the draft order attached to it sought declarations that:

> "1. On the balance of probabilities:
>
> a. [The screenshots of the WhatsApp Messages] are forgeries;
>
> b. [Mr Holloway] did not exchange WhatsApp messages with Jeremy Hazlehurst as alleged in the affidavit of Jeremy Hazlehurst dated 7 August 2023;
>
> c. [Mr Holloway] and Mrs Vicky Holloway did not send the communications referred to as 'the Malicious Communications'…;
>
> d. The said Malicious Communications were in fact concocted by or at the instigation of Sean O'Grady for the purpose of putting false evidence before the Court.
>
> 2. [Mold] failed to comply with its duties of fair presentation and full and frank disclosure in connection with the without notice applications (i) heard by Mellor J on 9 August 2023 and (ii) heard by Richard Smith J on 5 January 2024 in the following respects:
>
> a. The reliance upon false evidence as set out in paragraph 1 above;
>
> b. The failure to draw the attention of Mellor J to the fact that no metadata existed in relation to [the WhatsApp Messages];
>
> c. The failure to inform Mellor J and Richard Smith J that [Mold] had on 2 March 2023 transferred investment properties valued in its accounts at £700,000 to a company then called RJS Civil Engineering Limited;

> d. The failure to inform Richard Smith J that the methodology adopted in the report prepared by MDR Cyber … was flawed and that such methodology was the subject of criticism by the Court of Appeal in *R v Sean Thomas Calland* [2017] EWCA Crim 2308 (Crim)."

56. The only substantive orders sought in the draft order were that the Freezing Order as varied from time and time, including in particular by the order dated 5 January 2024, be set aside and that Mold pay Mr Holloway's costs of and occasioned by the Freezing Order on the indemnity basis. No order was sought for an inquiry as to the damage suffered by Mr Holloway pursuant to Mold's cross-undertakings in the various orders.

57. The application was supported by an affidavit sworn by Mr Holloway, his seventh. This is an important document, and it is therefore necessary to describe its contents in a little detail. It runs to 126 paragraphs over 28 pages, and it is accompanied by one exhibit containing 40 documents totalling 212 pages as well as two other exhibits consisting of copies of (the original versions of) Ms Crane's and Ms Dainty's reports. After an introduction (paragraphs 1-7), Mr Holloway states (in paragraph 8) that he is making the affidavit in support of his application to discharge the Freezing Order as extended, for permission to cross-examine Mr Hazlehurst and Mr O'Grady and for an order that Mold pays his costs on the indemnity basis. He does not state that he is seeking an inquiry as to damages.

58. Mr Holloway then sets out a summary of the grounds on which he relies (paragraphs 9-13), explaining that it is his case that the screenshots of the WhatsApp Messages and the Malicious Communications were fabricated by or behalf of Mold, its officers or agents with a view to putting perjured evidence before the Court in order to obtain the Freezing Order and its extension and that Mold and its officers and agents had thereby perverted the course of justice. He also asks for permission to rely on expert evidence.

59. The next section of Mr Holloway's affidavit (paragraphs 14-57) is headed "Background to this Application". Mr Holloway begins by explaining that on 20 June 2023 a notice of trial date had been issued in the Leeds Proceedings, that Mold had applied for the Freezing Order six weeks later and that he believes that the two events were connected. He then explains the background to JHHL's claim in the Leeds Proceedings. In summary, he was asked in early 2015 if he would be interested in going into business with Mr Taylor and Mr Jacques operating the Quarry. Mr Holloway was to be a non-executive director. Mr Taylor would run the business, but would not be appointed a director because he had been disqualified. Mr Jacques was to contribute about £2 million to the purchase of the Quarry, while JHHL would contribute £1 million as a loan. Mold was set up to buy the Quarry. In 2016 Mr Taylor introduced Mr Hughes to Mold. Mr Taylor told Mr Holloway that Mr Hughes had lent £3.2 million to Mold. Mr Holloway was told by Mr Jacques and Mr Taylor that the day-to-day running of the Quarry was managed by Mr Amos.

60. In 2019 Mr Holloway was told by Mr Jacques and Mr Taylor that Mr Hughes had decided to shut the Quarry. In early 2020 Mr Hughes offered to give JHHL its £1 million back and to pay Mr Jacques £3 million for his shares in Mold. Mr Hughes said that, if Mr Jacques and Mr Taylor attempted to re-open the Quarry, he would burn down all of the plant and machinery on site. In June 2020 Mr Jacques and Mr Holloway decided to re-open the Quarry with Mr Amos being responsible for day-to-day

operations. JHHL lent Mold money from time to time to keep it going. Within a week, some of the plant and equipment had been set on fire. Mr Jacques' wife's car had also been set on fire and a shotgun had been found at the end of the drive to Mr Jacques' house. Mr Holloway believed that Mr Hughes had made good on his threat. In July 2020 Mr Hughes demanded repayment of his £3.2 million loan, but took no further action.

61. In February 2021 Mr Taylor called Mr Holloway to a meeting with himself, Mr Jacques and three others. At the meeting Mr Taylor said that he was going to take over the running of the Quarry and made various financial proposals. In May 2021 Mr Taylor sacked Mr Amos. In October 2021 Mr Taylor called Mr Holloway to meeting with himself, Mr Jacques, Mr O'Grady and four others. Mr Holloway was offered a deal which he rejected. On 21 November 2021 Mr Holloway telephoned Mr O'Grady about this deal. Heated words were exchanged, and Mr O'Grady threatened to set fire to Mr Holloway's house and have his kneecaps or legs broken. On 29 November 2021 documents were filed at Companies House that purported to remove Mr Holloway and Mr Jacques as directors of Mold and to appoint Mr O'Grady a director. Mr Holloway suggests that the removal of himself and Mr Jacques and the appointment of Mr O'Grady was irregular. Between 11 October and 21 December 2021 Mr Holloway received a number of calls from Mr O'Grady, but ended up blocking his number. During one of these calls Mr O'Grady said that, if charges which JHHL had registered over Mold's assets as security for its loan were not removed, Mr Holloway would not live to regret the day. On 21 December 2021 Mr O'Grady called Mr Holloway. Mr O'Grady said that Mr Hughes had put £3 million into Mold and Mr Holloway was causing Mr Hughes to lose that money. Mr O'Grady said that he and Mr Hughes would make sure that Mr Holloway never forgot about the matter and that Mr Holloway would have to look over his shoulder for the rest of his life as he would never know when someone would come to finish him off. Mr O'Grady also threatened Mr Holloway's wife and children. Mr Holloway reported these threats to the police the same day.

62. On 6 January 2022 JHHL's solicitors wrote to Mold demanding repayment of the balance of JHHL's loan of £954,990. This was followed by the Administration Proceedings. The solicitors withdrew from the case following an arson attack on their offices on 12 February 2022. Mold's accountants suffered a similar attack on 18 December 2021. Mr Holloway believes that both incidents are linked to Mold and its officers. On 20 February 2022 three windows of Mr Holloway's house were smashed and Mr Holloway found a petrol can outside. Mr Holloway believes this incident to be connected with the threats previously made by Mr O'Grady. He reported it to the police. Mr Holloway also makes allegations concerning a sum of £875,000 said to have been paid to Mold by Mr Hughes which featured in the Administration Proceedings. Finally, he outlines the chronology of the Leeds Proceedings which JHHL commenced on 2 November 2022.

63. In the next section of his affidavit (paragraphs 58-82) Mr Holloway describes the service of the Freezing Order upon him and subsequent events. Mr Holloway repeats and enlarges upon the account given in his second affidavit concerning the background to his application for the Imaging Order. He exhibits a witness statement of Chris Collier of MD5 made on 11 August 2023 confirming that MD5 had taken possession of Mr Holloway's phone that day. He says that the account given by Mr Hazlehurst in his second affidavit is incredible, not least because part of it is contradicted by the report

prepared by Mr Williams (the supervising solicitor), which makes it clear that Mr Hazlehurst was told that he was required to hand over the phone used to send and receive the WhatsApp Messages. He says that one of the documents provided by Mr Hazlehurst to Mr Williams to prove his identity was his driving licence. When Mr Holloway received a copy of this, he immediately recognised Mr Hazlehurst as one of two men who attended his house in the early hours of 21 June 2022, Mr Holloway believes with the intention of recovering a car whose return Mr O'Grady had demanded. Mr Holloway refers to photographs found online showing Guilio Gallina (a friend of Mr O'Grady who made a witness statement for Mold in the Leeds Proceedings) with Mr Davies. Mr Holloway also says that he believes Mr Hazlehurst to be the person caught on CCTV who was responsible for the attempted arson attack on his home on 20 February 2022.

64. In the next section of his affidavit (paragraphs 83-87) Mr Holloway explains about the replacement of CYFOR by CCL and says that Ms Crane's report, which he exhibits, shows that no WhatsApp messages exchanged with Mr Hazlehurst had been found on Mr Holloway's phone, nor had any messages which could have been the WhatsApp Messages been deleted.

65. In the next section of his affidavit (paragraphs 88-115) Mr Holloway discusses the Malicious Communications. He draws attention to a caveat attached by Vodafone to the data analysed in the MDR Cyber Report and says that Ms Dainty's report, which he exhibits, shows that it is not safe to rely upon the Vodafone data. He goes on to give an account of the whereabouts of himself and his wife at the dates and times when the Malicious Communications were sent, seeking to show that in several cases they were not present in the relevant locations at the relevant times. In one case he says that he and his family were at a pub called The White Swan. In another case he says that he, his wife and his brother were with a friend called Adrian Bicker at another pub.

66. In the next section of his affidavit (paragraphs 116-123) Mr Holloway makes allegations of breaches of Mold's duty of fair presentation at the hearings on 9 August 2023 and 5 January 2024. In the final section (paragraphs 124-126) Mr Holloway says that the application has taken longer to finalise than hoped and is not a tactical attempt to derail Mold's committal application, and that evidence of fact is in the course of being obtained from a number of witnesses. He concludes by repeating the relief he seeks. Again, there is no request for an inquiry as to damages on the cross-undertaking. Consistently with that absence, Mr Holloway says nothing about any losses he claims to have sustained as a result of the Freezing Order and its extension.

67. Despite the fact that, as Mr Holloway's affidavit made clear, Mr Holloway sought permission to cross-examine Mr Hazlehurst if Mold continued to rely upon his evidence, the application was not served on Mr Hazlehurst.

68. On 6 February 2025 Mr O'Grady made an affidavit, his third, in reply to Mr Holloway's seventh affidavit. Mr O'Grady completely rejected Mr Holloway's allegations that the screenshots of the WhatsApp Messages and the Malicious Communications had been forged and said that he believed them to be genuine. He said that the CYFOR report raised serious questions concerning deletions of data found on Mr Holloway's phone and that Mold has instructed Kroll (in the persons of Nick Ellison and Thomas Bailey) to produce a report in response to Ms Crane's report, which he exhibited. He also said that he recalled seeing Mr Holloway using two mobile devices during the hearing in

Birmingham on 27 November 2023. He also referred to the fact that call records disclosed by Mr Jacques for the period 25 to 28 July 2023 did not show any calls with Mr Holloway, whereas call logs disclosed by Mr Holloway revealed that Mr Holloway had called Mr Jacques on 26 July 2023. As for the Malicious Communications, Mold had instructed Greg Robinson of Footprint Investigations to produce a report in response to Ms Dainty's report, which he exhibited, and which he said supported Mold's case that the Malicious Communications were made from the addresses where Mr and Mrs Holloway and Mr Jacques lived or worked.

69. Section 6 of Mr O'Grady's affidavit gave an initial response to the section of Mr Holloway's seventh affidavit setting out the background to the matter. Mr O'Grady denied making threats of violence against Mr Holloway or others and denied involvement in any of the incidents alleged by Mr Holloway. He noted that Mr Jacques and his partner had been charged with conspiracy to commit aggravated arson and conspiracy to blackmail. He said that Mr Holloway and Mr Jacques had a history of making allegations against others to deflect blame from themselves. He said that this was exemplified by messages exchanged by Mr Holloway, Mr Jacques and Mr Taylor as part of the Mold WhatsApp Group in which, he said, they agreed to blame Mr Amos and a Mold employee called Ian Greaves for the illegal tipping at the Quarry. Mr O'Grady cast doubt on Mr Holloway's identification of Mr Hazlehurst as the person responsible for the alleged attempted arson attack on 20 February 2022 and one of those involved in the incident on 21 June 2022.

70. On 17 February 2025 Mr Holloway served further evidence in support of his application: (i) a witness statement made by Deborah Webb (manager of The White Swan) on 15 March 2024; (ii) a witness statement made by Mr Bicker on 15 March 2024; (iii) a witness statement made by Mr Williams on 17 November 2024 exhibiting reports dated 4 September 2023 and 12 October 2023; (iv) a witness statement made by Vicky Holloway on 14 February 2025; and (v) a witness statement made by Tracy Mansfield (Mr Holloway's sister-in-law) on 14 February 2025.

71. On 20 February 2025 Mr Holloway swore an affidavit, his eighth, in reply to Mr O'Grady's third affidavit and Mr Hazlehurst's second affidavit. Among other things, Mr Holloway exhibited a recording of a phone conversation with Mr O'Grady said to have been made in February 2022.

*The directions hearing*

72. On 4 and 5 March 2025 there was a directions hearing before Richard Smith J, primarily with respect to (i) Mr Holloway's application to set aside the Freezing Order and its extension, but also with respect to (ii) an application by Mr Holloway dated 27 January 2025 for variation of the Freezing Order and (iii) an application by Mold in the Leeds Proceedings for a stay dated 6 November 2024. Because Mr Hazlehurst had not been served with the set-aside application, he was not present or represented.

73. Mr Holloway asked for an expedited hearing of the set-aside application with a direction for the makers of all affidavits and witness statements (except for Mr Whelan and another solicitor) to attend for cross-examination and with both parties being given permission to rely upon expert evidence.

74. Mold's position was that the set-aside application should be summarily dismissed both because it could and should have been made earlier, having regard to the previous applications by Mr Holloway and by Mr Jacques, and because of undue delay since the evidence relied upon was available to, or could have been obtained by, Mr Holloway. Furthermore, Mold submitted that the applications for permission to cross-examine Mold's witnesses and for expert evidence were misconceived for a number of reasons, but in particular because cross-examination prior to trial was exceptional and because this would involve a mini-trial of heavily contested factual issues. In support of this submission Mold relied upon *Derby & Weldon Co Ltd v Weldon* [1990] 1 Ch 48, *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 and *National Bank Trust v Yurov* [2016] EWHC 1914 (Comm). In the alternative, Mold submitted in paragraph 75 of its skeleton argument that "it would be wrong for this application to be determined prior to the trial" for two reasons: first, it would be a waste of costs and court resources for there to be two hearings with oral evidence; and secondly, there was a substantial overlap of issues between the substantive claim and the set aside application, in particular concerning the alleged threats/acts of violence, the removal of Mr Holloway as a director of Mold and the role of Mr Amos, as well as issues of credibility. Accordingly, the set-aside application should be heard, if it all, at the same time as the trial of Mold's substantive claim.

The judgment

75. The judge gave judgment on the applications for directions orally on 18 March 2025. He briefly summarised the procedural background at [1]-[13]. He summarised the bases for Mr Holloway's set-aside application at [14]-[16]. He summarised Mr Holloway's submissions at [17]-[21]. He summarised Mold's submissions at [22]-[34]. In this context, he mentioned at [32] Mold's submission that applications to set aside interim relief should not descend into mini-trials and noted Mold's reliance on *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451. He discussed and determined the issues concerning the set-aside application at [35]-[56]. He began by observing that "the appropriate course to be adopted by the court … is not … a straightforward matter" ([35]). Having noted the two previous applications by Mr Holloway and Mr Jacques ([36]-[37]), and expressed some concern about Mr Holloway's lack of urgency ([38]), he expressed more concern about the lack of particularisation of Mr Holloway's allegations against Mold, Mr O'Grady and Mr Hazlehurst ([39]). Despite the concerns he had expressed, he was not persuaded that Mr Holloway could and should have made his application at the time of his earlier application to vary the Freezing Order or at the time of Mr Jacques's application to set aside the Freezing Order ([40]).

76. The judge then turned to consider whether the application should proceed on the basis of written evidence or whether oral evidence was appropriate. He accepted Mold's submission that "cross-examination on interim applications is reserved for very exceptional circumstances" ([41]). He concluded that this was one of those very exceptional cases in which it was appropriate to permit cross-examination for the following reasons. First, the evidential basis for the Freezing Order was the WhatsApp Messages. Their authenticity had been disputed straightaway, leading to the Imaging Order ([42]). Secondly, the Freezing Order was by its very nature draconian and had been extended by him on 5 January 2014. The circumstances of that application were themselves exceptional, and had led to exceptional relief being granted. The exceptional

allegations had been challenged from the outset by Mr Holloway and Mr Jacques, culminating in allegations of fraud on the court, which were themselves vehemently denied by Mr O'Grady. Accordingly, cross-examination was in principle warranted. In coming to that view, the judge was satisfied that, as serious as they were, those allegations were "of a relatively straightforward and discrete nature, with limited overlap with the substantive issues" ([43]).

77. As to whether cross-examination should in fact be ordered, the judge reiterated his concern over the lack of particularity as to Mr Holloway's allegations even after further clarification had been provided on the second day of the hearing. The summary provided by Mr Holloway was inadequate for Mr O'Grady to know what was alleged against him. The position was even worse for Mr Hazlehurst who was not a party ([45]). Accordingly, although the judge would grant permission for cross-examination of the witnesses of fact, this was subject to Mr Holloway setting out as fully possible his allegations against Mr O'Grady, Mr Hazlehurst and any other person said to be implicated, including identification of their motives and other events or matters relied on ([45]-[50]). As to who should be cross-examined, this should be all the witnesses save for the solicitors ([51]). Consideration would need to be given to any privilege issues that were likely to arise ([52]).

78. Turning to expert evidence, the judge was satisfied that the evidence of Ms Crane and Kroll was required. He was also satisfied that the evidence of Mr Robinson was required. He was less sure about Ms Dainty's evidence, but gave permission for that as well ([53]).

79. Turning to disclosure, the judge noted that Mold had voluntarily disclosed the *Norwich Pharmacal* application papers and had promised to disclose a report made by Mr O'Grady to the police. It was agreed that Mold should have a copy of the image of Mr Holloway's phone. An image of Mr Jacques' phone was in the custody of the police following his arrest on 29 July 2023, and steps needed to be taken to address this ([54]).

80. In terms of timing, the judge vacated a three-day hearing of the committal application listed for the end of June 2025, and directed a five day hearing of Mr Holloway's set aside application (with one day's judicial pre-reading) be listed in that slot instead ([55]). He then addressed the other applications ([56]).

The order under appeal

81. The judge's order dated 18 March 2025 provides (amongst other things) for the set side application to proceed to a final hearing (paragraph 5), following particularisation of Mr Holloway's allegations (paragraph 8) and the exchange of further factual evidence (paragraphs 9 and 10). It provides for expert evidence in relation to the forensic examination of Mr Holloway's phone and the cell mast data (paragraphs 11 and 12). It provides for the makers of all affidavits and witness statements, apart from the parties' solicitors, to attend (if required) for cross-examination (paragraph 13(b)). It requires Mr Hazlehurst to attend for cross-examination if Mold wishes to rely upon his affidavit (paragraph 13(c)); and it also requires Mr O'Grady to attend for cross-examination (paragraph 13(d)).

Subsequent developments

82. Since the judge's order there have been a number of subsequent developments which are material.

83. On 25 March 2025 Mr Holloway served a Statement of Allegations against Mr O'Grady and Mr Hazlehurst pursuant to paragraph 8 of the order. Leaving aside the question of whether this fully complies with the judge's order, it is, as counsel for Mold pointed out, a curious document in that it does not take the form of a statement of case and does not include a statement of truth. Be that as it may, it is pertinent to note that it begins with the following allegations:

> "1. [Mr Hazlehurst] and [Mr Holloway] did not know one another (contrary to [Mr Hazlehurst's] affidavit [and witness statement] …).
>
> 2. Prior to July 2023, [Mr Holloway] did not have [Mr Hazlehurst's] number saved on his phone (contrary to [Mr Hazlehurst's] [witness statement] …).
>
> 3. [Mr Holloway] did not allow Mr Hazlehurst to tip at the Quarry (contrary to [Mr Hazlehurst's] affidavit …).
>
> 4. Mr Hazlehurst did not exchange the WhatsApp [M]essages (contrary to [Mr Hazlehurst's] affidavit …).
>
> 5. The screenshots showing the … WhatsApp [M]essages … were created by one of two alternative methodologies, as set out below. That was done by [Mr Hazlehurst] (or with Mr Hazlehurst]'s connivance) at the instigation of [Mr O'Grady]."

84. Other allegations include allegations that Mr Hazlehurst's daughter did not damage his phone, but rather he deliberately destroyed it to prevent forensic examination (paragraphs 10 and 11); that Mr O'Grady's phone was not stolen, but rather he deliberately destroyed it to prevent forensic examination (paragraphs 16 and 17); that the Malicious Communications were concocted by Mr O'Grady and one or more persons acting on his behalf, who are alleged to have purchased two "burner" phones, driven to locations close to Mr and Mrs Holloway's home and workplace and to Mr Jacques' home and sent the Malicious Communications to Mr O'Grady (paragraphs 18-23); and that the Boxing Day Incident did not happen, but was invented by Mr O'Grady (paragraphs 24-26).

85. On 11 April 2025 Mr Jacques launched an application to set aside the Freezing Order and its extension on the same grounds as those relied upon by Mr Holloway. The application was supported by a fifth witness statement of Mr Jacques in which, among other things, he explained in more detail what had happened to the phone seized by the police on 29 July 2023 and returned on 16 February 2024. Although the police had stated that an image of the phone had been taken, it had recently transpired that they meant a photograph of the object and not an image of its data. He denied wiping that phone, but understood that it could have been wiped inadvertently when his partner set up his replacement phone.

86. On 7 May 2025, pursuant to paragraph 9 of the Order, Mold served its evidence in response to the set-aside application, contained in a fourth affidavit sworn by Mr O'Grady and a witness statement made by Mark Tibbs of MDR Cyber. Mr O'Grady disputed Mr Holloway's allegation that the motivation for Mold's claim against Mr Holloway and Mr Jacques, and the Freezing Order, was a "feud". He also expressed the view that the strength of the claim against Mr Holloway and Mr Jacques gave them a strong motive both to have sent the WhatsApp Messages and to allege that Mr O'Grady was involved in forging them. He gave a number of examples of messages from the Mold WhatsApp Group, referred to extensive documentary evidence obtained by Mold placing Mr Holloway and Mr Jacques at the centre of the illegal waste disposal and referred to a conversation he had with Tim Harper of TBS who admitted illegal tipping at the Quarry arranged with Mr Jacques with Mr Holloway's knowledge.

87. Mr O'Grady went on to address the Statement of Allegations. In relation to the theft of his phone he explained that his car had been broken into while he was in Sainsbury's, that the passenger side window had been smashed and that two laptops had also been stolen. He had reported the matter to the police the same day. Two days later the police had emailed him saying that Sainsbury's had confirmed that the incident had been captured on CCTV, but this was not of evidential value because, although a suspect could be seen breaking into the car and taking property, the suspect could not be identified due to the fact that he was wearing a face covering and also the distance from the camera. In relation to the Malicious Communications Mr O'Grady provided detailed evidence of his whereabouts at the dates and times they were sent, in each case placing him far away from the masts from which they had been sent. He also provided further details of his reporting of the Malicious Communications and the Boxing Day Incident to the police. He also responded to Mr Holloway's evidence concerning the phone call recorded in February 2022, suggesting that the recording supported his account of what happened on 20 February 2022 rather than Mr Holloway's.

88. Mr O'Grady also responded to a statement made by counsel for Mr Holloway at the directions hearing that the Freezing Order had caused "huge practical difficulties for the Holloway family as a whole, by reason of their bank's response to it". The bank in question is Lloyds. Mr O'Grady noted that the Freezing Order permitted Mr Holloway to spend £1,000 a week on living expenses and Mr Holloway had not requested this limit to be increased. He said that Mold had been informed by Lloyds that Mr Holloway had consistently withdrawn £1,000 a week in cash. When asked why, Mr Holloway's solicitors had explained that it was because Mr and Mrs Holloway were unable to use their debit or credit cards. Mr O'Grady said that that was a matter between Mr Holloway and Lloyds, but Mold had no objection to Mr and Mrs Holloway being able to use bank cards within the terms of the Freezing Order. He also explained that Mold had consented to the sale of two properties, one by Mr Holloway and one by JHHL, and had consented to various payments being made by Mr Holloway's companies which Lloyds considered to be outside the terms of the Freezing Order.

89. On the same day, Mr Hazlehurst and Mr Collier each served a witness statement responding to the Statement of Allegations.

90. Mr Hazlehurst's second witness statement explains in a little more detail than his previous evidence how he knew Mr Holloway, Mr Jacques and Adam Holloway. His evidence is that, in late 2020 and early 2021, he arranged through them on two occasions to tip various loads of sewage cake (a byproduct from sewage treatment) at

the Quarry, in return for a fee. On this occasion he explains that he did not personally do the tipping, which was done by others, but he was the one who arranged it and took a profit on the fees paid. He also explains in more detail how he knew Mr Collier and how, in late July 2023, he came to learn from Mr Collier that a court claim was to be made against Mr Holloway and Mr Jacques, and why he decided to help Mr Holloway and Mr Jacques by letting them know about the claim, given that they had in the past helped him by allowing him to tip waste at the Quarry.

91. Mr Collier's witness statement explains how he learned that there was going to be a court case concerning the Quarry, and the circumstances in which he passed that information on to Mr Hazlehurst. He says that he later saw the WhatsApp Messages on Mr Hazlehurst's phone and explains why, at Mr O'Grady's request, he pressed Mr Hazlehurst to pass the WhatsApp Messages on to Mold's solicitors. He also says that he replaced his phone in late 2024.

92. Also on 7 May 2025 Ms Crane and Jason Coyne of Kroll produced a joint expert's statement. They agreed that the WhatsApp Messages in the screenshots appear correct; that the WhatsApp Messages were not found in the data extracted by CCL from Mr Holloway's phone, but that the method used by CCL would not collect deleted WhatsApp records; and that, although there was no gap in the values in the WhatsApp database in the relevant database, they could not state that there were no deletions. Also on 7 May 2025 Ms Crane produced a supplemental report. On 14 May 2025 Mr Coyne produced an expert report.

93. On 19 May 2025 Mr Holloway served evidence in reply consisting of a ninth affidavit sworn by himself and a second witness statement made by Adam Holloway. Each took issue with points made by Mr O'Grady and/or Mr Hazlehurst. In particular, Mr Holloway denied allowing Mr Hazlehurst (or anyone else) to tip at the Quarry. Mr Holloway also said that he had suffered numerous practical difficulties as a result of the Freezing Order as had his companies. One of his complaints is about being unable to use a bank card, but there is no explanation as to why this should continue to be the case given Mr O'Grady's statement that Mold has no objection to this. Another complaint is that Mr Holloway has attended the bank in person numerous times to request payments to be made, but the Lloyds CPO unit always tells the branch staff that he needs permission from Mold.

94. The parties agreed that all of these additional materials should be admitted as further evidence on the appeal.

Mold's appeal

95. Mold's appellant's notice appealed against paragraphs 11-13 of the order dated 18 March 2025, but only to the extent of setting aside the parts which directed the cross-examination of witnesses, alternatively to varying the order so that such cross-examination should take place at the trial of Mold's substantive claim. On 17 April 2025 I granted Mold permission to appeal on four out of six grounds and expedited the appeal.

96. In his argument on the appeal counsel for Mold requested this Court to direct that Mr Holloway's set-aside application be determined at the same time at the trial of Mold's substantive claim, and did not pursue the challenge to the parts of the order which

directed cross-examination. Furthermore, he condensed the four grounds of appeal into three.

97. Ground 1 is that the judge erred in law in ordering the set-aside application to be determined by means of a hearing with oral evidence, including expert evidence, in advance of trial because that is contrary to the established practice of the court.

98. Ground 2 is that, even if it was in principle open to the judge to order such a satellite trial, he was wrong to do so on the facts of this case, having regard to the overlap between the issues arising on the satellite and substantive trials, the undesirability of trying relevant issues of fact in advance of the substantive trial, the absence of exceptional circumstances, and the impact on third parties. In so doing he failed to take into account all relevant considerations and took into account irrelevant matters, thereby coming to a decision that no reasonable tribunal could properly reach.

99. Ground 3 is that the judge erred in law in failing to give due regard to the procedural unfairness that would arise from the absence of statements of case or disclosure, and the lack of restrictions on the specific topics on which cross-examination would be permitted.

Intervention by Mr Hazlehurst

100. On 6 May 2025 I granted Mr Hazlehurst permission to intervene in the appeal. Counsel for Mr Hazlehurst supported Mold's arguments, but emphasised the impact of the judge's order on him.

The test to be applied by this Court

101. The judge's decision was one of case management. As Lewison LJ said in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51] (cited with approval by Lord Neuberger in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495 at [13]):

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

Ground 1

102. Counsel for Mold's starting point for this ground was to submit that it was important, amidst the welter of allegations and counter-allegations, not to lose sight of the fact that Mr Holloway's application was an application to set aside a freezing order. Although Mr Holloway alleged that the evidence relied upon by Mold to obtain the Freezing Order and its extension was forged (in the case of the WhatsApp Messages) and concocted (in the case of the Malicious Communications), the application was in principle no different to any application to set aside a freezing order as having been obtained by means of false evidence. Such applications were, regrettably, not that uncommon, even if the precise nature of the allegations made by Mr Holloway was unusual.

103. Furthermore, the evidence challenged by Mr Holloway had been relied upon by Mold solely to establish a risk of dissipation. Mr Holloway did not dispute that the other requirements for the making the Freezing Order and its extension, and in particular the existence of a good arguable case, were satisfied.

104. On the other hand, it is common ground that the evidence challenged by Mr Holloway was the only evidence relied on by Mold to establish a risk of dissipation. It follows that, if that evidence was false, there was no basis for the Freezing Order and its extension. Accordingly, contrary to the submission of counsel for Mold, it is irrelevant that Mold only needed to establish a risk of dissipation and that did not require proof of any facts on the balance of probabilities. Furthermore, if the Freezing Order and its extension were obtained by means of fabricated evidence, then Mold should be deprived of the benefit of those orders.

105. Counsel for Mold submitted that it was the settled practice of the court not to attempt on interim applications, and in particular applications to set aside or discharge freezing orders, to resolve disputed questions of fact in advance of trial, particularly where the resolution of such questions required cross-examination of witnesses. There were sound reasons for this practice:

    i) It prevented inappropriate diversion of the parties' and the court's resources at an interim stage. It reflected a clear policy that interim applications should be dealt with quickly, efficiently and cost-effectively, on the basis of documentary evidence.

    ii) It avoided the unsatisfactory position of the court determining at an interim stage facts which were, or might be, relevant at the final trial upon incomplete evidence, rather than in light of the full evidence available at trial. This was all the more so if (as was proposed here) the interim determination took place before disclosure had been given.

    iii) It might well be impossible to isolate the issues that fell to be determined at the interim stage from those to be determined at the final trial. This gave rise to the risk of inconsistent decisions, and in particular the risk of a decision at the interim stage which the fuller evidence at trial demonstrated to be wrong.

iv) In the case of applications concerning interim injunctions, including freezing orders, the primary protection for those adversely affected by orders which turned out wrongly to have been granted was the cross-undertaking in damages.

106. The principal authority counsel for Mold relied upon in support of this submission was *Derby & Co Ltd v Weldon* [1990] Ch 48. In that case the judge had continued a domestic *Mareva* injunction (nowadays referred to as a freezing order) granted without notice, but considered that he was bound by authority to decline to extend it worldwide. This Court allowed the plaintiffs' appeal against the refusal of worldwide relief and dismissed the defendants' cross-appeal against the finding that there was a likelihood that they would dissipate their foreign assets if not restrained. In observations with which May LJ agreed at 56 and Nicholls LJ agreed at 64, Parker LJ was highly critical of the fact that the hearing of the application in the court below had taken 26 days and the appeal had taken seven days.

107. Parker LJ said at 57 that the following statement of principle of Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 at 407-408 was equally applicable to *Mareva* cases:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629."

108. Having explained that, in the court below, the defendants had not accepted until the eighteenth day of the hearing that the plaintiffs had a good arguable case, and that, on the cross-appeal, the defendants had sought to persuade the Court to attempt to resolve conflicts of fact going both to the merits of the claim and the question of the risk of dissipation, Parker LJ said at 58:

> "What … should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a *Mareva* is sought or relating to the elements of the *Mareva* jurisdiction such as that of dissipation or (2) detailed argument on difficult points of law on which the claim of either party may ultimately depend."

109. This statement was reiterated by this Court in *Sukhoruchkin v Van Bekestein* [2014] EWCA Civ 399 at [32] (Sir Terence Etherton C).

110. Although *Derby v Weldon* concerned an application for a freezing order, similar statements have been made concerning applications to discharge freezing orders. In *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 Longmore

LJ said at [23] that it was "very important that applications to discharge freezing injunctions do not turn into mini-trials; parties are often tempted to anticipate the real trial on these applications, but that temptation must be firmly resisted". He went on at [36] to cite with approval the following statement by Toulson J in *Crown Resources AG v Vinogradsky* (unreported, 15 June 2001):

> "Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself."

111. The same statement was also cited with approval by David Richards, Flaux and Newey LJJ in *PJSC Commercial Privatbank v Kolomoisky* [2019] EWCA Civ 1708, [2020] Ch 783 at [245], who said that it was "of wider significance".

112. The combined researches of counsel have only identified one case in which there has been cross-examination of a witness prior to trial for the purpose of determining an application to set aside a freezing order, namely *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm), [2015] 3 All ER 577. The following points should be noted about this case:

i) Flaux J had already found in a judgment dated 13 November 2014 that he had been misled by the claimants when granting them a freezing order and other relief on 11 September 2013. The defendant had applied on 9 January 2015 to set aside the order, alleging that Peter Gray of the claimants' solicitors had deliberately or recklessly misled the court. What was in issue was (i) whether Mr Gray had deliberately or recklessly misled the court and (ii) whether the order of 11 September 2013 should be set aside (see [1]-[3]).

ii) The fact that the court had been misled was apparent from documentary evidence relied upon by the claimants in other proceedings. This was discovered and raised by the defendant, and acknowledged by the claimants, before any question of cross-examination of Mr Gray arose (see [142]-[143]).

iii) Cross-examination of Mr Gray was ordered by consent at a directions hearing for which there is no reported judgment (see [217]). It appears from the Court of Appeal judgment referred to below that cross-examination was ordered by Flaux J of his own motion rather than upon the application of the defendant.

iv) Mr Gray was separately represented, as was the firm of which he was or had been a partner.

v) As an English solicitor ([8]), Mr Gray was an officer of the court, a fact upon which Flaux J placed great emphasis (see [115], [117(6)], [119], [177] and [187]).

vi) Flaux J found that Mr Gray had deliberately misled the court and set aside the order of 11 September 2013. The claimants accepted this decision. Mr Gray did not and sought permission to appeal against it. Permission to appeal was refused by Gloster and Briggs LJJ: [2017] EWCA Civ 56. The Court accepted that it had jurisdiction to entertain an appeal by Mr Gray on grounds 1-3, which alleged procedural unfairness (following *Re W (A Child) (Care Proceedings: Non Party Appeal)* [2016] EWCA Civ 1140, [2017] 1 WLR 2415); but it held that it would have no jurisdiction to entertain a free-standing appeal by Mr Gray on grounds 4-12, which were substantive challenges to Flaux J's decision. The Court refused permission to appeal on grounds 1-3 because they had no real prospect of success since Flaux J had taken care to ensure procedural fairness to Mr Gray; and, even if they did have a real prospect of success, it would be wrong to grant Mr Gray as a non-party a right to appeal against the decision given the potential consequences for the actual parties neither of whom wished to appeal and given that Mr Gray would have the opportunity to vindicate himself in proceedings before the Solicitors' Disciplinary Tribunal.

113. In my view the principle stated by Parker LJ in *Derby v Weldon* and the line of authority which follows it is a salutary one for the reasons articulated by counsel for Mold. Mr Gray's unsuccessful attempt to appeal against *Boreh v Djibouti* illustrates another potential problem with satellite trials, which is the need to ensure procedural fairness for non-parties such as Mr Gray, or here Mr Hazlehurst, who are accused of serious wrong-doing. Although that problem does not disappear if such issues are dealt with at the substantive trial, steps taken to ensure procedural fairness for non-parties are more likely to be proportionate at the substantive trial.

114. I do not accept, however, that the principle stated by Parker LJ is an absolute or inflexible one. Otherwise, it could itself be a source of injustice. There may be exceptional cases in which, even if a fact critical to the obtaining or discharge of a freezing order or other interim relief is disputed so as to require cross-examination, it can be determined in advance of trial in a manner which is both proportionate and avoids the risks of taking that course. This is more likely to be the case if (i) it appears probable that the fact can readily be established by evidence falling with a relatively narrow compass and (ii) the fact is not one which is germane to any of the substantive issues in the underlying proceedings: compare the approach to applications for the committal of witnesses who are alleged to have made false witness statements described by Moore-Bick LJ in *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280, [2009] 1 WLR 1406 at [18]-[19].

115. I would therefore not allow the appeal on ground 1, but the factors I have considered in this context are highly material to ground 2.

Ground 2

116. Counsel for Mold submitted that the judge had in numerous respects erred in principle, had failed to take relevant factors into account, had taken irrelevant factors into account and was in any event plainly wrong. It is not necessary to consider all these submissions as it is sufficient to consider the principal errors identified by counsel for Mold.

117. The first and most significant error is that the judge never addressed the submission made in paragraph 75 of Mold's skeleton argument, and therefore never asked himself

the question identified in the first paragraph of this judgment: should the set-aside application be heard at a stand-alone hearing with oral evidence from factual and expert witnesses or should it be heard together with the trial of Mold's claim? In short, should be there two trials or one?

118. There is no challenge by Mold to the judge's decision that Mr Holloway is not debarred from pursuing the set-aside application on the grounds of abuse of process or delay. Nor does Mold now challenge his decision that cross-examination is required to determine the issues raised by the application. On the contrary, Mold agrees with it. (For this reason, there is no need for me to discuss a number of authorities cited by the parties in their skeleton arguments as to the circumstances in which cross-examination of a witness may be permitted prior to trial.) Nor does Mold now challenge his decision that the parties should be permitted to adduce expert evidence. On the contrary, Mold accepts that the admission of expert evidence is appropriate, albeit that it is unlikely, for the reasons outlined below, to be determinative.

119. As counsel for Mold submitted, however, it does not follow that there should be a satellite trial in advance of the main trial. There is precedent for an application to set aside interim orders being determined at trial where this requires the determination of disputed factual questions, a well-known example being *Columbia Pictures Inc v Robinson* [1987] Ch 38. In the present case, there are a number of strong reasons for having one trial and not two, some of which I have anticipated in considering ground 1.

120. The first is that having two trials is inherently likely to be less efficient and more costly for the parties than one. It will also require a greater share of the court's resources, to the detriment of other litigants. It will also involve a number of witnesses having to give evidence twice, which is undesirable for obvious reasons. This point is emphasised by the sheer scale of the satellite trial provided for by the judge's order. Even when the judge made his decision, it was Mr Holloway's team's own estimate that a five day hearing (plus one day's judicial pre-reading) would be required. At counsel for Mold observed, now that it is known that 12 factual witnesses will be called and four expert witnesses, it may reasonably be doubted whether five days would suffice. This is in circumstances where more than two days of court time had already been devoted to the issue of directions for the determination of the set-side application by the time the judge's order was made, and at the time of the hearing before this Court the parties were preparing for a further directions hearing estimated at another day.

121. The second reason is that the evidence at the satellite trial would be incomplete, not least because there has been no disclosure yet. As counsel for Mold submitted, it is very unsatisfactory that Mr Holloway should be permitted to make the allegations advanced in his Statement of Allegations without being required to give disclosure. A simple illustration of the point is the recording of the phone conversation with Mr O'Grady in February 2022 first mentioned in, and exhibited to, Mr Holloway's eighth affidavit (paragraph 71 above). If Mr Holloway has other relevant recordings, or other relevant documents, he should be required to disclose them before these issues are determined, and yet the judge's order does not require this.

122. The third reason is that it is plain that there will be a significant overlap between the issues arising on the set-aside application and the issues arising on Mold's claim. I will explain why this is so below. At this stage I would note that the judge made no attempt

to avoid this by setting limits on the scope of cross-examination permitted at the satellite trial. If he had attempted to do so, it would quickly have been apparent that this was not feasible for reasons that will appear.

123. The fourth reason is that it will be more difficult proportionately to ensure procedural fairness for non-parties such as Mr Hazlehurst and Mr Collier. As an illustration of this point, as explained above, the judge made his order without hearing from Mr Hazlehurst. At the further directions hearing which was scheduled, Mr Hazlehurst was intending to apply for permission to be represented at the satellite trial, an application partly opposed by Mr Holloway. I express no view as to the appropriateness of Mr Hazlehurst being represented, or as to the extent to which Mr Hazlehurst should be permitted to participate in the satellite trial if it were to proceed, questions on which we heard no argument. It is frequently the case that non-party witnesses are accused of wrong-doing in the course of trials. In that context courts are accustomed to ensuring that such witnesses are fairly treated. While procedures can be put in place to achieve the same result at a satellite trial, this is less likely to be proportionate.

124. When asked to justify having two trials rather than one, the best that counsel for Mr Holloway could do was to emphasise that, if Mr Holloway was right, Mold had been guilty of perverting the course of justice and to argue that Mr Holloway would be prejudiced if the setting aside of the Freezing Order was delayed until after the substantive trial, which he suggested might not take place for another two years.

125. So far as the first part of this submission is concerned, I entirely accept that what is alleged against Mold is extremely serious. But those allegations have yet to established, and the question at this stage is how best to determine their correctness. As Males J (as he then was) observed in *National Bank Trust v Yurov* [2016] EWHC 1914 (Comm) at [22]:

> "Inevitably there will be some cases in which a freezing order is granted where it can only be seen with hindsight after judgment in the action that it should not have been and that there were serious and culpable failures of disclosure by the claimant. … That, however, is not a consequence of adopting the disciplined approach proposed by Toulson J [in *Crown Resources v Vinogradsky*] and adopted by the Court of Appeal in *Kazakhstan Kagazy v Arip*]. Rather it is a necessary consequence of a system where hotly contested issues of fact can only be fairly and finally resolved at the trial. … The remedy for a defendant who suffers an injustice as a result of a freezing order remaining in position until the trial when in fact it should not have been granted in the first place is to enforce the claimant's undertaking in damages which, when appropriate, will need to be properly secured to protect a defendant against foreseeable loss."

126. As for the second part of counsel for Mr Holloway's submission, I am unimpressed with it for a number of reasons. First, by the time the set-aside application was launched on 6 December 2024 Mr Holloway had been subject to the Freezing Order since it was served on 10 August 2023, over 16 months. On his account, he had known that the WhatsApp Messages must have been fabricated as soon as the Freezing Order had been served. The same goes for the order of 5 January 2024 and the Malicious

Communications. As the judge commented, Mr Holloway showed no urgency in bringing his application.

127. Secondly, as I have pointed out, Mr Holloway's application does not seek an inquiry as to damages pursuant to Mold's cross-undertakings, nor did Mr Holloway claim in either his seventh or eighth affidavits that he had suffered any loss or even inconvenience due to the Freezing Order or its extension. Such a claim was only made in support of this application in his ninth affidavit sworn after the judge's order (paragraph 93 above). I acknowledge that freezing orders are capable of causing serious disruption for individuals and companies that are subject to them, but in this case there is little or no evidence of any financial damage to Mr Holloway or his companies. While there is evidence of inconvenience to Mr Holloway and his wife, that appears to be at least partly attributable to problems caused by Lloyds which ought to be surmountable (for example the bank card issue, see paragraph 88 above). No doubt for these reasons, there has been no application by Mr Holloway to increase the fortification of the cross-undertaking originally provided by Mold, which still stands at £100,000 (a sum already dwarfed by the costs generated by Mr Holloway's set-aside application).

128. Thirdly, the Court was given no reason why the trial of Mold's claim should be as much as two years away. As can be seen from the procedural history, the claim was started as long ago as 11 August 2023, yet it has not even progressed as far as disclosure. Part of the reason for this is the time, effort and money that has been eaten up by Mr Holloway's and Mr Jacques' applications to set aside and vary the Freezing Order and its extension. What this case really needs is firm case management to get it to trial as soon as is realistically possible.

129. I turn to the second and third errors in the judge's judgment, which are interrelated. The second error is that the judge recognised that Mr Holloway's allegations were unparticularised, and ordered that they be particularised, yet made his order for the satellite trial before those particulars had been provided. Thus he made the order without full visibility of Mr Holloway's allegations. As counsel for Mold submitted, this put the cart before the horse.

130. The third error is that the judge's bald statement at the end of [43] that there was "limited overlap with the substantive issues" is wholly unreasoned: the judgment contains no analysis of the issues respectively raised by the set-aside application and the substantive claim and the extent of any overlap. Upon analysis, it is plain that, as I have said, there is in fact a significant overlap, although it is fair to say that this is somewhat clearer in the light of Mr Holloway's Statement of Allegations.

131. Before turning to consider the overlap, I should explain that it was common ground before this Court that the expert evidence is unlikely to be determinative of the issues concerning the WhatsApp Messages and the Malicious Communications. In the case of the WhatsApp Messages, Mr O'Grady's phone and Mr Hazlehurst's phone used on 26 July 2023 are no longer available. Mr Holloway says that this is very convenient for them, but Mr Jacques' phone is no longer available either, nor is there any image of the data on it. Although Mr Holloway's phone was imaged, the joint experts' statement of Ms Crane and Mr Coyne suggests that the possibility of data having previously been deleted cannot be excluded. Mr O'Grady's evidence raises the possibility that Mr Holloway had a second phone anyway. As for the Malicious Communications, it is not clear to what extent the reliability of the Vodafone cell mast data is still challenged by

Mr Holloway. It is common ground that, even assuming that it is reliable, it does not demonstrate who was using the phones in question to send the Malicious Communications. Resolving that question will depend on the factual evidence.

132. In those circumstances it was common ground before this Court that much will depend on the credibility of the various factual witnesses. But the credibility of the factual witnesses will depend upon an assessment of that evidence as a whole, which necessarily will include evidence concerning the substantive issues. It is sufficient to illustrate this point in five ways.

133. First, there is Mr Hazlehurst's evidence concerning the WhatsApp Messages. He has no interest in the substantive claim. The credibility of his account depends in large part of his account of his motives (i) for tipping off Mr Holloway and Mr Jacques and then (ii) thinking better of it and disclosing what he had done to Mold. That in turn depends on his evidence as to his prior relationship with Mr Holloway and Mr Jacques, and his evidence that they allowed him to tip waste (or allow others to tip waste) at the Quarry in return for payment. These points are highlighted by paragraphs 1 to 3 of Mr Holloway's Statement of Allegations alleging that Mr Holloway did not know Mr Hazlehurst, did not have his phone number and had not allowed him to tip at the Quarry. That goes straight to the merits of the substantive claim.

134. Secondly, there is the background section in Mr Holloway's seventh affidavit (paragraphs 57-61 above). As that demonstrates, it is Mr Holloway's own case that the obtaining of the Freezing Order must be seen against the background of the prior relationships between the individuals involved, and the enmity between Mr Hughes, Mr Taylor and Mr O'Grady on the one hand and Mr Holloway and Mr Jacques on the other hand as a result of the events of 2015-2022 concerning both the running of the Quarry and the Leeds Proceedings and the Administration Proceedings concerning JHH's loan to Mold. These events also form the background to many of the specific factual issues raised by the set-aside application (such as the reference in the Malicious Communication on 6 December 2023 to Mr O'Grady smiling in court, see paragraphs 31 and 36 above).

135. Thirdly, there is the question of Mr Holloway's and Mr Jacques' motivation. As Mr O'Grady makes clear in his evidence, and counsel for Mold confirmed, it is Mold's case that Mr Holloway and Mr Jacques had a motive to send the WhatsApp Messages and the Malicious Communications because they knew that Mold would have a strong case against them. As counsel for Mold made plain, this will involve cross-examining Mr Holloway and Mr Jacques upon (among other things) messages they exchanged as part of the Mold WhatsApp group which Mold contends show that they were responsible for the illegal tipping. Again, this goes straight to the merits of the substantive claim.

136. Fourthly, there is the evidence of Mr Davies. Mold intends to rely upon it as part of its case on the set-aside application. Counsel for Mr Holloway submitted that this evidence was irrelevant and therefore he would not challenge it. As counsel for Mr Holloway was constrained to accept, however, Mr Holloway does not accept that Mr Davies' evidence is true. If the evidence is relevant, as it at least arguably is for the reasons explained above, then Mr Holloway will have to put his case to Mr Davies in cross-examination. Again, this goes straight to the merits of the substantive claim.

137. Fifthly, there is what Mold characterises as the propensity of Mr Holloway and Mr Jacques to try to pin the blame for their own actions on others. In the case of the WhatsApp Messages and the Malicious Communications, it is said that they are trying to pin the blame on Mr Hazlehurst and Mr O'Grady. In the case of the substantive claim, it is said that they are trying to pin the blame on (among others) Mr Amos and Mr Greaves. Thus Mr Holloway and Mr Jacques will be cross-examined about the latter as well as the former.

138. It is no answer to these points that, as counsel for Mr Holloway submitted, Mr Holloway accepts that Mold has a good arguable case. Nor is it an answer that, as counsel for Mr Holloway also submitted, Mr Holloway is much more at risk if an adverse finding as to his credibility is made than is Mold if adverse findings as to the credibility of Mr O'Grady and Mr Hazlehurst are made. The fact remains that the issues raised by the set-aside application overlap significantly with those raised by Mold's claim.

139. The last criticism of the judge's judgment advanced by counsel for Mold which I shall mention is that the judge's reasoning was inconsistent with the reasoning in his earlier judgment of 23 May 2024 dismissing Mr Jacques' applications for cross-examination and expert evidence (paragraph 48 above). In that judgment the judge cited *Derby v Weldon*, *National Bank v Yurov* and *Kazakhstan Kagazy v Arip*, and concluded that it would be inappropriate to order a mini-trial. Counsel for Mold submitted that the judge had been correct to reach that conclusion, and that there had no development between 23 May 2024 and 18 March 2025 which justified the judge in reaching a different conclusion on Mr Holloway's application. I agree with this.

140. In conclusion, I would allow the appeal on ground 2. In my judgment it is plain that the right course is to direct that Mr Holloway's set-aside application be heard together with the trial of Mold's claim. The same must go for Mr Jacques' me-too application.

Ground 3

141. It is not necessary to consider this ground separately, although it can be seen that it raises issues which I have taken into account in considering ground 2.

Respondent's notice

142. Mr Holloway served a respondent's notice raising three grounds. One relied on *Boreh v Djibouti*, which I have considered above. A second identified additional factors to those relied upon the judge for concluding that the present case was sufficiently exceptional that cross-examination should be permitted on an interim application. As I have explained, Mold does not dispute that there should be cross-examination. The third invoked the principle that a party which has misled the court should be deprived of the benefit of doing so. As discussed above, that principle is not in dispute; but Mr Holloway's reliance upon it begs the question whether Mold has misled the court.

**Lord Justice Nugee:**

143. I am very grateful to Arnold LJ for setting out the background to this matter and the issues that arise. I concurred in the decision to allow the appeal on Ground 2, but not on Ground 1, and in this judgment I explain why I took that view.

*Ground 1*

144. On Ground 1 Mr Crow submitted that the Order made was wrong in principle because it was contrary to the settled practice of the Court when dealing with interlocutory applications. He formulated a number of propositions of law, of which the first three were as follows:

i) The test for the grant or discharge of a freezing order is whether there is a serious issue to be tried on the substantive claim; whether there is a risk of dissipation; and whether it is just and convenient to grant the injunction.

ii) Accordingly it is wrong in principle to direct a trial for the purpose of determining on the balance of probabilities whether, on the merits, the claimant is more likely than not to succeed and, on dissipation, to determine whether a defendant actually does intend to dissipate his assets.

iii) The Court will only resolve disputed questions of fact in the context of an application for the grant or discharge of a freezing order if the facts are truly so plain that they can readily and summarily be established.

145. These submissions to my mind elide two distinct situations which it is helpful to keep apart. The first is the ordinary application for the grant of an interlocutory injunction. (We are only concerned with interlocutory injunctions and not with final injunctions granted at trial to which very different considerations apply, so I will hereafter refer simply to an "injunction", by which I mean an interlocutory injunction.) I have no difficulty with the proposition that on such an application the practice is not to seek to resolve disputed questions of fact, and hence the Court will not hold anything in the nature of a trial when deciding whether to grant an injunction. This is not of course peculiar to freezing injunctions but is a general practice applicable to all injunctions. There is nothing surprising about it, as the whole point of an injunction is that it preserves the position until the parties' legal rights can be determined at trial. Ever since the seminal decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, it has been clear that in the ordinary case it is no part of the Court's function on hearing an application for an injunction to attempt to resolve conflicts of evidence as to disputed facts on the basis of affidavits (or witness statements). These are matters to be dealt with at trial. Nor does the Court need to be satisfied that the claimant has a *prima facie* case (in the sense that on the evidence before the Court the claimant appears more likely to win at trial than not): it is sufficient if the Court is satisfied that the claim is not frivolous or vexatious, that is, that there is a serious issue to be tried: see per Lord Diplock at 407F-H.

146. The same applies to an application for a *Mareva* or freezing injunction. That was decided by this Court in *Derby v Weldon* [1990] Ch 48: see per Parker LJ at 57C-58G, expressly endorsed by May LJ at 56D and by Nicholls LJ at 64E. Parker LJ said at 57G that the only difference between an application for an ordinary injunction and a *Mareva* was that in the former a plaintiff need only establish that there is a serious question to be tried whereas in the latter the test "is said to be whether the plaintiff shows a good arguable case", but that this difference, "incapable of definition", did not affect the applicability of Lord Diplock's observations to *Mareva* cases. Even this distinction has now effectively disappeared according to the most recent consideration by this Court

of the vexed question of what is meant by a "good arguable case": see *Unitel SA v Dos Santos* [2024] EWCA Civ 1109, [2025] 2 WLR 255.

147. It follows that it is no part of the Court's function on an application for a freezing injunction to seek to resolve disputed issues of fact, whether they go to the merits of the substantive claim, or to the risk of dissipation: see *Derby v Weldon* at 58C per Parker LJ. I therefore accept the first two of Mr Crow's propositions so far as concerns the grant of an injunction.

148. Mr Crow said that the same applied to an application for discharge of an injunction. For this he referred us to *Ninemia-Maritime Corporation v Trave Schiffahrtsgesellschaft mbH und Co KG* [1983] 1 WLR 1412 (***"The Niedersachsen"***) at 1425-6 per Kerr LJ giving the judgment of the Court. That was a case where the judge had granted the plaintiff a *Mareva* injunction on an *ex parte* application and the defendant had then applied to discharge it *inter partes*. That was (and as far as I am aware still is) the usual practice in the Commercial Court, by contrast to the practice in the Chancery Division where it was (and again still is) the practice only to grant an *ex parte* or without notice injunction for a limited time until the return date, leaving it to the claimant to apply for its continuation to trial. As one would expect, this difference in practice does not make any substantive difference to the parties' rights, as explained by Kerr LJ at 1426A-B:

> "Whether the inter partes hearing takes the form of an application by the defendants to discharge the injunction, as is usual in the Commercial Court, or whether—as in the Chancery Division—the injunction is only granted for a limited time and there is then an inter partes hearing as to whether or not it should be continued, the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made."

149. Again I have no difficulty with the proposition that on such an hearing – whether that is technically, as in the Chancery Division, an application to continue the injunction or, as in the Commercial Court, an application to discharge it, the same principles apply as already discussed, namely that the questions for the Court are (i) is there a serious issue to be tried on the merits, (ii) is there a real risk of dissipation, and (iii) is it just and convenient to continue or renew the injunction; and that for those purposes the Court as a matter of practice does not hear oral evidence but decides the matter on the basis of the affidavits or witness statements.

150. But *The Niedersachsen* was a case where the basis of the application by the defendant to discharge the injunction granted *ex parte* was that once account was taken not only of the evidence adduced by the plaintiff on the *ex parte* application but of the further evidence available at the *inter partes* hearing (namely the defendant's evidence in answer and the plaintiff's in reply), the fuller picture shown by the entirety of the evidence showed that the test for a *Mareva* was not satisfied. That is entirely standard. The Court has an undoubted jurisdiction to grant injunctions on a without notice basis and there are of course good reasons why many applications – in particular those for freezing injunctions – are made without notice to the defendant, who might, if given notice, frustrate the application by pre-empting any injunction before it could be heard. But for the Court to make orders in such a one-sided fashion offends against the general

principle that one should hear both sides before deciding anything, and can only be justified as a temporary measure pending the right of the defendant to adduce its own evidence and advance its own submissions as to why the order should not be continued. The *inter partes* hearing is therefore the first proper opportunity – by which I mean with the benefit of evidence and submissions from both sides – for the Court to consider whether an injunction should be in place until trial and even if it takes the form, as in the Commercial Court, of an application by the defendant to discharge, the issues, and the mode of resolving them, remain the same as if the claimant had applied on notice in the first instance.

151. So far therefore I am in agreement with Mr Crow's submissions. But there is also another principle which is relevant. This is that an applicant for a without notice order must make full and frank disclosure of all matters relevant to the application. The principles are well established and were not in dispute. They can be found summarised in *Civil Procedure (The White Book) 2025* at §§25.8.2ff, and see also the convenient summary by Carr J in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7]. If the duty of full and frank disclosure is not observed, the Court may discharge any order obtained. This is a long-standing principle, already regarded as settled law in *R v Kensington Income Tax Commissioners ex p de Polignac* [1917] 1 KB 486. It applies in particular in the context of *Mareva* or freezing injunctions where applications without notice in the first instance are the norm: *Bank Mellat v Nikpour* [1985] FSR 87, *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350. Although discharge of the order is not automatic, on any non-disclosure being established of any fact known to the applicant, it would only be in exceptional circumstances that the Court would not discharge an order where there had been deliberate non-disclosure or misrepresentation: *Congentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm), [2008] 2 Ll Rep 602 at [62] per Flaux J. Such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders: *Re OJSC Ank Yugraneft* [2008] EWHC 2614 at [104] per Christopher Clarke LJ.

152. This is a salutary principle. It deprives the wrongdoer of an advantage improperly obtained and serves as a deterrent to ensure that those who make applications without notice realise that they have this duty and the consequences if they fail: *Brink's Mat Ltd v Elcombe* at 1358C-D per Balcombe LJ. The duty is owed not just to the other party but to the Court itself and exists in order to secure the integrity of the Court's process: *Re OJSC Ank Yugraneft* at [104] per Christopher Clarke J.

153. As appears from the authorities the principle can be invoked even if the non-disclosure was entirely innocent, but it is obviously more likely that non-disclosure will lead to a discharge of an injunction (and the Court declining to impose a fresh one) where the non-disclosure is deliberate. In the present case of course the allegation goes beyond deliberate non-disclosure and is one of deliberately manufacturing false evidence – on two separate occasions – for the very purpose of deceiving the Court into finding that there was a risk of dissipation where there was otherwise no evidence to that effect, and so persuading the Court to grant a freezing injunction that could not otherwise have been obtained. If this allegation is well-founded, this is a blatant and cynical abuse of the Court's process. It is self-evident that if the claimant has behaved as alleged then it should not be able to retain the benefit of the orders it has so obtained. Nor was that

in dispute: Mr Crow accepted in terms that if the defendants' allegations were correct, the order could not stand.

154. I will refer for convenience to an application to discharge an injunction on this basis (that is on the ground that the applicant failed to comply with the duty of full and frank disclosure, or, as alleged here, deceived the Court by fabricating evidence) as an application to "set aside" the injunction. Mr Crow in his submissions equated such an application to set aside an injunction with an "ordinary" application to discharge an injunction of the type exemplified by *The Niedersachsen*. He said that the question was the same in both: was there a sufficient risk of dissipation? That, on the basis of the authorities from *Derby v Weldon* onwards, was to be decided without oral evidence. But here, he said, the effect of the judge's order was that "you are doing exactly what the court has said you should not do because you are conducting a trial to establish whether it is more likely than not that there is going to be dissipation."

155. But I think this wrongly conflates two different things. In a case like *The Niedersachsen*, as I have sought to explain, the application to discharge is in truth simply a hearing on notice of the question whether the evidence discloses a suitable case for there to be an injunction to trial. For that purpose the issues are whether the claimant has shown a sufficient case on the merits (now equated with a serious case to be tried) and a real risk of dissipation; and whether it is overall just and convenient to make the order. But on an application to set aside for failing to make full and frank disclosure or for deceiving the Court, the issues are different. The question is whether the applicant has failed to disclose facts which are material, or has misled the Court by fabricating evidence or otherwise; and if so whether the conduct is such that the Court should set the order aside (and not renew it). The purpose of the hearing is not, as Mr Crow suggested, to determine whether it is more likely than not that there is going to be dissipation; nor is it whether there is in truth a risk of dissipation. The purpose of the hearing is to determine whether the claimant acted as alleged. In a case like the present where the *only* evidence that there was a risk of dissipation is the impugned evidence, it is no doubt the case that if the defendant establishes that the claimant made that evidence up, he will also in fact establish that there is no evidence of a risk of dissipation. That however will be a consequence of showing the evidence to be fabricated. It is not the issue to be decided.

156. That this is so must logically be the case as it is well established that the Court may, and often will, set aside (and not renew) an order obtained in breach of the duty of full and frank disclosure even if the evidence otherwise does demonstrate a sufficient case for the grant of an injunction. See *The White Book 2025* at §25.8.3: "The court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure". See also *Tugushev v Orlov* at [7(xi)]. That demonstrates that the issue on an application to set aside cannot simply be whether there is a sufficient case on the merits or sufficient evidence of the risk of dissipation, but is the separate question whether there has been material non-disclosure, or active deception. If there has, the order is liable to be set aside whatever the strength of the case on the merits, or the cogency of the evidence of risk of dissipation.

157. In my judgement therefore an application to set aside for non-disclosure or for deception of the Court is not of the same character as an "ordinary" application to discharge. In saying this I do not think I am saying anything new. Indeed in the course

of preparing this judgment I came across a statement by Hobhouse LJ to similar effect in a decision of this Court, *Kuwait Oil Tanker Company v Albania* (27 November 1995). It appears to be unreported but extracts from Hobhouse LJ's judgment are cited in the judgment of Jacob J in *OMV Supply and Trading AG v Clarke* (1999) CLY 435 (***"OMV"***), as follows:

> "Where an *ex parte* order has been made a party aggrieved by that order may apply *inter partes* to have the order set aside. He can make that application simply on the material that was before the court on the *ex parte* application. The court on the *inter partes* hearing has to consider the matters afresh and may arrive at a different conclusion. Alternatively, application to set aside may be made with the support of additional evidence or material placed before the court on the *inter partes* hearing. Here again, if the court concludes, having considered all the material including the new material and all the arguments placed before it, that the order should not be made, the order will be discharged. Thus far, what happened on the *inter partes* hearing was the decision on the merits of the application for the relevant order. If the order is not one which should, on the merits, be made then it will be set aside. If however the result of the *inter partes* hearing, and the consideration of the totality of the material before the court is that the order is the appropriate one on the merits the party aggrieved may be able to make an application that the order be set aside on the grounds of non-disclosure. This is an application of a different character which relates to the need to preserve the integrity of judicial procedure."

158. That was not cited to us but seems to me to draw the same distinction that I have sought to draw above between what I have called an ordinary application to discharge on the grounds that the order should not be made on its merits, and what I have called an application to set aside for non-disclosure or deception which is an application "of a different character".

159. If this is right then I think it follows that Mr Crow is wrong in his submission that the present case is governed by the principle that he derived from *Derby v Weldon* and subsequent cases. The question is not how the Court resolves the issues on an application for the grant or discharge of an injunction on the merits. The question is how the Court should resolve the issue whether there has been material non-disclosure or active deception of the Court, and the answer to that question is not necessarily the same as the issues are different.

160. So how should such an issue be resolved? I think that it all depends on the circumstances and that no single answer can be given to this question. In many cases of alleged non-disclosure or deception, the facts are not substantially in dispute. It is often possible for a defendant to show that some fact was known to the claimant but not disclosed. The argument will then be over such matters as whether the undisclosed fact was material or not, whether non-disclosure was deliberate, and what the Court should do in all the circumstances. Such matters may well not require any oral evidence to resolve, and the Court will proceed to determine them on written evidence. In such a case there is usually no need to defer consideration of the question until trial.

161. But in other cases, of which the present is a prime example, it is impossible to decide on written evidence alone where the truth lies, and the Court can only safely do so by hearing oral evidence and cross-examination. Mr Crow accepted that in the present case the question was not whether a hearing with oral evidence and cross-examination was required – he agreed that it undoubtedly was – but when it should be held.

162. This seems to me to be a classic instance of competing considerations. On the one hand I think there is some force in the suggestion that once such an issue has been raised, the Court should, if it conveniently can, decide it sooner rather than later. It is well known that freezing injunctions can make life very difficult for defendants, particularly if they are individuals: see for example Jacob J in *OMV* where he cites from a previous unreported decision of his own, *Alliance Resources plc v O'Brien* (8 December 1995), in which he refers to the "devastation caused by the hydrogen bomb of a *Mareva*". It is true that the Court does what it can to protect defendants against the possibility that an injunction has been wrongly granted by requiring the claimant to give a cross-undertaking in damages, but it is in truth scant consolation to a wrongly restrained defendant to be told that at the end of the day, if they ever get that far, they might be compensated. If the claimant has indeed obtained an order in breach of the duty of full and frank disclosure, or *a fortiori* deceived the Court by putting forward fabricated evidence, then the argument that it should in principle be deprived of the benefit of its misconduct as soon as it can, rather than leave it to enjoy the benefit of an order so obtained, has an obvious attraction. This is not least because the duty of full and frank disclosure and the duty not to mislead the Court are owed to the Court itself, and the Court has its own interest in seeing that its processes are not abused, and if they are, in depriving those responsible of any advantage so obtained.

163. But there are undoubtedly considerations the other way. As the present case illustrates it is all too easy for what seems like a short and self-contained point to expand until it becomes a substantial hearing with large numbers of witnesses. The Court has often deprecated satellite litigation and there is a real question whether it is the best use of the parties' – or the Court's – resources to hold what is in effect a significant separate trial (which may, in order to be fair, require pleadings and disclosure of its own) to decide what is, even if important, a collateral issue.

164. In these circumstances I think it must depend on what is the most convenient course in the circumstances of any particular case – by which I mean what is most in accordance with the overriding objective. I do not accept that there is some default principle under which it is always or even *prima facie* more convenient to have such matters determined at or after the main trial. The Court admittedly does not usually hear oral evidence or permit cross-examination at an interlocutory stage but that is because it is not normally necessary to do so. But where it *is* necessary, then the Court has ample power to do so. A defendant for example can be cross-examined on the adequacy of his disclosure of assets. There may be a committal application for breaches of orders in which cross-examination of the applicant's witnesses (and also of the respondent if they choose to give evidence in their defence) is standard. There is nothing to say that such applications have to await the main trial – it depends on what is most just and convenient in all the circumstances.

165. In practice I think the most significant consideration is likely to be the extent to which the issues overlap with or trespass on the issues for the trial. If they do, then that is likely to be a very good reason why it is more convenient to stand the application over

to be heard at or after the trial. In *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 this Court followed the approach suggested by Toulson J in *Crown Resources AG v Vinogradsky* (15th June 2001) for cases of any magnitude and complexity (see at [36] per Longmore LJ). This was as follows:

> "Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself."

But that depends on the question whether there is in fact an overlap and in the present appeal is the subject of Ground 2 of the appeal. It is not by itself a reason for a general principle such as Mr Crow argues for under Ground 1.

166. That can be illustrated by assuming a case in which the application to set aside turns on a discrete point that is quite distinct from the issues for trial. Suppose for example a crucial document relied on by the claimant is alleged to have been fabricated and resolution of the issue turns on a short point on which there is a conflict of expert evidence, and that the point will not recur at trial. I see no reason in principle why resolution of that issue should have to await the trial or why the Court should not direct a hearing of that application as soon as it can conveniently be arranged, even if that involves cross-examination of the experts. Indeed, as I have said, I think that there is some force in the point that issues of this sort, once raised, should where possible be decided sooner rather than later because if the allegation is well-founded the claimant should be deprived of the benefit of the order as soon as that can properly be done. Of course there are cases, of which an *Anton Piller*, or search and seizure, order is a good example, where the effect of the order is spent once it has been executed (see again per Jacob J in *OMV* referring to the *Anton Piller* order as involving "a severe invasion of privacy but once executed, it is by and large over") and it may make sense to put off the question whether it was properly obtained or executed until trial. But where an order has a continuing effect, as a freezing order does, the defendant has a legitimate interest in having it set aside as soon as possible.

167. For the reasons I have given therefore I do not accept Ground 1 of the appeal and would dismiss the appeal on this ground.

*Ground 2*

168. That brings me to Ground 2. I have already said that the most significant consideration is whether the issues on the application to set aside are likely to overlap or trespass with those in the main trial. The judge said there was a limited overlap. But I am persuaded by Mr Crow that this does not withstand the detailed scrutiny to which he subjected it on appeal. The reasons are given by Arnold LJ at paragraphs 132 to 138 above, and it is not necessary for me to repeat them. In short, the resolution of the set aside issue is likely to turn almost entirely on questions of credibility; and that cannot be divorced from the question whether Mr Holloway was indeed complicit in the use of the quarry

for illegal dumping. But that is the very question at the heart of the main trial. That question should be decided once at trial with all relevant material deployed; it should not be decided twice, once at trial and once at a pre-trial hearing on partial evidence.

169. In those circumstances I think this is sufficient by itself to mean that Ground 2 of the appeal is made out. It is not obvious to me that in the absence of this overlap the other criticisms of the judgment would have sufficed to disturb the judge's decision, but I have not thought it necessary to pursue this question.

170. I therefore agree with Arnold LJ that the appeal should be allowed on this ground, and that Mr Holloway's application to set aside (and Mr Jacques') should be directed to be heard together with the trial of Mold's claim.

*Ground 3 and Respondent's notice*

171. On Ground 3 and the Respondent's notice I agree with Arnold LJ and have nothing to add.

**Lord Justice Snowden:**

172. I agree with Arnold LJ and Nugee LJ that the appeal should be allowed on Ground 2 but not on Ground 1. I also agree with Arnold LJ's observations on Ground 3 and the Respondent's Notice.

173. As I read their judgments, there is a difference between Arnold LJ and Nugee LJ on one aspect of Ground 1. That difference flows from their analysis of the judgment of Parker LJ in *Derby v Weldon* [1990] Ch 48, and in particular his comment at page 58 that,

> "What, however, should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a *Mareva* is sought or relating to the elements of the *Mareva* jurisdiction such as that of dissipation or (2) detailed argument on difficult points of law on which the claim of either party may ultimately depend."

174. At [114] above, Arnold LJ does not accept that this is an absolute or inflexible rule. He takes the view that there may be cases in which, even if a fact critical to the obtaining of a freezing order or other interim relief is disputed so as to require cross-examination, it can be determined in advance of trial in a manner which is both proportionate and avoids the risks of taking that course.

175. In contrast, at [147] Nugee LJ takes the view that it is no part of the Court's function on an application for a freezing injunction to seek to resolve disputed issues of fact, whether they go to the merits of the substantive claim, or to the risk of dissipation, He therefore accepts the second of Mr Crow KC's propositions so far as concerns the grant of an injunction, namely that it is "wrong in principle" to direct a trial for the purpose of determining, on the balance of probabilities, whether a defendant actually does intend to dissipate his assets.

176. On this issue, like Arnold LJ, I would not accept Mr Crow KC's second proposition in the absolute terms in which it was stated.

177. In order to explain why that is so, it is necessary to put the relevant passage from Parker LJ's judgment in *Derby v Weldon* into context. Parker LJ said, at 57-58,

> "[On an application for a Mareva injunction] there are in essence only three issues; (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that there are assets within and, where an extraterritorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory. Such matters should be decided on comparatively brief evidence. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407-408, Lord Diplock, dealing in that case with an application for an interlocutory injunction, said:
>
> > "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629."
>
> …
>
> In the present case this seems to have been forgotten. It was not until the eighteenth day of the hearing before the judge that the defendants accepted that there was a good arguable case which, unless the many conflicts on the affidavit evidence are resolved in the defendants' favour, there plainly is. Moreover, the defendants sought to go into and obtain the court's view on questions of law, which the argument before us and the judgment of the judge show clearly to be questions calling for detailed argument and mature consideration. This is quite wrong….
>
> Mr. Heslop for the defendants has however sought to go yet again into large parts of the evidence in order to persuade us that the judge's finding that there is a high risk of dissipation of assets both here and overseas should be reversed in respect of overseas assets. ***In essence he sought to persuade us to attempt to resolve conflicts of fact going to the merits of the claim but which were also important on the question of risk of dissipation.*** This is no part of this court's function any more than it is the function of the court at first instance. He also sought to show that the plaintiffs in the present case have no proprietary claim. His submissions in this behalf depended on the resolution both of disputed, detailed and complex fact and of difficult questions of law requiring mature consideration. The function of this court is again misappreciated.
>
> It is to be hoped that in future the observations of Lord Diplock and Lord Templeman will be borne in mind in applications for a *Mareva* injunction,

> that they will take hours not days and that appeals will be rare. I do not mean by the foregoing to indicate that argument as to the principles applying to the grant of a *Mareva* injunction should not be fully argued. With a developing jurisdiction it is inevitable and desirable that they should be. What, however, should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a *Mareva* is sought or relating to the elements of the *Mareva* jurisdiction such as that of dissipation or (2) detailed argument on difficult points of law on which the claim of either party may ultimately depend. If such attempts are made they can and should be discouraged by appropriate orders as to costs."
>
> (my emphasis)

178. I have emphasised the critical sentence from Parker LJ's judgment which makes it clear that his observations were made in the context of a case in which the *same* disputed conflicts of fact went *both* to the question of good arguable case *and* to the risk of dissipation.

179. I fully accept that, as Lord Diplock indicated in *American Cyanamid*, a court hearing an application for an interim injunction should not attempt to resolve disputes of fact upon which the case of either side depends, since those matters will be for determination at the trial. I also accept that where those same issues are relied upon to support the allegation on a *Mareva* injunction that there is a risk of dissipation, the decision in *Derby v Weldon* is to the effect that the court should not attempt to resolve them on an interim basis. That might frequently be the case with *Mareva* injunctions, since claimants often seek to rely on the same allegations of dishonesty or egregious misconduct that gives rise to their cause of action, to support an argument that the defendant is the type of person likely to take improper steps to frustrate enforcement of any future judgment against them.

180. But that will not always be the case. I agree with Arnold LJ that there may be cases in which the evidence said to demonstrate a risk of dissipation, although disputed, may be sufficiently unrelated to the underlying causes of action, that it may be possible for the court to resolve those disputed issues without trespassing on, or prejudicing the fair determination of, the issues for trial. In such a case, given the potentially burdensome nature of a *Mareva* injunction and the disclosure orders that usually accompany it, if such an injunction was shown to have a significant impact upon the defendant and was alleged to have been based on entirely unrelated evidence fabricated for the purpose, I can well see that it might be necessary in the interests of justice for the Court to resolve those issues in advance of the main trial.

181. That said, for the reasons which Arnold LJ has explained, the instant case does not fall into that category. The issues of alleged fabrication of the evidence relied upon to support the injunctions granted in this case are inseparably intertwined with the issues for trial and it would be impossible to resolve them appropriately without trespassing upon the matters for trial. I therefore agreed that the appeal should be allowed on Ground 2.