[2015 Gib LR 380]

ADVALOREM VALUE ASSET FUND LIMITED v. ADVALOREM ASSET MANAGEMENT LIMITED, MARK COMPSON and MINETTE COMPSON

COURT OF APPEAL (Kay, P., Potter and Rimer, JJ.A.): December 10th, 2015

Investments and Securities—investment management—investment in land—requirement to invest in land as "distressed asset" breached if investors have no honest belief that land "distressed" and price is at market value—that price even significantly below market value insufficient to infer belief that land "distressed"—creates good arguable case of fraud by investors

Investments and Securities—investment management—investment in land—knowledge that land in green belt and flood plain requires purchaser to obtain valuation without planning permission—not to rely on valuation assuming planning permission granted

The appellant applied for a freezing order against the respondents.

The second and third respondents, Mr. and Mrs. Compson, were directors of the first respondent company, which was a corporate director of the appellant, Advalorem. Advalorem was an experienced investor fund that accepted investments on the basis of a private placement memorandum ("the PPM") with the aim of achieving capital growth through investment in distressed assets, *i.e.* property put up for sale at a value that was severely depressed for a reason particular to the seller and not due to general market conditions.

Mr. and Mrs. Compson approved the purchase by Advalorem of a piece of land for £6m. based on a surveyor's report valuing the land at £10.3m. That valuation was undertaken on the basis of three special assumptions, the most important of which was that the land was in receipt, at the date of valuation, of planning permission that would allow development potential,

and consequently value, to be maximized. However, Mr. and Mrs. Compson were aware that the land was part of a flood plain situated within the green belt.

Linder Myers, Advalorem's firm of solicitors, was aware that the value of the land without planning permission was less than £200,000. It raised its concerns with an intermediary but not with the Compsons themselves.

The Financial Services Commission ("FSC") investigated Mrs. Compson in respect of the purchase of the land. It found that she was not a fit and proper person to be a director of an experienced investor fund and prohibited her from holding any senior role in the financial services industry in Gibraltar but did not make any findings of fraud against her. The Compsons invited the FSC to report any suspicions of fraud to the police but no criminal investigation ensued.

Advalorem applied for a freezing order against the respondents on the grounds that, *inter alia*, there was a good arguable case that the Compsons had engaged in fraudulent activity in relation to the purchase of the land at a grossly excessive price.

The Compsons had directors and officers liability insurance to the extent of £1m. but that insurance did not cover fraud and the insurers had not yet decided whether to cover the present litigation.

The Supreme Court granted an *ex parte* freezing order against the respondents. After the *inter partes* hearing, however, it discharged the freezing order on the basis that Advalorem had failed to show a good arguable case in fraud and there was insufficient evidence of a risk that the respondents would dissipate their assets. Advalorem then invited the Supreme Court to admit in evidence a document not previously placed before it, namely a letter of December 14th, 2012 from Linder Myers to Mrs. Compson indicating that she had instructed it to undertake minimal due diligence in relation to the purchase of the land and that she accepted the risks of doing so. The Supreme Court refused to do so on the basis that the letter was insufficient to change its view on whether a good arguable case in fraud had been established.

On appeal, Advalorem submitted that (a) the Supreme Court had erred in concluding that Advalorem had not shown a good arguable case in fraud against the respondents, particularly given that the Compsons had adduced no evidence that they thought the land was a distressed asset as required by the PPM; (b) the Supreme Court had erred in taking into account and/or giving excessive weight to, *inter alia*, (i) the Compsons' invitation to the FSC to report the matter to the police, (ii) the fact that, although the respondents had liability insurance, it was limited to £1m., did not cover fraud, and the insurers had not yet decided whether to cover the present proceedings, and (iii) the fact that the respondents could potentially have a claim against Linder Myers for an indemnity or contribution, as the possible existence of a claim against a third party which had not yet been brought was not a relevant factor when considering whether to continue a freezing order against an existing party; (c) the Supreme Court had erred in holding that there was no real risk of the

Compsons dissipating their assets; and (d) the Supreme Court had erred in refusing to admit the letter of December 14th, 2012 by applying the wrong test and failing to give sufficient weight to its effect as being contrary to the respondents' case.

The respondents submitted in reply, *inter alia*, that (a) Advalorem had not established a good arguable case of fraud, as shown by the reasoning of the Supreme Court in its *inter partes* judgment; (b) the surveyors had told the Compsons that planning permission was very likely to be obtained and they were therefore buying the land for only 40% of its full value; and (c) fault lay with Linder Myers for failing to inform the Compsons of its concerns as to the value of the land and, as a result of that failure, they lacked knowledge of the fraudulent nature of the transaction.

Held, dismissing the appeal:

(1) The Supreme Court's conclusion that there was insufficient risk that the Compsons would dissipate their assets to justify continuation of the freezing order would be upheld and the appeal would therefore be dismissed. The fact that there was a good arguable case of fraud against a defendant would not necessarily justify the inference that it was likely that he would dissipate his assets, though in many cases such an inference would be appropriate. There was no evidence that the Compsons had attempted to dispose of any of their assets thus far. The Supreme Court's conclusions that Advalorem had failed to establish any reasonable likelihood that the Compsons were concealing foreign assets and that all of the funds available to them would be used to provide for the reasonable living costs of their family could not be faulted (paras. 70–73).

(2) However, contrary to the Supreme Court's conclusion, Advalorem had established a good arguable case in fraud against the Compsons. The relevant test was whether Advalorem had established a good arguable case that the Compsons had knowingly approved and paid £6m. to purchase the land without any honest belief or careless as to whether that land was a distressed asset and whether the price paid was no more than the true market value of the land. The following factors, amongst others, supported Advalorem's good arguable case in fraud: (a) the gravamen of the alleged fraud, *i.e.* that the Compsons misused a contrived over-valuation of the land based on unrealistic special assumptions to justify purchase of the land at a price grossly in excess of its market price, was established at the *ex parte* hearing and remained largely unchallenged at the *inter partes* stage; (b) the Compsons had failed to address the issue of whether they thought the land was a distressed asset and they would therefore be treated as knowing that it was not, and the Supreme Court was wrong to infer that, as they believed that they were purchasing the land at a fraction of its true value, they must have believed it to be a distressed asset; (c) the Compsons had offered no justification as to why no valuation of the land without the special assumptions was requested, despite their knowledge that it was part of a flood plain situated within the green belt; (d) the fact that the FSC did not instigate a police investigation into the alleged fraud

was irrelevant because the FSC's views were not admissible to show that the Compsons were innocent, the terms of reference of the FSC's investigation specifically excluded criminal fraud, and the decision as to whether to report the matter to the police was for the Chief Executive of the FSC, who was not a party to the present proceedings; (e) the fact that Linder Myers had failed to raise concerns as to the true value of the land with the Compsons was irrelevant because the Compsons had approved the purchase despite knowing that the land was part of a flood plain situated within the green belt; and (f) the Supreme Court had been wrong to place significant weight on the fact that the Compsons had liability insurance because insurance was irrelevant to the existence of a cause of action and no final decision had been taken by the insurer as to whether to cover the present litigation (para. 45; paras. 49–50; paras. 56–59; para. 62; para. 64).

(3) The Supreme Court's decision not to admit the letter of December 14th, 2012 would be upheld. Although recent case law had broadened judicial discretion in this area, the most important consideration was the likelihood that the omitted material would persuade the judge to change his conclusion. The Supreme Court had been correct to hold that the letter was insufficient to change its view on whether a good arguable case in fraud had been established against the Compsons and had therefore been correct to refuse to admit the letter (paras. 66–67).

Cases cited:

(1) *Barrell Enterprises, In re*, [1973] 1 W.L.R. 19; [1972] 3 All E.R. 631, distinguished.
(2) *Compson* v. *Financial Servs. Commr.*, 2015 Gib LR 435, referred to.
(3) *Derry* v. *Peek* (1889), 14 App. Cas. 337; [1889–90] All E.R. Rep. 1; 61 L.T. 265; 5 T.L.R. 625; 58 L.J. Ch. 864, referred to.
(4) *Egan* v. *Motor Servs. (Bath) Ltd.*, [2008] 1 W.L.R. 1589; [2008] 1 All E.R. 1156; [2008] 1 FLR 1294; [2008] Fam. Law 317; [2007] EWCA Civ 1002, referred to.
(5) *Jarvis Field Press Ltd.* v. *Chelton*, [2003] EWHC 2674 (Ch), applied.
(6) *L and B (Children), In re*, [2013] 1 W.L.R. 634; [2013] 2 All E.R. 294; [2013] 2 FLR 859; [2013] 2 F.C.R. 19; [2013] Fam. Law 664; [2013] UKSC 8, referred to.
(7) *Thane Invs. Ltd.* v. *Tomlinson*, [2003] EWCA Civ 1272, applied.
(8) *VTB Capital plc* v. *Nutritek Intl. Corp.*, [2012] 2 Lloyd's Rep. 313; [2012] 2 BCLC 437; [2012] 2 C.L.C. 431; [2012] EWCA Civ 808, applied.

S. Davenport and *D. Lewis* for the appellant;
C. Gomez and *D. Benyunes* for the respondents.

1 **POTTER, J.A.:**

Introduction

This is an appeal by Advalorem Value Asset Fund Ltd. ("Advalorem"), a limited liability company incorporated under the laws of Gibraltar on June 29th, 2012 and registered on July 26th, 2012 with the Financial Services Commission of Gibraltar ("the FSC") as an experienced investor fund ("EIF"). Such registration permitted Advalorem to sell investments in collective investment schemes to "experienced investors," as defined in reg. 3 of the Financial Services (Experienced Investor Funds) Regulations 2012. Investments were accepted by Advalorem on the basis of a private placement memorandum ("the PPM"). Advalorem is now in administration, the administrator being Mr. Adrian Charles Hyde ("Mr. Hyde"), who was so appointed by order of Dudley, C.J. dated January 27th, 2014.

2 The respondents to the appeal are the fourth defendant, Advalorem Asset Management Ltd. ("AAML"), the fifth defendant ("Mr. Compson") and the sixth defendant ("Mrs. Compson"), who were AAML's two directors and joint owners. AAML was at all material times a corporate director of Advalorem and constituted its investment director under and for the purposes of the PPM. As such, AAML was responsible for sourcing, recommending and performing due diligence in respect of prospective investments. Mr. and Mrs. Compson were the registered *de jure* directors of and shareholders in AAML. There were no other directors. The Compsons were thus together responsible for performing its protective and advisory roles in relation to Advalorem's investments.

3 On September 4th, 2015, Jack, J., on the application of Mr. Hyde, granted an *ex parte* freezing order against all the defendants save the third defendant, Mr. Weal, on the ground, *inter alia*, that there was a good arguable case that they had engaged in fraudulent activity in relation to the use of moneys from four UK pension funds operated by Marley Administration Services Ltd. ("Marley"), which funds were used to purchase land in Scotland ("the Kirkintilloch land") at a grossly excessive price.

4 At the return date for the *inter partes* hearing on September 18th, 2015, the respondents sought the discharge of the judge's earlier order. The matter was adjourned part heard to September 23rd, 2015, when, following further submissions, the judge handed down a draft judgment providing for the discharge of the injunctions earlier granted.

5 At that point, the judge was invited by Advalorem to admit in evidence a document not previously placed before him, but he declined to do so and delivered a judgment in which he concluded that, on full consideration of the factual matters then before him, Advalorem had "failed to show a good arguable case in fraud in the relevant sense" (September 23rd, 2015 judgment, at para. 46). He went on to add that, even if that were wrong, he

would have refused to continue the injunction on the basis that there was insufficient evidence of risk of dissipation of the respondents' assets. He accordingly refused to extend the freezing order previously granted against these respondents. The order was nonetheless extended by way of an undertaking to abide by the outcome of this appeal.

6 It is important by way of background to observe that, prior to the hearing of the injunction application on September 4th, 2015, the judge was already familiar with the background and much of the detail relevant to this case as a result of earlier proceedings before him when he had, *inter alia*, heard the appeal of Mrs. Compson from a directive of the FSC dated December 12th, 2014 which, following an investigation, had barred her from any senior role in the financial services industry in Gibraltar without the FSC's consent.

7 Turning to identify the other defendants in the action, the first defendant ("Mr. Redford") was a *de jure* director of Advalorem from July 3rd, 2012 to August 19th, 2013; the second defendant ("Mr. Stark") was a *de jure* director of Advalorem from July 3rd, 2012 to February 19th, 2013; the third defendant ("Mr. Weal") was a *de jure* director of Advalorem from February 19th, 2013 to January 20th, 2014; the seventh defendant ("Mr. King") was the ultimate beneficial owner and controller of the eighth defendant ("Thistle") [which held the shares in two special purpose vehicles that were acquired by Advalorem to effect its purchase of the Kirkintilloch land], *de facto* a company incorporated under the laws of Gibraltar; and the ninth defendant ("Mr. Kane") appears to have acted throughout for Advalorem in the actions giving rise to the claim and it is alleged that he was a *de facto* or shadow director of Advalorem, acting as he did as adviser to Advalorem in finding the land, advising on its purchase, dealing with the seller and liaising and communicating with the lawyers in respect of its purchase.

8 Mr. Redford, Mr. Stark, Mr. Weal and Mr. and Mrs. Compson were all licensed by the FSC as EIF directors.

9 As indicated in para. 6 above, prior to these court proceedings there had already been an investigation by the FSC which barred Mrs. Compson from any senior role in the financial services industry. Mr. Weal was also barred from acting in any EIF (save for Temple Rock Fund PCC Ltd.) without the FSC's consent. Conditions as to trading were also imposed on Mr. Weal. Mrs. Compson and Mr. Weal each appealed to the Supreme Court. The appeal was heard by Jack, J.: *Compson* v. *Financial Servs. Commr.* (2). Each was unsuccessful. In those proceedings, Mr. Hyde relied upon largely the same evidence as he now relies upon in the present proceedings and which, indeed, Jack, J. adopted by way of recital in his judgment of September 4th, 2015 when he granted *ex parte* relief.

The facts outlined

[The learned Justice of Appeal quoted from the detailed statement of the facts given by Jack, J. in *Compson* v. *Financial Servs. Commr.* and his September 4th, 2015 judgment and continued:]

The *ex parte* proceedings

10 It is not in dispute that, in addressing the matter on September 4th in his judgment upon Advalorem's *ex parte* application for a freezing order, the judge rightly held:

(1) That to demonstrate a "good arguable case" for relief by way of a freezing order, Advalorem was obliged to demonstrate a case "'which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50% chance of success': *The Niedersachsen*, [1983] 2 Lloyd's Rep. 600, at 605" (September 4th, 2015 judgment, at para. 13).

(2) That the FSC, in dealing with the cases of Mrs. Compson and Mr. Weal, made no finding that either was knowingly party to a fraud (*ibid.*, at para. 14).

(3) ". . . [T]hat the view taken by the FSC as regards Mrs. Compson and Mr. Weal is not admissible to show that Mrs. Compson and Mr. Weal were innocent of the alleged fraud, but that the existence of the FSC's view can be taken into account in deciding whether a good arguable case has been established by the claimant. Likewise, insofar as I made any determinations of fact in the *Compson* and *Weal* appeals [*Compson* v. *Financial Servs. Commr.* (2)], my judgment given on those appeals is only relevant to whether Mr. Hyde has a good arguable case, not to prove the underlying facts" (*ibid.*, at para. 17).

11 I shall now turn to the terms in which the judge granted (and the transcript shows readily granted) a freezing order against the respondents by way of *ex parte* relief on the ground that a good arguable case of fraud had been demonstrated. Because the grounds were succinctly set out in his judgment and, as Mr. Davenport, Q.C. contends, their strength has not been effectively impaired as a result of the Compsons' evidence filed for the *inter partes* hearing, I proceed by way of quotation from the relevant paragraphs of the judgment.

[12 The learned Justice of Appeal quoted the reasons given by Jack, J. to justify the imposition of the freezing order at the *ex parte* stage, which may be summarized as follows: (a) the Compsons were aware that (i) only one valuation of the Kirkintilloch land was obtained, in breach of the requirement of two valuations in the PPM, (ii) that valuation did not assess the market value of the land as defined in the PPM, (iii) the valuation was based on special assumptions with no indication that they were realistic or

reasonable, (iv) the valuation said nothing as to whether any applications or enquiries had been made into obtaining planning permission for the Kirkintilloch land, (v) there was no evidence that the land was a distressed asset, and (vi) the terms of the contract to purchase the land were unusual and disadvantageous to Advalorem and its investors; (b) the Compsons were aware that the Kirkintilloch land was part of a flood plain situated within the green belt; (c) Mrs. Compson had set up a company called Cassani Ltd. ("Cassani") in order to receive commission payments from Advalorem, but payments were made to Cassani before the Compsons' commission became due and Cassani made payments to Mr. King for no apparent reason; (d) the fact that the FSC made no findings of fraud against Mrs. Compson was irrelevant because the terms of reference of the FSC's investigation prohibited it from making such a finding; and (e) there was a serious risk that the Compsons would dissipate their assets because the sanctions imposed on Mrs. Compson by the FSC meant that they had nothing left to lose, they were dishonest in relation to the purchase of the Kirkintilloch land and could therefore be dishonest in relation to their own assets, and they knew how to use offshore companies to conceal assets.

The learned Justice of Appeal continued:]

The *inter partes* proceedings

13 Following the making of the freezing order upon Advalorem's *ex parte* application, a return date for the *inter partes* hearing was fixed for September 18th, 2015.

14 It is noteworthy that, at the outset of the *inter partes* hearing on that date, Jack, J., having read the witness statements of the Compsons, observed that there were two relevant aspects of issues of the case relied on by Advalorem which had not been addressed or adequately explained in their evidence, namely (a) why, having participated in the preparation of the PPM which defined the term "distressed assets" and limited Advalorem's business to investment in such assets, they considered the Kirkintilloch land to be such an asset; and (b) Mr. Hyde's observation that, on a simple viewing of the Kirkintilloch land, it was obviously unsuitable. The judge, having expressed concern at these gaps in the evidence, offered Mr. Gomez the opportunity of an adjournment of the hearing to the following week in order to deal with them. This was, however, declined. The matter accordingly proceeded. However, the argument not being complete, the hearing was adjourned to September 23rd, 2015 when, following further argument, Jack, J. refused to extend the freezing order on the basis of the evidence and argument adduced before him.

15 In his judgment handed down on that date, in which he stated that it should be read with the earlier judgment of September 4th, 2015, Jack, J. dealt with and dismissed two preliminary matters raised by way of

complaint by Mr. Gomez for the respondents, concerning respectively alleged delay in service of the *ex parte* order over what had, in fact, been a public holiday in Gibraltar, and a point raised as to alleged non-disclosure by Mr. Hyde in his affidavit relating to the question of whether or not any of the first six defendants held directors and officers ("D&O") or professional indemnity insurance (September 23rd, 2015 judgment, at paras. 3–9).

16 For the purposes of the *inter partes* proceedings, the judge had before him further evidence, not available to him on the *ex parte* hearing, by way of affidavits from Minette and Mark Compson dated respectively September 16th and 17th, 2015, seeking revocation of the freezing order, and a further affidavit of Mr. Hyde by way of reply dated September 23rd, 2015, the importance of which lay largely in the fact that it filled the gap highlighted by the judge which Mr. Compson declined to fill.

17 Mrs. Compson's affidavit may be summarized as follows.

[18 The learned Justice of Appeal quoted from and summarized Mrs. Compson's affidavit, to the effect that (a) the surveyors wilfully misled her as to the value of the Kirkintilloch land, as they led her to believe that planning permission could be obtained; (b) she therefore believed that Advalorem was purchasing the land at just 40% of its market value; (c) Linder Myers wilfully withheld from her its concerns about the true value of the land, communicating its concerns only to Mr. Kane, who dismissed them; (d) if she had been aware of Linder Myers's concerns, she would not have agreed to purchase the land; (e) while Mr. King may have committed fraud, she did not associate with and was not close to him; (f) she had close ties to and wished to continue to work in Gibraltar; and (g) she was attempting to sell Castellum, a licensed company management and secretarial group of private companies owned by her but of which she had been required to divest herself following her disqualification.

The learned Justice of Appeal continued:]

19 Mr. Compson, in turn, in his affidavit dated September 17th, 2015, affirmed and shortly supplemented the evidence of Mrs. Compson. The content of his affidavit is almost exclusively by way of comment. The matters of substance may be summarized (with reference to the paragraphs of his affidavit) as follows:

(i) He asserted that "all the evidence points to a situation where we were misled, either actively or by omission, by the solicitors in England and chartered surveyors in Scotland who we had relied upon to advise us" (para. 8).

(ii) He stated that, far from his being "close to Mr. King" as Mr. Hyde had asserted in his affidavit, "I have never met Mr. King or had any dealings whatsoever with him."

(iii) He challenged Mr. Hyde's expressed view that on a visit to the Kirkintilloch site he (Mr. Hyde) considered it "obvious that the site is not suitable for development or to present an attractive investment opportunity for Advalorem . . . because it is obvious from my site visit that the land is immediately adjacent to a river and is at a lower level than the surrounding developed land and therefore at a significant risk of flooding." In this respect, however, Mr. Compson notably failed to engage with the particular "flooding" point made by Mr. Hyde. He simply stated in general terms:

> "21 When I attended on site, Mr. Black [a member of the Black Partnership, the firm of surveyors which provided the valuation of the Kirkintilloch land] gave me a running and glowing commentary on why the property was a suitable acquisition. I was able to see for myself that adjacent to the site was a substantial housing development plus an industrial site . . . During the site visit, I had no reason to come to any other conclusion, and with respect to Mr. Hyde, I think that his opinion is wholly inappropriate not least because he is not qualified to make it."

(iv) At para. 24 of his affidavit he stated:

> "In summary therefore, the evidence produced by Mr. Hyde shows that the Black Partnership had told me and later told Mr. Killick that planning permission could be obtained for the land. Three reputable firms of chartered surveyors issued valuations without suggesting to me or my fellow directors that the assumptions were unrealistic. The valuations range from £10.3m. to £19.75m. Since the land was acquired for £6m., I was always under the impression that we had made an excellent investment. We now know that Advalorem's solicitors, Linder Myers, had expressed doubts and serious concerns about this but, as can be seen from Minette Compson's affidavit, they never so much as hinted at those doubts to us. In fact, the evidence (set out in detail in Minette Compson's affidavit) is that they deliberately withheld those doubts from us, for reasons which are unknown to us."

(v) At paras. 14–16 of his affidavit, Mr. Compson relied upon the fact that, at a meeting with Mr. Killick of the FSC on April 4th, 2013 (accompanied by Mr. Gomez), when told of Mr. Killick's suspicions that there had been a "land bank fraud," Mr. Gomez on Mr. Compson's behalf had said that the matter should be reported to the police as it subsequently was. However, no police action had followed.

20 In response to the Compsons' evidence, Mr. Hyde swore a further brief affidavit dated September 23rd, 2015, in which:

(i) In relation to Mr. Compson's involvement with "offshore" companies, he observed that, in addition to his involvement with Advalorem in

Gibraltar and AAML in the British Virgin Islands, Mr. Compson was also a director of an Isle of Man company, Swan Holding PCC Ltd., of which Mr. Kane was also a director.

(ii) In relation to Mrs. Compson's contact and/or communication with Linder Myers, Mr. Hyde said it was clear from its file that (a) not only was she noted in those files as the "point of contact" with Advalorem as the client, it was also clear that she had herself taken a number of administrative steps in the course of the transaction. These included sending the Tripod and Polyburn [special purpose vehicles that were acquired by Advalorem to effect its purchase of the Kirkintilloch land] company details to Mr. Benjamin of Linder Myers on December 12th; (b) she returned to Mark Dennis of Linder Myers the retainer letter signed by her on behalf of Advalorem on December 14th; (c) she communicated with Mark Dennis on December 17th, instructing him to send the funds due on completion of the Kirkintilloch land purchase straight to the vendor's solicitor; and (d) on December 18th and 19th, she dealt with one or two of Linder Myers's queries concerning the mechanics of completion.

(iii) However, as Mr. Hyde also deposed, it was clear from his enquiries of Mr. Dennis and Mr. Benjamin of Linder Myers that Mrs. Compson had requested that, in relation to the substance and progress of the transaction, they should deal with Mr. Kane rather than Mrs. Compson.

(iv) In relation to Mr. Compson's assertion that he had visited the site and concluded that it was suitable for development (the point which the judge had invited Mr. Compson to elaborate, but which he had declined to do), Mr. Hyde, who had also visited the site, observed:

> "The land is a flood plain. The land has streams running across it. The land is bounded on all sides by steep banks, either abutting the road, the houses that are built at one end of the site, and protecting the adjoining industrial estate. It is therefore very difficult to see why the Planning Authority would ever zone this area of land for development, given its importance as a flood plain and protecting homes in the locality and downstream. Valuing the land on the basis of an assumption that it is not a flood plain makes the valuation completely worthless."

The judgment of September 23rd, 2015

21 Having made clear in his September 23rd, 2015 judgment (at para. 2) that that judgment should be read with his earlier judgment of September 4th, 2015, Jack, J. turned to what he called the "substantive points" made by Mr. Gomez in the light of the evidence to which I have referred (September 23rd, 2015 judgment, at para. 10 *et seq.*). He did so under three broad heads namely, "The substantive points," "The D&O insurance" and "Linder Myers."

22 As to the substantive points, the judge referred to the "thrust" of the Compsons' defence being that they were the innocent dupes of Mr. Kane and Mr. Black. He went on to observe in that respect that none of the points made by the Compsons in their evidence was a "knock-out" point (*ibid.*, at para. 11). However, he identified a number of "potentially strong" points as follows (*ibid.*, at paras. 12–18):

[23 The learned Justice of Appeal referred to a number of points made in the Compsons' defence, including, *inter alia*, (a) although Cassani had made payments to Mr. King and this would be evidence of fraud by the Compsons if they had been aware of these payments, they may not have been aware of them because payments were made to Cassani by a company called Vista Fund Services Ltd., rather than by Adavlorem; (b) Mr. Compson said he had never met Mr. King, and Mr. Hyde gave no source for his assertion that the Compsons were close to Mr. King; (c) the Compsons said that they genuinely believed that the Kirkintilloch land was worth substantially more than the £6m. that Advalorem paid for it based on the convincing statements by the surveyors that planning permission could be obtained; (d) if the Compsons believed that Advalorem was purchasing the land at a fraction of its true worth, then it was reasonable to infer that they also believed the land to be a distressed asset; (e) the Compsons did not explain their failure to consider whether the Kirkintilloch land was a distressed asset, but this may have been for tactical reasons to avoid compromising their position in other actions against them; (f) the question of whether it would be obvious to Mr. Compson on inspection of the land that planning permission would not be granted could not be determined at an interlocutory stage; and (g) the Compsons invited the FSC to report any suspicions of fraud to the police.

The learned Justice of Appeal continued:]

The D&O insurance

24 The judge observed (*ibid.*, at paras. 20–23) that, as was now common ground, the Compsons had D&O insurance to the extent of £1m. At the same time, he acknowledged that the insurance was limited to that sum and did not cover fraud so that, if Advalorem was successful against the Compsons, the insurance would provide no indemnity. He observed: "I regarded it as very significant in considering whether to continue the freezing order or not that the Compsons appear to have insurance to defend themselves against the current claim" (*ibid.*, at para. 23). However, he did not say why.

Linder Myers

25 The judge highlighted Linder Myers's failure to advise Mrs. Compson of its major and repeated reservations, expressed by email to Mr. Kane

with mounting concern, in relation to the terms of the purchase of the Kirkintilloch land, but which were neither expressed nor copied on by it to Mrs. Compson (*ibid.*, at paras. 24–25). He observed that this supported the Compsons' case that they were not on notice of the fraud. The correspondence culminated in an email to Mr. Kane from Mr. Willan of Linder Myers on the evening of December 16th, 2012, which read as follows (*ibid.*, at para. 26):

> "Please see enclosed highlighted yellow the points that they wish to delete which I consider are things we should fight for, even if we give everything else away—*e.g.* the cl. 7.2 amendment—that if they fail to complete through their fault (not ours) we don't get any money back! Typical of their approach, it is wholly unfair and objectionable. I don't want to rant on as I know it will only bore you . . . But if it were me and my own money I would now insist they reinstate the yellow wording or we walk away. It's your call though."

26 The judge went on to observe that (as a standard part of its "know your client" requirements) Linder Myers must have known the identity of the directors of Advalorem and AAML and that Mr. Kane was not a director of either, being simply an authorized intermediary; this raised the question of whether Linder Myers should not have sought confirmation from its client company of the unusual instructions which it was receiving from him (*ibid.*, at paras. 27–28). The judge recorded that both Advalorem and the Compsons' insurers were currently considering the issue of third party proceedings against Linder Myers which, by reason of previous and recent involvement for other clients, was aware of the low sale value hitherto attributed to or achievable for the Kirkintilloch land against the planning background (*ibid.*, at paras. 29–30).

27 The judge rejected Mr. Davenport's submission that the email correspondence was to be regarded as consistent with Mrs. Compson being a party to Mr. Kane's fraud simply on the ground that, if it were not so, Mr. Kane was taking a massive risk in his instructions to Linder Myers to proceed despite its strongly expressed reservation (*ibid.*, at para. 31). The judge was similarly unpersuaded that the extent of Mrs. Compson's inclusion in the email chain in relation to payment of money and approval of board minutes was an indicator that she was also aware or informed of the matters dealt with in Mr. Kane's correspondence with Linder Myers. Indeed, the contrary appeared to be the case (*ibid.*, at para. 32).

Risk of dissipation

28 Jack, J. considered the risk of dissipation of the Compsons' assets in the absence of a freezing order (*ibid.* at paras. 34–38). On the basis of the evidence before him (which has not been the subject of any substantial challenge here or below), the position appears to be as follows. The

Compsons have two children aged 14 and 9, one at school in England, the other in Spain at Alcaidisa, where the Compsons live. The Compsons' home in Spain is substantially in negative equity. They also own a flat in Gibraltar in which Mr. Compson's mother and 93-year-old grandmother live with two of Mr. Compson's brothers. That property is said to be worth £220,000 but is subject to a mortgage of some £135,700 and, if it were to be resold, a claim by Mrs. Compson's mother in respect of her contribution of £110,000 to the purchase price. So far as cash assets were concerned, they had £45,000 in a savings account in joint names and £20,000 held by Mr. Gomez in his client account against costs. At the time of the judgment, the Compsons owned two motor cars, namely a Range Rover and a Porsche 991, valued at €50,000 and €60,000 respectively (though since judgment the latter has been sold for €70,000 to assist in discharging the Compsons' legal fees: see the Addendum to this judgment). The Compsons' only other substantial asset, as deposed by the Compsons, is a group of companies called Castellum, through which Mrs. Compson provided company administration services and derived her income, which they are in process of selling for a price of some £181,000. Hitherto, Castellum yielded a net income of approximately £125,000 to Mrs. Compson. However, the directions of the FSC prevented her from continuing to provide those services, hence the necessity for her sale of Castellum.

29 Having considered the position, the judge observed (*ibid.*, at paras. 37–38):

> "37 In my judgment, this does not present a picture of people likely to dissipate their assets. The Compsons do not appear to have great wealth. They have close ties to Gibraltar and the Campo. True it is that they—or at least Mrs. Compson—have experience of offshore companies in jurisdictions like the British Virgin Islands, but unless they have assets to hide in the first place that would not do them much good in concealing assets.
>
> 38 I bear in mind too that, if the D&O insurance does not cover their legal expenses, then most of the moneys identified will need to be used for that purpose."

Overall assessment

30 Under this heading (*ibid.*, at para. 39), the judge turned first to consider whether the claimant had shown a "good arguable case" (as defined in the September 4th, 2015 judgment, at para. 13).

31 The judge observed that, in determining whether that was so, he was "entitled to have regard to matters which would not be relevant at the trial of the matter" and in this context referred to "three matters to which greater weight can be attached" (*ibid.*, at paras. 40–41).

32 These were said to be—

(a) "the striking fact that Mr. and Mrs. Compson (and AAML) are having their legal fees paid by insurance. Insurers are notoriously unsentimental. If they thought the Compsons were fraudsters, they would say so and repudiate liability" (*ibid.*, at para. 41);

(b) that, on the limited evidence available, there appeared to be "a viable third party claim" against Linder Myers. The judge observed (*ibid.*, at para. 42):

> "True it is, as Mr. Davenport submits, that if Mrs. Compson was a fraudster in cahoots with Mr. Kane, then no such claim would lie. However, that is to put the cart before the horse. On the *concrete* evidence of the emails (and subject to all the provisos as to the evidential limitations at this stage of proceedings), there appears to be a third party claim against Linder Myers. Against that, Mr. Davenport can only put the *circumstantial* evidence that Mr. Kane and Mrs. Compson were jointly involved in a fraud" [Emphasis in original]; and

(c) the judge observed that a further striking fact was that no criminal investigation had been begun against Mr. and Mrs. Compson, despite their expressly raising this as an issue with the FSC.

33 The judge then summed the matter up in this way (*ibid.*, at paras. 44–47):

> "44 Now against these three matters (and the FSC determination and my own judgment in the *Compson* and *Weal* appeals [*Compson* v. *Financial Servs. Commr.* (2)], insofar as weight can be attached to them) I have to balance the factual matters on which the claimant relies. As to this, my assessment is that Mr. and Mrs. Compson have done sufficient to challenge the main thrust of the claimant's allegations of fraud. There are a lot of facts which are in dispute and which, for reasons I have explained, I cannot possibly decide at this stage of proceedings. Nonetheless, the claimant's case in fraud against these defendants is, in my judgment, much weaker than it appeared when I considered the matter on an *ex parte* basis.
>
> 45 I accept that the test of a 'good arguable case' is a fairly low threshold for a claimant to satisfy. Further, the boundary between a 'good arguable case' and a merely 'arguable case' is rather undefined and rests largely on the judge's impression of the case.
>
> 46 In my judgment, however, balancing all the above matters, the claimant has failed to show a good arguable case in fraud in the relevant sense.

47 Even if that were wrong, I would still have a discretion whether to continue the injunction. In the light of my conclusion as to the risk of dissipation, I would refuse to continue the injunction on that basis as well."

34 The judge rounded off his judgment by observing (*ibid.*, at para. 48):

"48 I have considered Mr. Davenport's fall-back argument that a claim for negligence and breach of fiduciary duty lies in any event, so that the freezing injunction should be continued on that basis in any event. However, firstly this claim is covered by insurance, albeit in an inadequate amount for the claim, and secondly the case in dissipation is even weaker for this claim, because the considerations I outlined in para. 78 of my judgment of September 4th do not apply to this claim."

35 Before considering the grounds of appeal it remains only to refer to one more matter.

The post-judgment application

36 On September 24th, 2015, when the judge handed down his judgment in writing, Mr. Davenport, Q.C., without having given previous warning, made an application that the judge should revise substantially the judgment handed down, continuing the freezing order as against AAML and the Compsons meanwhile, in the exercise of the court's so-called *Barrell* jurisdiction: see further below. Mr. Davenport, Q.C. also raised two points said to require correction to paras. 10 and 30 of the judgment handed down, but I need not deal with them as being of any significance in relation to the appeal.

37 The application for revisitation of the judgment was based on the content of a letter of December 14th, 2012 (not adduced in evidence prior to judgment) from Linder Myers to Mrs. Compson in relation to DBH, the corporate vehicle for the purchase of Tripod and Polyburn. The letter, which enclosed the terms and conditions, stated (September 24th, 2015 judgment, at para. 6):

"I have been instructed that there will be minimal due diligence undertaken and warranties given in respect of these two companies as Michael Kane has notified me that you have knowledge of these companies together with knowledge of the land that they each own. You therefore confirmed to me that you do not require full due diligence to be undertaken and you are happy to proceed on this basis and accept the risk in doing so."

38 Mr. Davenport sought to rely upon the letter as showing that Linder Myers was entitled to act as it did in not referring the unusual and risk-ridden nature of the instructions it was receiving from Mr. Kane back

to Advalorem for confirmation. Mr. Davenport submitted that this adversely impacted on the viability of a third party claim against Linder Myers. Mr. Gomez's response to this submission was simply that the disclaimer which was the purpose of the letter did not meet the point that the series of warnings and disclaimers being given in correspondence by Linder Myers to Michael Kane were being given to the wrong person; they should have been given or copied to the directors of Advalorem. They, and not Mr. Kane, were the directors and mind of the company; Mr. Kane was no more than an *ad hoc* authorized intermediary without evident or ostensible professional status who appeared to be brushing aside its concerns.

39 The judge first considered the question of whether Mr. Davenport's post-judgment application to rely upon the letter came too late, on the basis that Mr. Hyde had been in possession of a copy of the letter of December 14th, 2012 since Monday, September 21st, 2015, two days before the date of his further affidavit of September 23rd, 2015, yet he had not sought to put it in evidence or rely on it prior to judgment, despite having the opportunity to do so. Having referred to the principles considered in *In re Barrell Enterprises* (1) (as revised in *In re L and B (Children)* (6) and 1 *Civil Procedure*, at para. 40.2.1.0.2 (2015 ed.)) and *Egan* v. *Motor Servs. (Bath) Ltd.* (4), the judge refused to permit the letter to be adduced in evidence. He said (September 24th, 2015 judgment, at paras. 11–13):

> "11 In my judgment, there are no special circumstances which would allow me to permit this further evidence to be adduced in evidence. In the current case, Mr. Davenport has fought the good fight, but has lost. He is now seeking to run further arguments with further evidence in the hope of retrieving that lost ground. That should not be permitted, save in exceptional circumstances. No such special circumstances arise here, in my judgment. The claimant had the letter; it could have deployed it; for inadequately explained reasons it did not. Accordingly, I refuse the claimant permission to rely on the further letter.
>
> 12 Even if I were wrong about that, the letter does not in my judgment—effectively for the reasons advanced by Mr. Gomez—amount necessarily to a 'get out of gaol' card for Linder Myers, as Mr. Davenport submits. Linder Myers was giving a warning against going ahead in a series of emails couched in increasingly strong terms, but Advalorem and DBH (and therefore the Compsons) can, in my judgment, properly argue that Linder Myers was negligent in giving the warnings to the wrong person, Mr. Kane, rather than to the directors.

13 I accept that the letter (were it admissible) does weaken the Compsons' third party claim somewhat, but not nearly sufficiently for me to change my view on whether a good arguable case of fraud has been established."

40 He accordingly refused to alter the substantive result recorded in his judgment as handed down.

Grounds of appeal

41 The grounds of appeal are succinctly stated in the notice of appeal:

Ground 1

That the judge erred in concluding that Advalorem had failed to show a good arguable case in fraud against the respondents.

Ground 2

That the judge erred in taking into account and/or giving excessive weight to four matters:

(1) the respondents' invitation to Mr. Killick on April 4th, 2013 to report the matter to the police, despite which no such report was made;

(2) the fact that the respondents have D&O insurance, given that such insurance is limited to £1m., does not cover fraud, and therefore provides inadequate cover for the claim;

(3) the fact that the respondents' legal costs were being met by the D&O insurance, when in fact no such decision had yet been made by the insurers in relation to these proceedings; and

(4) in finding that the respondents had made out a "potentially viable claim" against Linder Myers for an indemnity or contribution.

Ground 3

That the judge erred in holding there was no real risk of the respondents dissipating their assets.

Ground 4

That the judge erred in refusing to admit, under the *Barrell* jurisdiction, the retainer letter of December 14th, 2012 from Linder Myers to Mrs. Compson concerning "minimum due diligence"—

(1) by applying the wrong test as to the letter's admissibility; and/or

(2) by failing to give sufficient weight to its effect as being contrary to the case advanced by the respondents in their affidavits.

Advalorem's submissions

42 The submissions of Mr. Davenport, Q.C. on behalf of Advalorem may be encapsulated in this way.

(1) That, on the material before the judge on the *ex parte* application, he was correct to hold in his careful judgment of September 4th, 2015 that there was sufficient evidence of fraudulent activity and/or state of mind on the part of the Compsons, and hence of AAML, for the reasons expressed, which were based on material with which he was well acquainted, he then having "no difficulty in granting the freezing orders sought."

(2) That, on the *inter partes* hearing, despite full argument, the facts and material documents before the judge essentially carried the matter no further in the Compsons' favour, the nature and quality of the affidavit evidence being insufficient to meet and negate an arguable case of participation in fraud by reason of dishonest assistance and knowing receipt as advanced against them.

(3) That, in particular, the Compsons failed to depose to matters which were plainly required to be addressed if they were to deal fully with the case advanced against them, namely the "distressed asset" point and the fact that the property was a flood plain on green belt land: see paras. 14 and 20 above.

43 By way of elaboration, the submissions for Advalorem were as follows.

Ground 1

44 (1) There was a plain and knowing failure by the Compsons to comply with the PPM both in relation to its restricted application to "distressed assets" and its requirement for two valuations. There was no suggestion in evidence or argument that the Compsons were not aware of the terms of the PPM and, when given the opportunity and encouragement by the judge to deal with the state of their knowledge or intention in evidence, that invitation was declined. That being so, it was inappropriate for the judge to engage in ameliorative speculation as to the Compsons' state of mind (see September 23rd, 2015 judgment, at paras. 16–17). Suffice it to say it was not stated by the Compsons that they thought the land was "being sold at a fraction of its true worth." Nor did they venture that the price was depressed for a reason peculiar to the seller, or for any identified reason.

(2) Despite the defining terms of the PPM, there was, in fact, no question that planning permission had been obtained or applied for (or indeed was at any preliminary stage or in prospect) in respect of what was green belt land situated in a flood plain and subject to flooding. The highly favourable special assumptions were therefore, by definition, false, or

"fanciful" as described by the judge, and no basis for any meaningful valuation of the land which ignored these vital considerations.

(3) The Compsons, rather than themselves discharging their duties and responsibilities as set out at para. 2 above, simply (and apparently informally without any record or evidence in writing) handed over their role in that regard to Mr. Kane, leaving it to him to instruct and communicate with Linder Myers. Whilst the Compsons have accepted that they authorized and/or permitted Mr. Kane to provide instructions to, and liaise with, Linder Myers in relation to the acquisition of the land and they have asserted that they were duped in that respect, they have not provided any proper or reasonable explanation as to their reasoning, purpose or state of mind in relation to such delegation of function.

(4) In that respect, the Compsons, without apparent query as to the necessity for, or concern as to the haste being adopted, agreed and pursued a brief and rushed time-frame for the purchase of the land.

(5) The terms of the sale were manifestly disadvantageous, not least in provision being made and agreed for a non-refundable deposit of over £2.1m. with no reason or justification being provided.

(6) Finally, despite full opportunity for all such matters to be dealt with in evidence, the Compsons (in addition to their failure to deal with the "distressed asset" provision of the PPM)—

(i) failed to explain why they accepted and/or failed to query or challenge the utility or purpose of the specific assumptions upon which the valuation was based;

(ii) failed to explain why, given their prescribed role, functions and responsibilities in both Advalorem and AAML, they did not deal with Linder Myers directly as to progress, due diligence and the like, but simply authorized and relied on Mr. Kane as their medium of communication, decision and instruction in those respects; and

(iii) failed to explain why, and on what basis, they regarded the timing and progress of the matter (which must of its nature have been discussed) as one of great urgency.

Ground 2

45 In relation to the four matters to which the judge appears to have accorded some weight (see para. 41, "Ground 2," above) Mr. Davenport submitted as follows:

(1) That the invitation to Mr. Killick to report the matter to the police if fraud was being alleged on the Compsons' part should be accorded little, if any, weight for three reasons. First, as the judge had observed at the *ex*

parte hearing, "the view taken by the FSC as regards Mrs. Compson and Mr. Weal is not admissible to show that [they] were innocent of the alleged fraud" (September 4th, 2015 judgment, at para. 17). Secondly, the terms of reference of the FSC's investigation specifically excluded "whether or not a criminal fraud has in fact been perpetrated and whether Advalorem and any directors or other persons concerned in the administration of its affairs were knowingly a party to any such fraud" (*ibid.*, at para. 46). Thirdly, the decision whether or not to report the matter to the police was that of the Chief Executive of the FSC who was not a party to the proceedings.

(2) That, in dealing with the now common ground that the Compsons had D&O insurance to the extent of £1m. (including costs), the judge failed to make clear what he considered its significance was, at least for the purposes of a decision as to whether the freezing order should be continued, given that the issue was whether there was sufficient evidence of liability in fraud.

(3) Whilst the judge appears to have assumed that D&O insurance was/is available in the instant proceedings (September 23rd, 2015 judgment, at para. 20), the position is in fact that no such decision has yet been made in that respect.

(4) Mr. Davenport (as he had submitted before the judge) points out that, if fraud is established on the part of Mrs. Compson in association with Mr. Kane, then a third party claim would not lie against Linder Myers in any event. However, Mr. Davenport's principal submission is that the possible existence of a claim against a third party which has not yet been brought is not a factor which should have any bearing on whether to continue a freezing injunction against an existing party.

Grounds 3 and 4

46 These require no elaboration.

The respondents' case

47 Mr. Gomez adopted the reasoning of the judge and argued that, so far as the allegation of fraud was concerned, no good arguable case had been demonstrated. He submitted that the important difference between the judge's view at the stage of the *ex parte* proceedings and his ruling on the *inter partes* application was that, on the former occasion, the focus was upon the terms of the valuations as a basis for the approval of the purchase of the land in question, whereas, on the *inter partes* hearing, the judge's attention was drawn to what the Black Partnership was telling the FSC in support of the respondents' case when under investigation by the Chief Executive of the FSC. Mr. Gomez accepted and averred that, in retrospect, the valuation reports of the Black Partnership do indeed appear to be

based on "fantastical assumptions"; he nonetheless emphasized that that was not a view propounded or accepted by the Black Partnership which, according to the Compsons, had orally indicated to them that planning permission was very likely and that they were buying the land for as little as 40% of its value.

48 Mr. Gomez also submitted that, in leaving matters to be progressed by Mr. Kane, Mrs. Compson was not abdicating her responsibilities in relation to the management of Advalorem; she was neither authorizing nor suggesting that she should be kept isolated from, or ignorant of, issues or queries of importance raised by Mr. Kane or Linder Myers. Mr. Gomez submits that it is Linder Myers that should be criticized for not referring to Mrs. Compson or keeping her informed in relation to the anxieties it had about the substance of the transaction and any matters in respect of due diligence which caused it concern. As Mr. Gomez put it, the highest case that could be put against the Compsons was one of suspicion rather than knowledge which is the essence of fraud.

Discussion

49 As to Mr. Gomez's last submission and by way of a preliminary, I pause to observe that, so far as knowledge is concerned, in relation to an allegation of fraud the court is, of course, dealing with a wider concept than actual knowledge of falsity on the part of the defendant in respect of the representation relied on; an absence of honest belief is sufficient: see *Derry* v. *Peek* (3) (14 App. Cas. at 374). In this respect, therefore, and having regard to the classic definition in that case, the question may properly be put as follows. Has Advalorem demonstrated a good arguable case that the Compsons, acting in their roles described in para. 2 above, knowingly approved and paid the purchase price of £6m. for the Kirkintilloch land without any honest belief, or alternatively careless as to whether it was true or false, that such land was a distressed asset as defined in the PPM and that such price represented no more than the true market value of the land, located as it was in an area classified as green belt and situated on a flood plain?

50 The gravamen of the fraud alleged against the Compsons in this case is their procurement, adoption and (mis)use of a contrived over-valuation prepared by the Black Partnership (in accordance with instructions approved by the Compsons) upon assumptions which were wholly unrealistic in relation to the nature, status and condition of the land concerned, so as to justify the purchase of the Kirkintilloch land at a price unrelated to, and grossly in excess of, its true market value. In more detail, the elements of the fraud appear set out at para. 5.1 of the FSC letter as matters of negligence/misfeasance without any finding of fraud (see *Compson* v. *Financial Servs. Commr.* (2) (2015 Gib LR 435, at para. 43)). However, as already indicated, those elements identified were essentially

the basis upon which Jack, J. found, rightly in my view, that an arguable case of fraud had indeed been sufficiently established against Mrs. Compson for the purposes of interlocutory relief (September 4th, 2015 judgment, at paras. 45–47). Further, those elements remained in large measure unassailed before the judge at the subsequent *inter partes* hearing, save in one particular but important respect which I consider at paras. 54 and 55 below.

51 As to Mr. Compson, in light of his personal and business relationship with Mrs. Compson and their dual and shared role as the sole directors of AAML, I regard it as artificial and unnecessary for the purposes of interlocutory relief in the instant case to distinguish between the actions and state of knowledge of either of them, save where grounds for such distinction are demonstrated, or at least argued. In this respect, it has not been suggested by Mr. Gomez at any stage of his argument that such a distinction is required to be drawn.

52 While differently put, the case of fraud against Mr. Compson (set out in the September 4th, 2015 judgment, at paras. 23–29) includes not only the matters I have referred to in respect of Mrs. Compson, but also the payments made to Cassani which also affect her (*ibid.*, at paras. 25–28). In addition, the judge referred to the brochure drafted and circulated by Mr. Compson and his backdating of the letter of instruction for a second valuation in respect of the Kirkintilloch land as evidence of fraudulent conduct on Mr. Compson's part.

53 That said, I turn to what the judge called the "potentially strong" points (September 23rd, 2015 judgment, at para. 12) made by Mr. Gomez, as identified by Jack, J. in his *inter partes* judgment and which, in the event, altered his view as to whether the case in fraud had been sufficiently established.

The Cassani payment

54 Jack, J. set out the brief facts relating to the setting up of Cassani by Mrs. Compson and Paul Segal for the purpose of receiving commission payments from Advalorem pursuant to the "introducer agreement" (September 4th, 2015 judgment, at paras. 25–28). The points being made were to demonstrate as components of the case of fraud against Mr. Compson (i) that he knew of the existence of Cassani; (ii) that Cassani, and in turn both Compsons, had received payment of commission before it was due under the introducer agreement; and (iii) the fact that a "commission" payment was made to Mr. King. The judge acknowledged Mr. Compson's point that it was not Advalorem but Vista Card Services Ltd., the administrator of the EIF, that had control of the money and that had made the payments (September 23rd, 2015 judgment, at para. 12). Hence the Compsons may have been ignorant of the payment by Cassani to

Mr. King. It nonetheless left intact the point on which the judge had focused at the *ex parte* stage, namely that the Compsons had both procured receipt of the money by way of commission before it was due.

Mr. King

55 The judge referred to a remark in Mr. Hyde's affidavit in support of the *ex parte* application that Mr. and Mrs. Compson appeared to have been "close to Mr. King" and observed that this was a speculative statement denied by Mr. Compson who said that he had never met him. Whilst that appears to be correct, it does not seem to me to go to the main thrust of the case against the Compsons, which depends upon their relationship with, and apparent delegation of their supervisory role to, Mr. Kane and not Mr. King. Nor did any possible or suggested link between the Compsons and Mr. King appear to have played a significant, if any, part in the judge's earlier decision as to whether or not a *prima facie* case of fraud was established against Mr. Compson.

Was the Kirkintilloch land a distressed asset?

56 I have no doubt that, having been offered, but declined, the opportunity to address the question of whether the Kirkintilloch land was a distressed asset, the Compsons should, for the purposes of these interlocutory proceedings, have been treated by the judge as aware that it was not; nor do I consider, as the judge considered, that they should be inferred to have had a state of mind which they do not assert as to why the land was being sold. As I understand their case, as advanced by Mr. Gomez, it is clear that they decided to approve the purchase of the land notwithstanding their knowledge of its physical location on a flood plain and its classification as green belt land, on the basis of a valuation which not only specifically left those matters out of account, but valued the land on the basis that it was both physically suitable and ripe for immediate development.

The value of the Kirkintilloch land

57 It is this issue which, as it seems to me, lies at the heart of the appeal. While Mr. Gomez has conceded (and has not sought to argue the contrary for the purposes of the appeal) that the price paid for the land was excessive, paid as it was by reference to a valuation based on fantasy assumptions, he nonetheless stresses that the Compsons believed the price paid to be justified on the ground that Mr. Black had said (they thought convincingly) that planning permission could be obtained.

58 The first point to be made in this respect is that there is no contemporaneous document or other record of such conversations as may have occurred in relation to the proposed purchase of the Kirkintilloch land. Nor has any justification or argument been advanced by any of those

involved as to why, prior to purchase, no valuation was requested or obtained on the basis of the land "as is" despite the fact (as was known) that it was part of a flood plain situated on green belt land. While, in the course of the FSC investigation, it was asserted that, on the "say so" of the Black Partnership, the Compsons believed planning permission could be obtained, they neither assert nor explain how, and by reference to what considerations, the purchase price of £6m. was arrived at, let alone what was discussed or considered in the exercise of the Compsons' duties and responsibilities in relation to the funds of Advalorem and its investors.

Report to the police

59 The judge alluded to the fact that Mr. Killick, the Chief Executive of the FSC, had been invited by the Compsons at a meeting on April 4th, 2013 to report the matter to the police if he was alleging a criminal fraud on the Compsons' part. The judge commented, wrongly in the event, that it appeared no report had been made (*ibid.*, at para. 18). It is not clear what significance the judge attached to the point; however, if he used it as a factor by which to judge whether a case of civil fraud had been made out, I consider he was wrong to do so for the reasons advanced by Mr. Davenport (see para. 41, "Ground 2," above).

Linder Myers

60 There are two aspects to the role played by Linder Myers in conveying only to Mr. Kane, with whom it had been instructed to deal, the indications of its mounting concern over the terms of the acquisition of the Kirkintilloch land. The first is its omission to convey its concerns over the head of Mr. Kane (who had no formal appointment or role in Advalorem) to the Compsons as the responsible directors, if only by copying them in on the email exchanges (September 23rd, 2015 judgment, at para. 24 and paras. 27–29). The second is Linder Myers's vulnerability to third party proceedings for an indemnity or contribution on the grounds of its failure so to act.

61 It is the first of these which, as Mr. Gomez points out, was neither highlighted to the judge nor referred to by him in his judgment at the *ex parte* hearing.

62 The judge referred to Mr. Gomez's heavy reliance on Linder Myers's failure to advise the Compsons of its reservations in respect of the purchase and underlined that its warnings were only given to Mr. Kane (with whom it had been instructed by Mrs. Compson to deal). As the judge rightly observed, that state of affairs supported the Compsons' case that they were not on notice of the fraud. However, it did not go to, or adversely affect, the case based on the Compsons' own knowledge and state of mind in approving and pressing forward with the purchase of the

land at a price of £6m. on the basis of a valuation acknowledged to be based on fantasy assumptions relating to the status and condition of the land.

63 Furthermore, the judge's relatively lengthy consideration of the position of Linder Myers was principally directed to the question of whether or not a "viable third party claim" might lie against it for its failure (despite Mrs. Compson having delegated to Mr. Kane the task of dealing with it) to copy to her its correspondence with Mr. Kane, given the unusual nature of his instructions to Linder Myers effectively to waive "due diligence."

The D&O insurance

64 The judge (presumably in relation to the "balance of convenience" rather than in relation to liability) found it "very significant" (*ibid.*, at para. 23), in relation to the question of whether to continue the freezing order, that the Compsons appeared to have D&O cover for £1m. However, I accept Mr. Davenport's submissions that he was wrong to do so. In the ordinary way, the existence of litigation insurance is irrelevant to the existence of a cause of action and/or remedial claim save in relation to security or other claims in respect of costs. The judge stated his view (*ibid.*, at para. 41) that it was a striking fact that the Compsons and AAML were having their fees paid by insurers who were "notoriously unsentimental" and had not repudiated liability. This was an uncertain basis for the judge's decision since, as clarified by Mr. Gomez, no final decision has yet been reached by the insurers in relation to litigation costs and the judge's conclusion on whether an arguable case had been established fell to be decided on the basis of the evidence before the court and not upon questions of insurance.

Ground 4

65 At this point, I turn briefly to the last of the grounds relied on by Mr. Davenport, namely the rejection of his post-judgment application to adduce the "minimum due diligence terms" on which Linder Myers was instructed by Mrs. Compson to effect the purchase of the Kirkintilloch land by DBH, the corporate vehicle by which it was to be acquired (see paras. 36–40 above).

66 In my view, the decision of the judge not to admit the letter so lately produced with no adequate explanation was correct. It seems clear to me that he consulted and cited appropriate authorities before making his ruling. There is no doubt that the decision in *L and B (Children)* (6) referred to by the judge has had the effect of "freeing up" in very broad terms judicial discretion relating to the admissibility of an overlooked document following hand-down judgments and before any order is drawn

up and perfected. However, the matter is necessarily subject to principled application directed to the impact of the document upon aspects essential to the reasoning and consequent outcome of the case as set out in the judgment sought to be amended, most notably to the likelihood that the material might persuade the judge to reach a different outcome in some substantial and material respect.

67 It appears that, in this case, the matter was presented to the judge and dealt with by him in the context of its effect on the likelihood of third party proceedings being successfully brought by the Compsons against Linder Myers and was treated by the judge on that basis. By way of contrast, as it seems to me, the argument before this court has been directed to whether or not the letter should have been admitted in relation to the issue between the claimant and the defendants as to the scope of the defendants' obligations towards Advalorem. Whichever it be, I see no error in the judge's reasoned conclusion, shortly stated, to the effect that, albeit the letter might weaken the third party claim, it was insufficient to change his view on whether a good arguable case in fraud had been established (September 24th, 2015 judgment, at para. 13).

Conclusion on arguable case (Grounds 1 and 2)

68 That said, however, when considering the question of "good arguable case," in my view, the judge was wrong in the decision he reached based on the various considerations I have enumerated. He had rightly identified in his *ex parte* judgment the features indicative, and the nature of the case supportive, of the allegation of fraud against the Compsons (and consequently AAML). I also think Mr. Davenport was right in saying that those features remained essentially unassailed at the *inter partes* hearing. I consider the submissions of Mr. Davenport as I have set them out at paras. 42 and 44 above to be correct and that Advalorem has established a good arguable case of fraud on the basis of paras. 49 and 50 above.

Dissipation of assets (Ground 3)

69 However, that is not the end of the matter for the purposes of the injunctive relief sought. As I have already made clear (see paras. 28–29 above), having formed his conclusion on the issue of "good arguable case," the judge was nonetheless astute to give separate consideration to the risk of dissipation should he be wrong in that conclusion. While his judgment makes no reference to authority in that regard, it seems clear that he followed the correct approach in cases of this kind. It is to be found set out in the judgment of the Court of Appeal in *VTB Capital plc* v. *Nutritek Intl. Corp.* (8) ([2012] 2 Lloyd's Rep. 313, at paras. 177–178, *per* Lloyd, L.J.). In that case the court considered the proper analysis of the approach which should be adopted when considering whether to grant a freezing injunction in a case where there are allegations of fraud or

deliberate misconduct against a defendant. It approved a passage from the judgment of Patten, J. in *Jarvis Field Press Ltd.* v. *Chelton* (5) ([2003] EWHC 2674 (Ch), at para. 10), in which he commented on the judgment of Gibson, L.J. in *Thane Invs. Ltd.* v. *Tomlinson* (7) as follows:

> "I have no difficulty in accepting the general principle, emphasised by Peter Gibson, L.J., that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson, L.J. made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care."

70 The effect of that passage appears to me to be that judicial satisfaction that there is a good arguable case of fraud against the defendant in relation to the primary cause of action relied on does not necessarily justify an inference of likelihood of dissipation of assets, though in many cases the drawing of such an inference may be appropriate.

71 Turning to the detail of the matter in this case, I observe at once that there is no evidence, complaint or suggestion of any step taken or attempt made by the Compsons to dispose of any of their assets in the period of over two years since Advalorem's assets were frozen on June 6th, 2013; nor has Advalorem been able to identify any sums received by the Compsons deriving from their brief involvement with Advalorem beyond the Cassani payments made to them by way of "commission" totalling £64,325, which sums were paid into the Compsons' joint account at NatWest in Gibraltar. Payments by Cassani to a number of other recipients of "commission" (all of whom have been identified by Mr. Hyde) including Mr. Segal, Mr. King and others accounted for the balance.

72 So far as the Compsons' current means generally are concerned, the position is as set out by Jack, J.: see para. 28 above. It is apparent that, so far as property ownership is concerned, the Compsons' assets are modest, largely thanks to the substantial negative equity on their Spanish home, which is said to be as much as €200,000. So far as income and expenditure are concerned, based on the figures in respect of last year to which they have deposed, the Compsons until recently enjoyed a joint income net of tax of some £185,000, *i.e.* a sum well in excess of the figure of £127,000 which they identified as being the basic living expenses of the family

(including school fees and mortgage repayments). That income was largely made up of Mrs. Compson's earnings of some £125,000 net by way of drawings from Castellum. That resource is no longer available to her because the delayed, but now operative, terms of the FSC letter of December 12th, 2014 have precipitated the need for the sale of Castellum. Albeit Mrs. Compson hopes thereby to receive a capital sum of £180,000 if and when the sale goes through, she is meanwhile in a limbo of unemployment. Mr. Compson, too, appears to be in no position to alleviate the situation. Having deposed to an income of £60,000–£70,000 over the past year, it appears that he is currently unable to work through ill health. He has retired and it is not clear when, if at all, he would be able to resume work, even if he wished to do so.

73 Faced with that picture, it is clear that the judge took the view that, even assuming a good arguable case of fraud to have been established on the basis of the Compsons' brief involvement in the affairs of Advalorem, the evidence before him (a) failed to establish any reasonable likelihood of the existence of foreign assets available to, but concealed by, the Compsons; and (b) satisfied him that such funds as are now available to the Compsons to alleviate the diminution of their joint income and loss of employment will not be "dissipated," but will rather be required and likely to be applied in providing for the reasonable living costs of the Compson family, including any necessary and/or uninsured costs in defending this litigation. In light of the statement of principle and the appropriate process of consideration to be applied in cases of this kind, as set out in the *Thane Invs.* case (7) (see para. 69 above), I find no fault in the reasoning of Jack, J. (September 23rd, 2015 judgment, at paras 34–38), with which I agree.

Conclusion

74 I would therefore dismiss this appeal.

Addendum to judgment

Further documents

75 Following the completion of the hearing, Mr. Charles Gomez wrote to the court by email dated October 9th, 2015 attaching copies of certain documents, a number of which it was said had not previously been placed before the court during the hearing. They were said to be documents which had been before the board of Advalorem on December 17th, 2012 for the purpose of ratification by the board of the purchase of the Kirkintilloch land. The court has received and read the documents *de bene esse*. It is apparent that most of them had indeed been before the court at the hearing of the appeal. Having considered all of them, I conclude that they do not affect in any material respect the reasoning or conclusions set out in the above judgment.

Breach of undertaking

76 Further, by email dated October 28th, 2015, elaborated by a document dated November 5th, 2015 and entitled "Submissions Regarding Sale of Porsche 991," Mr. Gomez gave notice to the Registrar of the court of a breach of undertaking on the part of Mr. Compson (said to be unknown to Mrs. Compson until after the event), namely the negotiation of the sale of Mr. Compson's Porsche 991 car for the purpose of meeting various of the Compsons' ongoing expenses and commitments without obtaining the prior consent of Mr. Hyde. The contract for sale of the car for the sum of €70,000 was dated October 27th, 2015, the proceeds of such sale being credited next day to the client account of Charles Gomez where they remain. The intention of the transaction, as confirmed by Mr. Gomez, was and is that the sum should be apportioned and applied to (a) payment of some £30,000 for school fees due in respect of the children's education at the beginning of the January 2016 term; (b) the Compsons' legal fees, currently amounting to some £56,000; and (c) repayment of a loan of £20,000 to the Compsons from Mr. Weal against funds held in the Compsons' joint account at the Malta Mediterranean Bank which funds were subject to a 90-day notice period in respect of their withdrawal.

77 On the basis of Mr. Gomez's submission referred to above, it appears that not only is there a breakdown in Mr. Compson's health, but also concern as to his mental state. That aspect may or may not require further application to the court by the claimant or the Compsons at some time. Whether or not that is so, I do not consider that the circumstances of Mr. Compson's breach of undertaking in selling his car without obtaining the prior consent of Mr. Hyde in order to provide for the Compsons' legal and educational expenses call for any revision of the court's reasoning or conclusions as set out in the judgment above.

78 **KAY, P.** and **RIMER, J.A.** concurred.

Appeal dismissed.