[2019] EWCA Civ 2203

Case No: A4/2019/1259

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
SIR MICHAEL BURTON
[2019] EWHC 1145 (CH)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE HADDON-CAVE
and
SIR STEPHEN RICHARDS

- -

Between:

LAKATAMIA SHIPPING COMPANY LIMITED	**Appellant**
- and -	
TOSHIKO MORIMOTO	**Respondent**

- -
- -

Stephen Phillips QC, Noel Casey and James Goudkamp (instructed by **Hill Dickinson LLP**) for the **Appellant**
David Head QC and Georges Chalfoun (instructed by **Baker & McKenzie LLP**) for the **Respondent**

Hearing date: Tuesday 19th November, 2019

- -

Approved Judgment

Lord Justice Haddon-Cave:

1. The issue in this appeal is whether the Judge was wrong to discharge a freezing order.

2. This is an expedited appeal by Lakatamia Shipping Co Ltd ('Lakatamia') against the order of Sir Michael Burton, dated 2nd May 2019, sitting as a Deputy High Court Judge in the Business and Property Courts, whereby he discharged a world-wide freezing order ('WFO') against the Respondent, Mrs Toshiko Morimoto ('Madam Su'). Mr Justice Males granted Lakatamia permission to appeal on 19th July 2019, but refused Madam Su permission to appeal on jurisdictional issues.

BACKGROUND

3. Madam Su, aged 86, is the mother of Mr Nobu Su ('Mr Su'). Her late husband, Mr Su Ching-Wun, established the Taiwan Shipping Company in 1958, initially for the export of bananas. As she explained in her first Affidavit, the business became successful and lucrative and the family accumulated substantial wealth. She worked alongside her husband in the business and also made her own investments. On his death in 2001, responsibility for the shipping business largely passed to their only son, Mr Su. The business has run into problems in recent years.

Substantive proceedings

4. On 6th July 2008, Lakatamia, a shipping company operated by Mr Haji-Ioannou, entered into a freight forwarding agreement with Mr Su and various companies that were owned by him. Subsequently, Mr Su breached the agreement causing Lakatamia substantial losses. Lakatamia subsequently brought a claim for damages against Mr Su.

5. On 22nd August 2011, Lakatamia applied for, and was granted, a WFO against Mr Su by Mr Justice Blair which prohibited Mr Su from dealing with, or dissipating, his assets anywhere in the world, up to the value of US$48,842,440.24 ('the First WFO').

6. On 5th November 2014, following a trial, Mr Justice Cooke granted judgment in favour of Lakatamia against Mr Su in the sum of US$37,854,310.24 (*Lakatamia Shipping Co Ltd v. Su* [2014] EWHC 3611 (Comm); [2015] 1 Lloyd's Rep 216). On 16th January 2015, Mr Justice Cooke granted judgment in the further sum of US$9,852,200.50. Mr Su has not discharged these judgment debts voluntarily. His liability to Lakatamia to date currently stands at around US$57m ('the Judgment Debt').

Committal Proceedings

7. On 26th January 2018, Mr Justice Popplewell granted an order requiring Mr Su to surrender his passports and remain in the jurisdiction pending a hearing at which he was to be cross-examined as to his assets.

8. On 10th January 2019, Mr Su entered the United Kingdom and was met by the police at Heathrow and served with the order of Popplewell J. On 15th January 2019, Mr Su was arrested in Liverpool in the course of attempting to flee the jurisdiction by ferry. He was arrested and brought before the Business and Property Courts in London, whereupon Lakatamia served him with a committal application notice ('the Committal Proceedings').

9. Lakatamia made three main allegations in the Committal Proceedings. First, that Mr Su owned two villas in Monaco ('the Villas') through two companies, namely, Portview Holdings Limited ('Portview') and Cresta Overseas Limited ('Cresta'). Second, that on 21st October 2015, the Villas were sold for a combined sum of €65.1m yielding, after the redemption of mortgages, proceeds of €27,127,855.01 ('the Net Sale Proceeds'). Third, that Mr Su then dissipated the Net Sale Proceeds in breach of the First WFO.

Mr Su implicates his mother

10. On 27th February 2019, at a hearing before Sir Michael Burton, in the course of being cross-examined by Mr Phillips QC on behalf of Lakatamia as to his assets, Mr Su gave evidence to the effect that (i) his mother, Madam Su, had received the Net Sale Proceeds *via* her lawyers, (ii) she knew about the First WFO and (iii) she performed a "treasury" function for the Su family.

11. The following are extracts from the transcript of Mr Su's evidence during the Committal Proceedings:

> "Q: Where is the money now, Mr Su?
> A: I believe it went to family's [sic].
> JUDGE: Went to?
> A: Family's money.
> JUDGE: Back to your family?
> A: Yes. ….
> JUDGE: Where did it go?
> A: It went to Zabaldano, the lawyer in Monaco.
> JUDGE: Yes?
> A: And it went to instruction of my mother's [sic] to go to the mother's lawyers.
> JUDGE: To the mother's?
> A: The family's lawyers, I think".
> JUDGE: Where does she keep the money?
> A: I have to ask my mother because I have problem with my mother last one month, to try and ask her to give me money back so I can settle with Mr Polys Haji-Ioannou.
> JUDGE: Right. That's good news. ….
> JUDGE: 29 million has gone to your mother. You haven't asked her where it is?
> A: I asked my mum to give back and want to settle discussion with Mr Polys Haji-Ioannou to reconcile the debt, so that we can finish this case."
> …
> "Q: She knows that these orders have been made, freezing your assets and the orders of those companies, doesn't she?
> A: Yes".

> …
> "Q: You referred to your mother a moment ago as having a treasury function in relation to Excel. What did you mean by that?
> A: In my family business my mother controlled the treasury side of the money and she give the final approval. ….
> Q: You give money to your mother so that the Lakatamia in this case can't get their hands on it; that's right, isn't it?
> JUDGE: Yes?
> A: My mother controlled money and I don't have signatures on many account. So such a big amount, I travel and we move to make a deal outside. My mum took money or not. I have trust her. If she took the money, as a son I never doubt my mother, but maybe my mother took some money."

12. In the course of cross-examination, Mr Su also gave evidence about a company called Great Vision Management Limited ('Great Vision'). He said: "It's the company owned by my mother, run by my mother, let me put it this way". Lakatamia submitted that this evidence was significant because, prior to the Net Sale Proceeds being dissipated, Great Vision had: (i) funded substantial legal costs of applications made by Mr Su to deal with his assets in spite of the First WFO; and (ii) written to the Court of Appeal in the context of Mr Su's application for permission to appeal against the judgments of Mr Justice Cooke. This meant, Lakatamia submitted, that if Madam Su owned Great Vision, she must have, or was likely to have, known about the First WFO and the Judgment Debt prior to the Net Sale Proceeds being dissipated.

Current proceedings

13. Mr Su's revelations during his cross-examination about his mother's role prompted Lakatamia's application for a further WFO and the current proceedings.

14. On 27th February 2019, Lakatamia applied *ex parte* on an urgent basis for a WFO against Madam Su, Portview and Cresta which was granted by Sir Michael Burton ('the Second WFO'). A return date was subsequently fixed for 10th April 2019.

15. On 6th March 2019, Lakatamia issued the current substantive proceedings against the four named defendants. As against Mr Su, Lakatamia alleges that he unlawfully conspired with Madam Su to breach the First WFO by transferring the Net Sale Proceeds to her. As against Madam Su (and Portview and Cresta), Lakatamia advances two claims in tort. First, that Madam Su committed the tort of unlawful means conspiracy by combining with the other defendants to assist Mr Su to breach the First WFO by dissipating the Net Sale Proceeds ('the unlawful means conspiracy claim'). Second, that Madam Su knowingly and intentionally facilitated the violation of Lakatamia's rights under the Judgment Debt by assisting Mr Su to dissipate the Net Sale Proceeds. Lakatamia contends that this conduct is actionable in view of the decision in *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm); [2017] 4 WLR 105 ('the *Marex* claim').

16. On 6th March 2019, Lakatamia also issued an application notice seeking *inter alia* orders that (i) the Second WFO be continued against Madam Su; (ii) Lakatamia be permitted to serve Madam Su with the claim form out of the jurisdiction on the basis

that: (a) she was a necessary or proper party to the unlawful means conspiracy against Mr Su, who had been served within the jurisdiction; (b) because damage had been suffered in the jurisdiction; and (iii) Madam Su disclose her worldwide assets with a value exceeding US$100,000 and swear and serve an Affidavit confirming that disclosure.

17. In support of its application, Lakatamia relied upon a first affidavit of Mr Russell Gardner, a solicitor of the Senior Courts and a partner of the firm Hill Dickinson LLP (the firm on the record for Lakatamia). Mr Gardner highlighted *inter alia*: (i) Mr Su's evidence that the Net Sale Proceeds had been transferred to Madam Su; (ii) evidence that Madam Su owned Great Vision and hence knew about both the First WFO and Judgment Debt at the time that the Net Sale Proceeds were transferred; and (iii) evidence that Madam Su funded Mr Su's extravagant lifestyle.

Committal hearing and decision

18. The Committal Proceedings were heard by Sir Michael Burton over four days, 25th, 27th, 28th and 29th March 2019. In the course of the hearing, Mr Su gave further evidence implicating his mother in handling the Net Sale Proceeds.

19. In a written judgment handed down on 29th March 2019, the Judge held that he was satisfied Lakatamia had proven to the criminal law standard that Mr Su had dissipated the Net Sale Proceeds in breach of the First WFO and ordered him to be committed to prison for 21 months for contempt (*Lakatamia Shipping Co Ltd v Su* [2019] EWHC 898 (Comm)).

    The Judge found as regards the Net Sale Proceeds (at [8]):

> "8. … [T]he balance of €27,127,885.01 was distributed to Cresta's lawyers in Monaco, and has subsequently disappeared, though, on the evidence of Mr Su, now given during cross-examination, plainly revealed to have been sent to his mother, [Madam Su], in Taiwan". (emphasis added)

20. The Judge also held (at [12]):

> "12. Most significantly, from the point of view of dissipation of the proceeds, Mr Su gave evidence that they were passed to his mother, or to family advisers at his mother's instructions, and he said that he had last month asked her to "give him the money back" so that he could settle with the Claimant. I am entirely satisfied that giving him the money back was a clear picture that he had given her the money to start with." (emphasis added)

Inter partes hearing regarding the Second WFO

21. On 10th April 2019, the *inter partes* hearing took place before Judge on the return date in relation to the Second WFO. The two main issues before the Judge were, (i) whether there should be service out of the jurisdiction and (ii) whether there should be continuation of the Second WFO, in particular, against Madam Su. It is necessary to set out some of the evidence that was before the Court on that occasion.

22. Lakatamia pointed to the following evidence in support of its case that there was a real risk that that Madam Su would frustrate any judgment against her: (i) evidence that Madam Su had acted to violate Lakatamia's rights in the Judgment Debt by conspiring to assist Mr Su to dissipate his assets; (ii) evidence that Madam Su held a substantial web of offshore companies that could be used to place assets beyond the reach of Lakatamia; (iii) correspondence which suggested that, contrary to her denials, Madam Su owned or controlled Great Vision and another company UP Shipping Corporation ("UP Shipping") (she asserted both were owned by her son); (iv) Mr Su's evidence that Madam Su performs a "treasury" function on behalf of the Su family; (v) evidence that Madam Su could facilitate the transfer of substantial funds between jurisdictions; and (vi) evidence that Madam Su has substantial liquid assets. Mr Gardner summarised Lakatamia's case in his first Affidavit simply as follows:

> "27. The risk of dissipation is self-evident in circumstances where the Defendants have transferred money out of Monaco to frustrate attempts to enforce in that jurisdiction."

23. Madam Su filed two Affidavits at the *inter partes* hearing in support of her application to discharge the Second WFO. In her first Affidavit, she denied (i) the allegations that Lakatamia had made against her; (ii) knowing about the First WFO at the time that the Net Sale Proceeds were transferred; and (iii) being the owner of Great Vision (she instead asserted that the shares in Great Vision were held by Mr Tai Chou Chang as Mr Su's nominee). She said she had loaned Mr Su "an amount in the region of USD 37 million" in connection with his business and had helped Mr Su to "pay his living expenses". However, she only became aware of the First WFO on 12th January 2019 upon "searching Nobu's old office". She also confirmed that none of her other children was involved in the business, only her son Mr Su.

24. In her second Affidavit, Madam Su attached bank statements for UP Shipping which she said she had located "in the cabinet of the accounting department during a search of Nobu's old office on 28 March 2019". Those statements recorded that UP Shipping had received the sum of €26,712,851.68 on 1st March 2017 from a Monegasque lawyer known to be instructed by Cresta. The statements also showed that the Net Sale Proceeds had been substantially dissipated. She stated that the transfer of the Net Sale Proceeds "did not attract my attention at the time". This was, on its face, surprising given the sum was very large and Madam Su, by her own admission was owed US$37m by her son, Mr Su.

25. In his second Affidavit in support of Lakatamia's application in response, Mr Gardner made two specific points. First, he pointed out that Madam Su's assertion that UP Shipping was owned by Mr Su was contradicted by correspondence issued by English

solicitors previously instructed by Mr Su, W Legal Limited. Second, he pointed out that Madam Su's assertion that Mr Su rather than she owned Great Vision was implausible given the previous evidence of a director of Great Vision, Mr Tai Chou Chang, and Madam Su's own evidence that had said that she was a widower and that none of her other children was involved in Mr Su's business.

26. Lakatamia's skeleton argument for the *inter partes* hearing dealt with the question of risk of dissipation succinctly as follows:

> "(3) Real risk of dissipation
>
> 42. Mr Su's evidence that Madam Su received the Net Proceeds of Sale despite her having had notice of the [First] WFO amply demonstrates that there is a real risk of dissipation if the [Second] WFO is not continued.
>
> 43. It is noteworthy that Madam Su says nothing at all in this regard in her Affidavit. She does not, for example, assert that she will not deal with assets in which she is interested with a view to frustrating the enforcement of Lakatamia's claim against her should it succeed. The evidence on which Lakatamia relies (to the effect that she combined with Mr Su) indicates that this is precisely what she will try to do."

27. In his oral submissions on behalf of Lakatamia at the *inter partes* hearing, Mr Phillips put the claimed conspiracy between Madam Su and her son to frustrate the judgment at the forefront of his submission and he described it as "the plainest obvious example of a risk of dissipation". He summarised his case pithily as follows:

> "My Lord, three specific points on real risk of judgments going unsatisfied, which is the real test when it comes to dissipation. [First], They've done this before. On your Lordship's finding beyond reasonable doubt Mr Su took the proceeds of sale of the Monaco villas which were his, your Lordship's found, and he's squirreled them away with his mother. Secondly, on the word of a solicitor of the Senior Courts in effect, UP Shipping is not Mr Su['s] company, it's his mother's company. She is the only other candidate. Thirdly, … she is the family treasurer. She is the controller. She is perfectly capable of moving money around. She says on her own evidence, she knows how to do it. … If you couple that with all the other points and your Lordship is persuaded that there's a serious issue to be tried as to conspiracy, that goes above and beyond any evidence that will be necessary to show dissipation."

Judgment below

28. On 2nd May 2019, Sir Michael Burton handed down his order whereby he ordered: firstly, that Lakatamia be permitted to serve the Claim Form on Madam Su, Portview

and Cresta out of the jurisdiction; and, secondly, that the Second WFO be discharged as against Madam Su but continued against Portview and Cresta pending further order.

29. In his Judgment (*Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145 (CH)), the Judge said that, in light of the fact that Mr Su was a "proven liar" and a "serial contemnor", he was very cautious as to accepting a case that was "made wholly dependent upon Mr Su's evidence" and turned to look at other evidence (at [8-9]).

30. The Judge said in connection with his decision to grant Lakatamia permission to serve Madam Su out of the jurisdiction:

> "[19] I am entirely satisfied that there is sufficient evidence for me to establish a serious issue to be tried in respect of both torts alleged, by reference to [Madam Su's] knowledge of the judgment [of Mr Justice Cooke dated 5th November 2014] and the [Second WFO], and her assistance by receipt and disposition of the [Net Sale Proceeds] to evade them. The "gateways" are available in respect of both torts as (i) Madam Su is a proper and necessary party to the claim made in conspiracy against Mr Su, who has been duly served and (ii) in respect of both torts, Mr Head [i.e., Leading Counsel for Madam Su] concedes that there is a question as to damage suffered within the jurisdiction …".

31. The Judge said as to the existence of a good arguable case:

> "[22] … I see no reason, having concluded that there is a serious issue to be tried for the purposes of jurisdiction, to reach a different conclusion on the facts of this case with regard to whether there is a good arguable case on the merits for the purposes of a worldwide WFO".

32. The Judge concluded, however, that he was not satisfied that a real risk of dissipation had been demonstrated on the evidence. The Judge's reasoning is contained in the final two paragraphs of his judgment:

> "[26] Nevertheless, this is not a proprietary injunction, as has been rightly accepted by Mr Phillips. The moneys which came into UP Shipping have… gone out again, leaving a minimal balance of some $90,000. …[T]he question that I must now ask in the forefront of this application (by reference to the helpful words of Popplewell J in paragraph 86 of [*Fundo Soberano de Angola v. Santos* [2018] EWHC 2199 (Comm)] is whether there is a "real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets." This, of course, must be tested against [Madam Su], and not against Mr Su, who has plainly been guilty of the conduct which I have adjudicated on in the Contempt Judgment. Mr Phillips understandably concentrates on the plethora of offshore companies, with which I have

> concluded that Madam Su may, at least in relation to Great Vision and UP Shipping, have been arguably involved. But as far as the present claim against [Madam Su] is concerned, she is now in Taipei, where at her age I suspect she will remain, and there is no evidence before me that there would be any difficulty in enforcing any judgment against her in Taiwan. The risk of dissipation by [Madam Su] must be "established by solid evidence". I do not conclude that there is such.
>
> [27] Whereas I conclude that, when I granted the ex parte application against Madam Su, there was sufficient evidence to justify it, in the light of the evidence which she has put in before me I now conclude that there is not a sufficient basis to continue the order".

THE LAW

33. The basic legal principles for the grant of a WFO are well-known and uncontroversial and hardly need re-stating. It nevertheless is useful to remind oneself of the succinct summary of the test by Peter Gibson LJ in *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [21] where he stated that, before making a WFO, the court must be satisfied that:

> "… the applicant for the order has a good, arguable case, that there is a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them, and that it would be just and convenient in all the circumstances to grant the freezing order."

34. I also gratefully adopt (as the Judge did) the useful summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) (subject to one correction which I note below):

(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question

points to the conclusion that assets [may be][*] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

([*] Note: I have replaced the words "are likely to be" in sub-paragraph (4) with "may be").

Test for 'good arguable case'

35. The test for 'good arguable case' in the context of freezing injunctions is not a particularly onerous one (Gee on Commercial Injunctions (6th edn, 2016) at [12-026]).

36. An applicant for a freezing order does not need to establish the existence of a risk of dissipation on the balance of probabilities. It is sufficient for the applicant to prove a danger of dissipation to the 'good arguable case' standard. As Mustill J observed in *Third Chandris Shipping Corp v. Unimarine SA* [1979] QB 645 at 652:

> "Mr. Howard argues that the plaintiff must show a likelihood that his claim will prove fruitless if an injunction is refused. If likelihood involves the idea of "more likely than not," I consider that the level is pitched too high. In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require".

37. There has been much discussion of the meaning of the 'good arguable case' test since Mustill J's well-known observation in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 at 605, namely that a good arguable case is 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".

38. The 'good arguable case' test was the subject of a comprehensive review by the Court of Appeal recently in *Kaefer v. AMS* [2019] 3 All ER 979 in the context of jurisdictional gateways. Green LJ (who gave the leading judgment, Davis and Asplin LJ concurring) conducted a magisterial analysis of the recent authorities, including *Brownlie v. Four Seasons Holdings* [2017] UKSC 80 and *Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34. He observed at [59] that a test intended to be straightforward "had become befuddled by 'glosses', glosses upon gloss, 'explications' and 'reformulations'". The central concept at the heart of the test was "a plausible evidential basis" (see paragraphs [73]-[80]).

GROUNDS OF APPEAL

39. Lakatamia raises five grounds of appeal as follows:

Ground (1): The learned Judge erred in finding that there was no real risk of dissipation in circumstances where he had held that there was a good arguable case on the merits that Madam Su had conspired to assist Mr Su to dissipate his assets in breach of the WFO made by Mr Justice Blair dated 22nd August 2011.

Ground (2): The learned Judge erred in finding that there was no real risk of dissipation in circumstances where he had held that there was a good arguable case on the merits that Madam Su had facilitated the dissipation of assets belonging to Mr Su with a view to violating Lakatamia's rights under a judgment of Mr Justice Cooke dated 5th November 2014.

Ground (3): The learned Judge erred in that he failed to consider evidence that Madam Su is able to move large amounts of money between accounts and jurisdictions with ease.

Ground (4): The learned Judge erred in that he failed to consider evidence that Madam Su has significant liquid assets.

Ground (5): The learned Judge erred in that he failed to consider evidence that Madam Su used a nominee director and shareholder, namely, Mr Tai Chou Chang of Great Vision Management Limited.

Respondent's Notice

40. By a Respondent's Notice, Madam Su submits the Court should uphold the Judge's decision to discharge the freezing injunction on the following additional ground:

> The evidence before the Judge was insufficient to support a finding of a good arguable case that Madam Su: (a) was a party to an unlawful means conspiracy; or (b) committed the tort of assisting, authorising, procuring or facilitating a failure to pay a judgment debt.

SUBMISSIONS

Appellant's submissions

41. Mr Phillips said that the case was 'bristling with simplicity'. His core submission on the law on behalf of Lakatamia was straightforward: Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation. And where (as here) this is the case, no further evidence in support of a real risk of dissipation is ordinarily required.

42. Mr Phillips's core submission on the merits was equally straightforward. He submitted that the Judge's finding there was a good arguable case that Madam Su had engaged in wrongdoing, pointed powerfully in favour of a real risk of dissipation by her and left little or no room for any other conclusion. He submitted, in essence, that the Judge's finding that there was no real risk of dissipation was fundamentally irreconcilable with his prior finding that there was a good arguable case on the merits. Mr Phillips reprised the same submissions that he had made before the Judge: namely, that the evidence demonstrating a serious issue to be tried as to conspiracy (Grounds (1) and (2) and taken with the other matters regarding Madam Su's ability to transfer funds etc. (Grounds (3), (4) and (5)), went above and beyond any evidence necessary to show dissipation.

43. He submitted that the Judge's decision was plainly wrong and, in these circumstances, this Court could and should interfere.

Respondent's submissions

44. Mr Head submitted on behalf of Madam Su that it is wrong to suggest that the simple fact of a finding of a good arguable case, even in cases of dishonesty or in actions relating to the dissipation of assets (and regardless of the nature and quality of the evidence that underpins that finding), is necessarily sufficient to satisfy the test for a real risk of dissipation. It cannot be a mechanical exercise (the effect of which would

essentially do away with any need to establish a real risk of dissipation). Rather, the first instance judge must apply his mind in evaluating the evidence on risk of dissipation as part of exercising his discretion as to whether it is ultimately just and convenient to grant a freezing injunction. Mr Head further submitted that nothing in the authorities supported an argument that a finding of good arguable case was *of itself* sufficient to establish a real risk of dissipation, *i.e.* necessarily and automatically established a risk of unjustified dissipation of her assets such as to justify the imposition of a US$27m freezing injunction. Whilst it was accepted that a good arguable case may be relevant to the risk of dissipation (most obviously in cases of dishonesty), it could not by itself establish the requisite risk.

45. Mr Head further submitted that the significance of a good arguable case will depend on the nature of the evidence adduced in establishing it. In circumstances where (i) as the Judge held (at paragraph [22]), this case "…depended upon both inference and a large series of unanswered questions as to the role and precise knowledge of [Madam Su]", and (ii) having regard to the lack of evidence about Madam Su's own actions or assets, the Judge properly concluded that there was no sufficient basis or 'solid evidence' to justify continuing the Second WFO. There is no proper basis on which this Court should interfere with the Judge's decision to discharge the injunction. He relied, in particular, on the decision of this Court in *Holyoake v. Candy* [2017] EWCA Civ 92; [2018] Ch 297.

Respondent's Notice

46. As regards the Respondent's Notice, Mr Head also contended that it was right to discharge the Second WFO against Madam Su for the additional reasons set out in the Respondent's Notice, namely that (contrary to the Judge's view on service out) the evidence before the Court was, in any event, insufficient to establish a good arguable case that Madam Su was party to an unlawful means conspiracy to breach the First WFO, or that she induced or procured Mr Su to fail to discharge the Judgment Debt.

47. In summary, Mr Head described the evidence against Madam Su as 'gossamer thin' and the Appellant's Grounds (3)-(5) as 'makeweights'. He submitted that the evidence overall was wholly insufficient to justify the invasive and serious consequences of a freezing injunction in the sum of US$27m.

ANALYSIS

Grounds (1) and (2)

The correct approach in law

48. I have considered the relevant authorities in this area, in particular: *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [28]; *Norwich Union Fire Insurance Ltd v Eden* [2003] EWCA Civ 1272, at [21] *per* Phillips LJ; *Jarvis Field Press v. Chelton* [2003] EWHC 2674 (Ch) *per* Patten J; *Grupo Torras SA v Al-Sabah*,

21 March 1997 unreported (CA), *per* Saville LJ; *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm) at [164-165] *per* Flaux J; and *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [177-178] *per* Lloyd LJ; *Holyoake v. Candy* [2017] EWCA Civ 92; [2018] Ch 297; and see also Gee on Commercial Injunctions, 6th edition, 2016, at [12-033].

49. There is perhaps less between the parties on the law than meets the eye. I did not understand Mr Phillips to be seeking to advocate some sort of automatic mechanism (as Mr Head suggested) by which an inference of dissipation should automatically be inferred; but merely to be submitting that a finding of good arguable case in wrongdoing relevant to the issue of dissipation was often likely in practice to justify a finding a risk of dissipation without more.

50. In my view, the first part of Mr Phillips' submission on the law (see paragraph 42 above) is correct in principle and supported by the authorities (although for clarity emphasis should be given to the words "…relevant to the issue of dissipation"). His second sentence, however, goes a little too far: there can be no firm rule since every case depends upon its own facts.

51. In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:

    (1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant *relevant to the issue of dissipation*, that holding will point powerfully in favour of a risk of dissipation.

    (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence.

The authorities in detail

52. In *Thane Investments*, Peter Gibson LJ issued what has sometimes been referred to as a 'salutary warning' as to how each case must be "scrutinised with care" in order to establish whether an inference of dissipation should be made. Peter Gibson LJ said (at [28]):

> "28. Mr Blackett-Ord submitted that it has now become the practice for parties to bring *ex parte* applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted." (emphasis added)

53. In *Jarvis Field Press Ltd v Chelton [2003] EWHC 2674 (Ch),* Patten J commented upon the import of Peter Gibson LJ's observations as follows (at [10]):

> "10. ... I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a WFO. 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 LJ 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." (emphasis added)

54. In *Madoff,* Flaux J carefully analysed the authorities such as *Norwich Union*, and *Grupo Torras* (at [163]-[167]) and cited the above prescient passage from Patten J's judgment in *Field Press.* Flaux J said (at [167]):

> "167. I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant."

55. In *VTB Capital*, Lloyd LJ summarised how the exhortation by Peter Gibson LJ in *Thane Investments* should be properly read and understood as follows (at [177]):

> "177. We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets." (emphasis added)

(It should be noted that, when referring to the heart of "the claim" in the above passage, Lloyd LJ was, I believe, referring to the claim for an injunction in the instant case.)

56. Lloyd LJ then cited Flaux J's observations in paragraphs [163]-[167] of *Madoff* in full and said (at [178]):

> "178. We agree with those observations by Flaux J. On that basis it seems to us that it would have been right for the judge to take into account a finding of a good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. We would regard such factors as capable of providing powerful support for the case of a risk of dissipation." (emphasis added)

57. In *Holyoake v. Candy,* the claimants obtained a 'notification injunction', *i.e.* an injunction restraining the defendants from dealing with assets without first notifying the claimants on the basis of proof of dissipation. Nugee J found a good arguable case that the claimants had engaged in an unlawful means conspiracy (the unlawful means comprising fraudulent misrepresentation, duress, actual undue influence, unlawful interference, extortion and blackmail) and held that there was a real risk of dissipation by the defendants in the light of the unlawful means conspiracy and other evidence relating to (i) unexplained transfers of property, (ii) lavish expenditure, (iii) complex and opaque offshore structures and (iv) "appalling conduct" by the defendants (see paragraph [20]). The Court of Appeal (Gloster LJ who gave the leading judgment, Jackson LJ concurring) reversed Nugee J's decision. The Court held that the Judge did not apply the correct test when granting the notification injunction in that he held that a lesser degree of risk would suffice to obtain a notification injunction as opposed to a conventional freezing order on the basis that the former was less intrusive than the latter (at [43]). The Court held that the test was the same and the claimants had to show a real risk of dissipation. Gloster LJ went on to consider the evidence and the matters relied upon by the Judge and concluded as follows:

> "61. … I conclude that, although the claimants' "good arguable case" in relation to the defendant's alleged conduct could theoretically be taken into account in evaluating whether there was a risk of dissipation, the evidence relating to the substance of those allegations was not sufficiently strong to support the necessary real risk of dissipation. In coming to this conclusion I have applied the approach of this court in *VTB Capital plc v Nutritek International Corp* and in *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [28] namely that the court should scrutinise whether what is alleged in relation to a good arguable case really justifies the inference of a risk of dissipation." (emphasis added)

58. Mr Head relied upon the above passage to support his submissions. However, I do not read Gloster LJ to be saying anything different from the authorities cited above. She expressly cited *VTB* in which, as noted above, Lloyd LJ explained Peter Gibson LJ's observation in *Thane* and emphasised the importance of whether the dishonesty

in question goes to "the heart of the claim" for an injunction and justifies an inference of dissipation.

59. Moreover, Gloster LJ's conclusion must be understood against the background of the unusual facts of *Holyoake v. Candy*. The case was not about dishonesty but about coercion. This is clear from a careful reading of Nugee J's judgment at first instance (see especially paragraphs [39]-[43]). Counsel for the claimants, Mr Trace, submitted that the claimant's allegations amounted to "allegations that the claimants would do everything they could to make life difficult for Mr Holyoake" (paragraph [39]). Counsel for the Defendants, Mr McQuater, submitted that the threats amounted to a threat that the claimant would get nothing back from their investment in the property, but "they are not threats by the defendants to do anything with their own assets, still less a threat to dissipate those assets to avoid a claim by the claimants". He submitted that the matters alleged against the defendants did not give rise to a real risk of dissipation (paragraph [40]). Nugee J accepted that "the thrust of the claimant's complaints in this action are not of having been defrauded but of having been coerced by duress and illegitimate threats" (at paragraph [41]); but went on to hold that there was, nevertheless, a risk of dissipation (at paragraphs 42]-[43]).

60. In these circumstances, it is understandable why, having determined that Nugee J applied the wrong test in law and the decision should be remade, the Court of Appeal then declined to draw an inference and came to a different conclusion on the question of the risk of dissipation from the Judge below. Properly understood, therefore, *Holyoake* is distinguishable from the present case.

Scope for inference in the present case

61. There was clear scope for an inference of dissipation in the present case. The wrongdoing here comprised not merely dishonest conduct (or what Patten J in *Field Press* called 'an unfocussed allegation of dishonesty or fraud'), but wrongdoing which went to the very *heart* of the question of the risk of dissipation (in the words of Lloyd LJ in *VTB Capital*). It was the dishonesty which "pointed" to the risk of dissipation (in the words of Popplewell J in *Fundo, supra* at paragraph [86(4)]). In other words, both Lakatamia's claims or causes of action against Madam Su bore directly on the question of dissipation itself: both the unlawful means conspiracy and *Marex* causes of action themselves concerned her assisting in the act of dissipation, albeit of her son's funds, but dissipation nevertheless. The Judge had found (at paragraph [25] of his judgment) that that there was a good arguable case that Madam Su had previously helped her son, Mr Su, to hide or dissipate €27,127,855.01 of his assets, *i.e.* the Net Sale Proceeds. In these circumstances, common sense would suggest that there was a strong inference that there was a risk that she would do exactly the same in relation to her own assets in order to frustrate the enforcement of any judgment against her.

62. The singular fact that the wrongdoing in this case involves a finding of a good arguable case that the defendant Madam Su participated in an *actual* breach (*i.e.* a contumacious breach) of an existing freezing injunction powerfully reinforces the inference that that defendant would breach another freezing injunction. Neither counsel is aware of any freezing injunction cases similar to the present, *i.e.* where

wrongdoing which is the subject of the substantive cause of action comprises the act of dissipation itself.

63. For these reasons, in my view, the present case can properly be considered a paradigm case for the application of the propositions which I have set out at paragraph 52 above.

Grounds (3) to (5) and other relevant matters

64. Lakatamia's case was not simply dependent upon inferences from the Judge's finding of a good arguable case on the merits. Nor was it solely dependent upon Mr Su's evidence.

65. As explained above, in addition to Mr Su's admissions (as to which see further below), Lakatamia put before the Court below evidence in the First and Second Affidavits of Mr Gardner which included (i) correspondence which suggested that, contrary to her denials, Madam Su owned or controlled UP Shipping; (ii) evidence which suggested that, contrary to her denials, Madam Su owned or controlled Great Vision; (iii) evidence that Madam Su held a substantial web of offshore companies that could be used to place assets beyond the reach of Lakatamia; (iv) evidence that Madam Su could facilitate the transfer of substantial funds between jurisdictions; and (v) evidence that Madam Su has substantial liquid assets.

66. As regards (i), Mr Gardner exhibited to his Second Affidavit an e-mail from W Legal Limited dated 12th June 2015 in which they confirmed that their due diligence "KYC" (Know Your Client) checks confirmed that Mr Su did not own UP Shipping.

67. As regards (ii), Mr Gardner exhibited to his Second Affidavit, Affidavits of a director of Great Vision, Mr Tai Chou Chang, who gave evidence in 2013 that he held the sole shareholding as a nominee and whilst he could not disclose the identity of the beneficial owner of Great Vision "I can assure the Court it is not Mr Nobu Su". Mr Gardner pointed out that the only other credible candidate as beneficial owner of Great Vision was Madam Su, given Madam Su's own evidence that she was a widower and that none of her other children was involved in Mr Su's business. Madam Su admitted controlling Great Vision until 2015.

68. The Judge referred to some of this evidence in his judgment (at paragraphs [14] and [15]) but concluded that Lakatamia had not established a risk of dissipation by 'solid' evidence (at paragraph [25]). In my view, he failed to give sufficient weight to this evidence or consider it in the context of the case as a whole.

69. Furthermore, whilst there was reason for regarding Mr Su's evidence with a degree of circumspection, his admissions in cross-examination about his mother's role in helping him dissipate the Net Sale Proceeds deserved weight as potential admissions against interest and because they were supported by other evidence (outlined above). It is noteworthy that the Judge had previously expressed himself in his judgment in the Committal Proceedings entirely satisfied that Mr Su admitting that his mother had given the money back to him "was a clear picture that he had given her the money to start with" (see paragraph 21 above).

RESPONDENT'S NOTICE

70. The Respondent's Notice sought to challenge the Judge's decision on good arguable case on the merits, namely as regards the unlawful means conspiracy and the *Marex* claims. Mr Head argued that the evidence was insufficient even to justify the Judge's finding on the merits of the causes of action.

71. In my view, it is doubtful whether an argument by way of Respondent's Notice on this basis is properly open to Mr Head for the following reasons.

72. First, the Judge's finding on the merits of the causes of action was parasitic upon his earlier finding on jurisdiction. The Judge stated at paragraph [19] that he was satisfied that the evidence established a 'serious issue to be tried' in respect of both torts alleged (his language "I am "entirely satisfied" suggested that he considered the test to have been easily surmounted well above the minimum threshold). The Judge, having concluded that there was a serious issue to be tried for the purposes of jurisdiction, then went on to state that he saw no reason to reach a different conclusion on the facts of this case with regard to the question of whether there was a 'good arguable case' on merits for the purpose of the Second WFO (see paragraph [25]).

73. Second, by his order of 23rd July 2019, Males J refused Madam Su permission to appeal the Judge's finding (at paragraph [19]) that there was a serious issue to be tried for the purposes of jurisdiction on the grounds that (i) the appellate courts have repeatedly discouraged appeals on jurisdictional issues, particularly where they would involve detailed investigation of contested factual issues, and (ii) there was no clear error of principle by the Judge.

74. Third, if a separate appeal had been lodged in respect of the Judge's findings (at paragraph [25]) as to the question of whether there was a good arguable case on merits for the purpose of the Second WFO, similar objections would have been raised and permission to appeal would in all probability have been refused for similar reasons.

75. Accordingly, it is difficult to see how the same points can now properly be raised objecting to the Judge's findings (at paragraph [25]) on good arguable case on merits under the guise of a Respondent's Notice.

76. In any event, I would dismiss the Respondent's Notice or the similar reasons to those given by Males J, namely (i) the appellate courts have repeatedly discouraged appeals on jurisdictional issues, particularly where they would involve detailed investigation of contested factual issues, and (ii) there was no clear error of principle by the Judge.

77. The Judge commented (at paragraph [25]) that there was no evidence before him that there would be any difficulty in enforcing any judgment against Madam Su in Taiwan. This was not a factor which had been raised or relied upon by either party, nor was there any evidence before him on the question either way. Accordingly, it was not a matter which he ought to have taken into account and was, at best, neutral.

Appeals

78. The Court will only interfere with a finding as to whether a good arguable case exists where it is plain that the judge below was wrong. As Longmore LJ said in *Lakatamia Shipping Co Ltd v Su* [2012] EWCA Civ 1195 at [27] (Lord Neuberger MR and Sullivan LJ concurring):

> "[I]t must be remembered that applications for freezing injunctions made on the basis of a good arguable case come before the commercial judges all the time. Derived from their time in practice they have developed what is perhaps best described as an instinct as to what is well arguable and what is not. That instinct should be respected by those in this court without the everyday experience of granting and refusing freezing injunctions unless it is plain that the judge is wrong: see *Stuart v Goldberg* [2008] 1 WLR 823 paragraph 76 *per* Sedley LJ and paragraph 81, Sir Anthony Clarke, Master of the Rolls." (emphasis added)

CONCLUSION

79. This Court is always reluctant to interfere with a finding of an experienced Commercial Judge on findings as to whether there is a real risk of dissipation. However, on this occasion, in my judgment, it is clearly appropriate to do so.

80. Firstly, because the Judge's reasoning, which is contained in paragraphs [25]-[26] of his judgment, was deficient. He failed to address (or even mention) Lakatamia's primary argument, that the evidence that Madam Su had received the Net Sale Proceeds despite knowing about the First WFO amply demonstrated that there was a real risk of dissipation by her if the Second WFO was not continued. If the Judge had had this key factor properly in mind, he would and should have come to a different conclusion.

81. Second, because in any event it is plain that the Judge's decision was wrong. There was a clear inference to be drawn from the Judge's earlier finding of a good arguable case on the merits of the causes of action. The wrongdoing of Madam Su went to the heart of the question of dissipation. This finding taken alone or together with the other evidence outlined above as a whole, meant that the existence of a risk of dissipation was plain and obvious, as correctly submitted by Mr Phillips below. Accordingly, the Second WFO should have been maintained against Madam Su.

82. Moreover, there were no counter-veiling factors militating against the exercise of discretion in favour of granting a WFO.

83. For these reasons, in my view, this appeal must be allowed.

The Rt Hon. Sir Stephen Richards

84. I agree.

The Rt Hon. Lord Justice McCombe

85. I am grateful to Haddon-Cave LJ for his careful recitation of the materials giving rise to the instant appeal. I have, however, entertained doubts as to whether we should disturb the decision of the judge on the issue of "risk of dissipation" on the part of Madam Su and whether overall, she should be subjected to a freezing order.

86. The foundation of the claim against Madam Su has been the evidence given by Mr Su in his cross-examination on the committal application. Without that evidence, there was no sign of any claim being brought by Lakatamia against her. As the judge noted (in paragraph 2 of his judgment) the claim is based upon Madam Su's alleged complicity in the breach by her son of the order of Blair J of 22 August 2011 and the sale of the Villas in 2015. After a success at trial in November 2014 before Cooke J, understandably, Lakatamia has left no stone unturned in seeking to enforce the judgment it obtained against Mr Su. However, until Mr Su's brief answers in cross-examination in February 2019, there was no claim intimated against Madam Su at all. Again, as the judge noted, the answers given were those of a man whom Lakatamia said (not without foundation) was a "proven liar" and a "serial contemnor" who was seeking to defend his liberty on a committal application. The case was one which the judge described as depending "both on inference and a large series of unanswered questions as to the role and precise knowledge of [Madam Su]". The "inference" and "unanswered questions" arose from the other, relatively slender items of evidence summarised by Haddon-Cave LJ in paragraph 65 above.

87. Given the tenuous nature of this evidence and looking at the case in the round, I am far from sure that I would not have reached the same conclusion overall as the learned judge, if I had been hearing the application below.

88. However, given that the judge did reach the conclusion that there was a "good arguable case" on the merits of Lakatamia's claim, I agree, on balance, that he did not "follow through" that finding sufficiently when addressing the issue of the risk of dissipation. Having reached the conclusion that he did on "good arguable case", which I do not think we could be justified in disturbing on the basis of the arguments raised on Madam Su's Respondent's Notice, I think that it had to follow on the particular facts of this case, that the relevant risk of dissipation had been established against her.

89. Thus, echoing the words of Lewison LJ in *Re B (Care Proceedings)* [2012] EWCA 1475 in this court (affirmed on other grounds [2013] UKSC 33) at [148], "[a]lthough I still have doubts, I do not push those doubts to a dissent". With some hesitation, therefore, I agree that the appeal should be allowed.

Judgment Approved by the court for handing down