Neutral Citation Number: [2018] EWHC 2612 (Comm)

Case No: CL-2014-000863

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/10/2018

Before :

PETER MACDONALD EGGERS QC
(sitting as a Deputy Judge of the High Court)

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Between :

FM Capital Partners Ltd	**Claimant**
- and -	
(1) Frédéric Marino	
(2) Aurélien Bessot	
(3) Yoshiki Ohmura	
(4) Marit Sjovaag (formerly known as Marit Sjovaag Marino)	**Defendants**

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Tim Akkouh (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Laurence Emmett and James Fox (instructed by **Cooke Young and Keidan LLP**) for the **Third Defendant**
The First, Second and Fourth Defendants were not represented

Hearing dates: 28 September 2018

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Approved Judgment

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MR PETER MACDONALD EGGERS QC

Peter MacDonald Eggers QC :

Introduction

1. On 30th July 2018, Mrs Justice Cockerill made an order requiring the Third Defendant, Mr Ohmura, to pay the Claimant the sum of US$9,917,803.83 plus post-judgment interest. In addition, Mr Ohmura was ordered to pay the Claimant's costs in a sum no more than US$1,000,000. I understand that Mrs Justice Cockerill has reserved judgment in respect of other remedies and issues of quantum.

2. This order was made following a 9 day trial which culminated in a judgment handed down by the learned judge on 11th July 2018. In that judgment, the Court found that Mr Ohmura was liable to the Claimant in respect of his dishonest assistance in breaches of fiduciary duty by the First Defendant, Mr Marino, and bribery. In making this finding, Mrs Justice Cockerill came to the conclusion that she was unable to accept significant portions of Mr Ohmura's evidence (para. 108), and that Mr Ohmura was subjectively dishonest in relation to certain transactions (para. 251-253, 329, 378, 400, 469 of the judgment).

3. Following that judgment, on 13th September 2018, upon an application by the Claimant, HHJ Waksman QC made a worldwide freezing order, without notice, against Mr Ohmura restraining him from removing or disposing of his assets up to US$11,250,000, including but not limited to the following items of property:

   (1) Mr Ohmura's interest in a property known as Villa Rive d'Or in Zollikon, Switzerland. I will refer to this as "the Swiss Property".

   (2) Bank accounts belonging to Mr Ohmura, and three companies in which Mr Ohmura has a 100% direct or indirect shareholding, namely Conquest Financial Partners AG ("Conquest"), Squadra Corse Ltd and Rubicon Financial Holding Ltd.

   (3) His shareholdings in those and other companies.

   (4) His pension.

   (5) Nine separately identified motor vehicles.

4. In addition, the Court ordered Mr Ohmura to inform the Claimant's solicitors, and file an affidavit, of his assets with a value in excess of £10,000. On 24th September 2018, Mr Ohmura swore such an affidavit, which exhibited his solicitors' letter dated 21st September 2018 setting out a schedule of his assets.

5. The worldwide freezing order included certain exceptions from its operation, including: (a) £1,000 per week for ordinary living expenses and a reasonable sum on legal advice and representation, and (b) assets which are dealt with or disposed of in the ordinary and proper course of business, provided that two clear working days' notice is given to the Claimant of Mr Ohmura's intention to carry out any such transaction.

6. HHJ Waksman QC ordered that the return date for the worldwide freezing order would be 28th September 2018.

7. There is before me an application by Mr Ohmura to discharge the worldwide freezing order. The Claimant maintains that the injunction should be continued. The parties presented their submissions on 28th September 2018. I reserved judgment and ordered that the worldwide freezing order be continued pending judgment and/or further order.

8. If the worldwide freezing order is not discharged, there are further applications by both Mr Ohmura and the Claimant to vary the worldwide freezing order.

9. I have not yet heard submissions on the proposed variations, because there was too little time available at the hearing and because if I decided to discharge the order, there would be no need to consider those applications for variation.

The parties' submissions

10. Mr Ohmura applies to discharge the worldwide freezing order on the following grounds, as submitted by Mr Laurence Emmett, together with Mr James Fox, on Mr Ohmura's behalf:

    (1) There is no risk of dissipation of assets by Mr Ohmura. In particular, it is said that when the application was made to HHJ Waksman QC, Mr Ohmura's interest in the Swiss Property had recently been transferred in August 2018 by Mr Ohmura to his former wife, whom Mr Ohmura recently divorced in Switzerland, which led the judge to conclude that the transfer was on its face a highly suspicious circumstance and an indication of a real risk of dissipation, but the judge was not in a position to say whether or not the transfer was legitimate, and concluded that on the materials before him there was a real risk of dissipation. Mr Ohmura has since adduced evidence, it is argued, demonstrating that the transfer of the Swiss Property was legitimate and therefore there is no risk of dissipation of assets which would justify the continuance of the worldwide freezing order.

    (2) Once the transfer of the Swiss Property falls away as a justification for the worldwide freezing order, the delay by the Claimant in seeking the worldwide freezing order is fatal to the application. The Claimant did not make an application for a worldwide freezing order at any time before judgment and was aware of the potential sale of the Swiss Property, as it had been put on the market by Mr and Mrs Ohmura, back in May 2018. In addition, it is said that the Claimant's reasons for waiting to make the application since May 2018 do not make sense.

    (3) The application notice in support of the application to discharge also refers to the fact that no steps have been taken by the Claimant to enforce the judgment against Mr Ohmura and the worldwide freezing order has the potential to have a significant adverse impact on Mr Ohmura's companies in that, upon notification of the freezing order, the companies' banks may close the companies' accounts.

11. In response, Mr Tim Akkouh on behalf of the Claimant submitted that:

    (1) There is solid evidence of a risk of dissipation of assets, because (a) the nature of Mr Ohmura's liability is one based on dishonesty, (b) the Court rejected Mr

Ohmura's evidence at trial as unsatisfactory, not credible and in some instances a deliberate evasion (para. 106-108, 232-233, 314, 319, 321-323, 373-374 of Mrs Justice Cockerill's judgment), (c) Mr Ohmura has the wherewithal to dissipate his assets, having the ability to move money, using fronting companies (including Conquest) (para. 4, 20-23, 46-47, 241-244, 288, 307, 357, 519 of the judgment), (d) serious questions remain in connection with the transfer of the Swiss Property, including the fact that the transfer from Mr Ohmura to Mrs Ohmura was consensual and the decision was taken on 28th August 2018, whereas previously the Swiss Property had been marketed for sale by both Mr and Mrs Ohmura, and (e) there is reason to believe that Mr Ohmura's disclosure of assets, as required by HHJ Waksman QC's order, was not complete.

(2) The Court should exercise its discretion to continue the worldwide freezing order.

(a) There has been no delay which has caused any prejudice. The fact that the Claimant has delayed in seeking a freezing order, albeit relevant, is in fact of marginal importance.

(b) The order made on 30th July 2018 was sealed only on 3rd September 2018 and the focus has been on the worldwide freezing order, not enforcement.

(c) It does not matter if the worldwide freezing order will have an adverse impact on Mr Ohmura's companies because Mr Ohmura is a judgment debtor.

The approach to determining the existence of a risk of dissipation of assets

12. The granting or continuation of a freezing order depends on a number of considerations, in particular (1) the applicant's right of action against the respondent must be sufficiently arguable (at least there must be a good arguable case), (2) there must be a real risk that a judgment against the respondent may not be satisfied because of an unjustified or unjustifiable disposal of or dealing with the respondent's assets (often described as "a real risk of dissipation of assets" by way of shorthand), demonstrated by solid evidence, and (3) the granting or continuation of the injunction must be just and, in the balance, address the parties' respective convenience, allowing the Court a discretion to refuse injunctive relief in any particular case on demonstrable grounds.

13. In the present case, the Claimant as the applicant for relief has obtained judgment against Mr Ohmura. This amply satisfies the first requirement that the applicant demonstrate its right of action against the respondent. As a post-judgment order, a freezing order acquires an enhanced role as an aid to the execution of the judgment. In this respect, it has been said that the applicant has a lesser burden to demonstrate an entitlement to relief. In *Great Station Properties SA v UMS Holdings Ltd* [2017] EWHC 3330 (Comm), Teare, J (at para. 61-63) said that it is in the public interest that a judgment of the Court be respected and enforced and, in this respect, relied on the decision of Farquharson, J in *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097, 1100, where the learned judge said that:

> "*If there is such a power, there seems to be no logical reason why a Mareva injunction should not be used in aid of execution. Indeed, in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him … Plainly an injunction will only be granted where the plaintiff can adduce evidence of a kind which normally supports an application for a Mareva injunction, namely, that there are grounds for believing that the judgment debtor may dispose of his assets to avoid execution. Perhaps such grounds may be more readily established after judgment than before it.*"

14. In the present case, the Court has entered judgment against Mr Ohmura in respect of his liability to the Claimant for dishonest assistance for breach of fiduciary duty and bribery. This satisfies the first requirement for the granting or continuation of a freezing order. The present applications focus in particular on the second requirement that there must be a real risk of dissipation of assets demonstrated by solid evidence.

15. In considering whether or not there is a risk of dissipation of assets, I have in mind the summary of the applicable principles recently provided by Mr Justice Popplewell in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm), at para. 86:

> "*The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; Holyoake v Candy [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and Petroceltic Resources v Archer [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:*
>
> *(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 are likely to 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 freezing order 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 freezing order 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 freezing order 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."

16. In *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd*, Farquharson, J suggested that this requirement of a real risk of dissipation of assets was perhaps more readily satisfied by the existence of such a judgment establishing the respondent's liability. To like effect is the decision of Teare, J in *Great Station Properties SA v UMS Holdings Ltd* [2017] EWHC 3330 (Comm), where the judge said (at para. 63):

"*These dicta all show that the policy of the law is to enforce judgments … so that freezing orders can, in an appropriate case, be granted after judgment. They also show that such orders may more readily be made after judgment than before. That may be because it is easier to infer a risk a dissipation. Thus, in Distributori Automatici Italia v Holford General Trading [1985] 1 WLR 1066 at p.1073 Leggatt J. cited with approval the dictum of Farquharson J. in Orwell Steel v Asphalt and Tarmac [1984] 1 WLR 1097 that "in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him." Leggatt J. agreed that "grounds for believing that the judgment debtor would dispose of his assets before execution might perhaps be more readily established after judgment than before." It may also be because factors which are said to weigh against the making a freezing order (for example delay or the absence of assets within this country and the presence of related proceedings in another jurisdiction, two of the factors relied upon in this case) have less weight where judgment has already been obtained. In circumstances where judgment has been given and there is solid evidence of a real risk of dissipation there would have to be particularly strong grounds for refusing freezing order relief*."

17. In applying these principles, the parties' submissions concentrated on (1) the legitimacy of the transfer of the Swiss Property, (2) the relevance of the findings of dishonesty made by the Court in its judgment dated 11th July 2018, (3) the alleged failure of Mr Ohmura to disclose his assets in accordance with the order made by HHJ Waksman QC, and (4) the impact and relevance of any delay by the Claimant in applying for a worldwide freezing order.

The Swiss Property transfer

18. As a matter of fact, the evidence provided by Mr Ohmura and his Swiss lawyer, Mr Christian Modl, by way of witness statement, demonstrates that:

    (1) In January 2014, Mr and Mrs Ohmura, who had been married in 2007, decided to separate. This was two years before Mr Ohmura became aware of the proceedings instituted in England by the Claimant. Although the Claimant's proceedings had been instituted against Mr Marino in 2014, the Court permitted the Claimant to bring a claim against Mr Ohmura in November 2015.

    (2) Mr Modl was instructed by Mr Ohmura in relation to the separation in March 2014. At this time, Mr Ohmura moved out of the Swiss Property, which had been his and Mrs Ohmura's matrimonial home.

    (3) Having failed to conclude a separation agreement, Mr and Mrs Ohmura involved the Swiss Court in October 2015, which resulted in an adjudication on the terms of settlement in May 2016, directing that the Swiss Property was to be marketed for sale and that Mrs Ohmura could remain living in the Swiss Property until it was sold.

    (4) On 25th May 2016, Mr and Mrs Ohmura filed a joint divorce application.

    (5) There followed a series of discussions between Mr and Mrs Ohmura, which involved delaying the Swiss Court proceedings.

    (6) In June 2018, the Court required an update on the parties' progress towards selling the Swiss Property. Mr Modl explained that the judge's clerk telephoned him and made it clear that the judge was not willing to suspend the divorce proceedings another time and that the judge wanted to finish the trial definitely this year. A hearing was fixed for 28th August 2018.

    (7) Immediately before that hearing on 28th August 2018, Mr and Mrs Ohmura agreed to the terms of the settlement of the divorce proceedings. Instead of agreeing to divide all of the assets on a 50/50 basis, it was agreed that Mr Ohmura would transfer the Swiss Property to Mrs Ohmura, whilst retaining his other assets, as well as paying Mrs Ohmura maintenance.

19. The Claimant has questioned the legitimacy of this arrangement. I do not consider that there is any reason to doubt that the terms of the divorce settlement were agreed as indicated by Mr Ohmura and Mr Modl.

20. However, the Claimant has adduced in evidence the witness statement of Dr Urs Patrik Feller, served the afternoon before the hearing, to the effect that he would not have

expected the Swiss Court to insist on a hearing date after even a considerable period of delay, as the Swiss Court encouraged the parties to discuss settlement, and also that although Mr Ohmura was bound to bring the Claimant's judgment debt against Mr Ohmura to the attention of the Swiss Court, he did not do so.

21. As to the Swiss Court's requirement of a hearing on 28th August 2018, Mr Modl's evidence on this point is clear and whatever Dr Feller would have or would not have expected does not affect Mr Modl's evidence. Accordingly, I do not consider that the first of the Claimant's points carries much weight. In any event, Mr Modl in a second witness statement served shortly before the hearing stated that the practice pertaining in the District of Toggenburg (where Dr Feller sits as a judge), in the Canton of St Gall, is or may well be different from that applicable in the District of Meilen, in the Canton of Zurich, where Mr Modl practises.

22. As to the second point, namely that Mr Ohmura made no reference to his judgment debt owed to the Claimant in the Swiss divorce proceedings, Mr Ohmura accepted that the judgment debt was not disclosed to the Swiss Court; it is not referred to in the Swiss Court's judgment and order dated 28th August 2018. This is a more difficult point. On the one hand, Mr Modl explained that the "*asset position of the parties*" was to be determined from the "*date of separation*", namely 11th October 2014, and as the judgment of the English Court was entered against Mr Ohmura four years later, there was no need to take this judgment debt into account as part of the divorce proceedings.

23. In addition, Mr Modl said that the English Court judgment has not been recognised by the Swiss Court. I found this surprising given the facility for the recognition of judgments under the Lugano II Convention.

24. On the other hand, Mr Akkouh on behalf of the Claimant relied on the evidence of Dr Feller that Mr Ohmura was obliged to disclose the judgment debt to the Swiss Court and pointed out that the Court summons dated 20th June 2018 required the parties to file information relating to their debts, including debts ("*debt directory*") within the last six months and "*receipts on debts*", and not only debts before the date of separation. Mr Akkouh argued that the fact that the transfer of the Swiss Property to Mrs Ohmura was consensual (as opposed to being imposed on the parties by the Swiss Court), took place soon after the judgment and order of the Court in August 2018, and occurred without Mr Ohmura referring to the judgment debt against him, demonstrates that there is at the very least a real risk that the transfer is not legitimate.

25. Of course, it might be said that if Mr Ohmura's judgment debt owed to the Claimant had been disclosed, this could have affected the distribution of matrimonial assets and may have prevented the transfer of the Swiss Property to Mrs Ohmura, with the result that the Swiss Property would remain available for the execution of the judgment. Thus, the Claimant submitted that Mr Ohmura may have capitalised on the opportunity presented by the divorce proceedings to transfer the Swiss Property to Mrs Ohmura.

26. However, on the evidence before me, I do not consider that it has been established that the transfer of the Swiss Property was anything less than legitimate and genuine, or even possibly less than legitimate and genuine, because (1) the separation proceedings preceded the institution of the claim against Mr Ohmura, (2) the timing of the transfer was explained by the uncontradicted evidence of Mr Modl, a Swiss lawyer, and (3) the

transfer of the Swiss Property was explained as a compromise and an alternative to the division of all of Mr Ohmura's assets as part of the divorce settlement.

27. I was struck by the lack of any reference to the judgment debt in the Swiss divorce proceedings, but this has been explained by Mr Modl (in his first witness statement at para. 7(b) and in his second witness statement at para. 10(a)) in that Mr Ohmura was not obliged to disclose the judgment debt to the Swiss Court (as he advised Mr Ohmura). Although there is a hint of inconsistency in the requirement of the Swiss Court summons that Mr Ohmura file information concerning his debts, I do not consider that this (unexplained) reference by itself provides any reason not to accept Mr Modl's evidence. In addition, I have in mind Dr Feller's evidence that Mr Ohmura was bound by a duty of good faith to alert the Court to a material change of circumstances, but Dr Feller did not address Mr Modl's emphasis on the date of separation marking the relevant period for the purpose of identifying the parties' asset position. This was a point addressed by Mr Modl not only in his second witness statement served shortly before the hearing, but also in his first witness statement to which Dr Feller's statement responded. Furthermore, Mr Modl stated that he considered the position and did not think that Mr Ohmura was under any duty to inform the Swiss Court of this debt. Whether Mr Modl was mistaken or not in his assessment of the legal duty, I cannot say, but this militates against the possibility that Mr Ohmura took illegitimate steps to evade the satisfaction of the judgment against the Swiss Property.

28. Accordingly, I do not consider that the transfer of the Swiss Property to Mrs Ohmura in August 2018 as part of the divorce settlement is a reason to conclude that there is a real risk of dissipation of assets on the part of Mr Ohmura.

The relevance of the Court's findings against Mr Ohmura

29. The Claimant also contended that there are additional, independent grounds for concluding that there is a real risk of dissipation of assets, namely (a) the fact that Mr Ohmura is liable by reason of having dishonestly assisted in breaches of fiduciary duty by receiving funds representing a proportion of secret profits earned by Mr Marino, (b) the fact that Mr Ohmura has a proven ability to engage in the transfer of assets behind fronting companies, and (c) his evidence before this Court at trial was discredited.

30. As HHJ Waksman QC said when granting the worldwide freezing order without notice, after considering the issue of the transfer of the Swiss Property:

> "*The other matters are all powerfully in favour of the Claimant. The Claimant now has a judgment saying Mr Ohmura acted dishonestly and secretively. His defence that all the money was earned by legitimate contracts was disbelieved by the Judge who found, in effect, that those alleged contracts and documents were shams. Mr Ohmura has a background in banking and is used to moving money around; he himself operated offshore companies in the Cayman Islands so knows precisely the kind of method of doing business which gives rise and can give rise to a risk of dissipation … So when one adds all the elements together I am satisfied on what I have seen today that there is a real risk of dissipation*."

31. It is unclear whether the learned judge considered that the "*other matters*" established a real risk of dissipation of assets without regard to the transfer of the Swiss Property. As Mr Emmett pointed out, in the transcript of the hearing before HHJ Waksman QC,

the judge said that he was "*just*" persuaded that a worldwide freezing order should be granted, suggesting that the transfer of the Swiss Property was critical to the judge's decision.

32. Of course, I must make my own assessment of the existence or non-existence of a real risk of dissipation of assets. Objectively, on the evidence, is there a realistic, non-theoretical, non-fanciful risk that Mr Ohmura might unjustifiably dissipate his assets to evade the execution of the Court's judgment against such assets? This does not necessarily translate to a probable dissipation of assets or the existence of a present intention on the part of the respondent to dispose of or deal with assets with a view to evading the enforcement of a judgment against those assets.

33. Mr Akkouh, on behalf of the Claimant, relied on the following findings made by the Court in support of the existence of such a risk: (1) the fact that Mr Ohmura has been found liable for dishonest assistance in Mr Marino's breaches of fiduciary duty and bribery, and that Mr Ohmura knew that his conduct was subjectively dishonest, (2) the finding that Mr Ohmura's evidence was not credible and, on occasion, represented a deliberate evasion of the truth, (3) the finding that Mr Ohmura was accustomed to using corporate structures for dishonest purposes, including Conquest, one of the companies referred to in the worldwide freezing order (para. 23, 46-47 of the Court's judgment), (4) the finding that Mr Ohmura dishonestly provided the means to act as a front for Mr Marino's benefit and to disguise Mr Marino's breaches of fiduciary duty (para. 307), and (5) the finding that Mr Ohmura used false and sham documents to aid him in his conduct, in particular the transfer of funds for one of Mr Marino's companies (para. 241-244, 288, 357, 519).

34. On behalf of Mr Ohmura, Mr Emmett submitted that it is well established that the mere fact that a party has been found to be dishonest does not itself establish a real risk of dissipation. In support of this proposition, Mr Emmett relied on the judgment of Peter Gibson, LJ in *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272, at para. 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*."

35. Mr Emmett also referred to the fact that, in *Thane Investments Ltd v Tomlinson*, Mr Tomlinson - the respondent to the application for a freezing order - had been found by the Court to have been guilty of a breach of fiduciary duty and to have been an untrustworthy witness (para. 6), and yet the Court was not satisfied that there were grounds for making a freezing order against Mr Tomlinson. In answer to this submission, Mr Akkouh pointed out that the findings had been made against Mr Tomlinson in proceedings in which he was not an active party (he had been a Part 20 defendant, but he had earlier compromised those proceedings), although he did give evidence, and that there were other reasons for the Court's decision to decline a freezing

order, namely concerns about the adequacy of the evidence and the provision of adequate notice to Mr Tomlinson.

36. All that Peter Gibson, LJ appears to be saying in *Thane Investments Ltd v Tomlinson* is that before the Court concludes that there is a real risk of dissipation of assets on the basis of "*dishonesty*", the Court should scrutinise with care whether the alleged or actual dishonesty justifies the inference of a real risk of dissipation of assets.

37. Such an approach does not justify the conclusion that an arguable case of dishonesty or a proven case of dishonesty cannot give rise without more to an inference, as a matter of fact, that there is a risk of dissipation of assets. As Mr Justice Popplewell said in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) quoted above:

> "*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 are likely to 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.*"

38. In a case where there is an established and proven case of dishonesty, one must consider whether the dishonesty so found can be relied on to infer a real risk of dissipation of assets. Can such findings constitute "*solid evidence*" of such a risk? There may well be some instances of proven dishonesty where no such inference can be made. If an applicant for life insurance is found to have lied about his or her medical condition in order to obtain the insurance policy, that does not mean (necessarily) that the applicant would dissipate his or her assets to evade the execution of a judgment debt.

39. The present case resides in a different quarter. The mischief which the freezing order is designed to minimise is the real possibility that the respondent will side-step the enforcement of a judgment by unjustifiably disposing of or dealing with his or her assets, that is outside the ordinary and legitimate course of business or the ordinary and legitimate conduct of one's personal life.

40. Mr Akkouh on behalf of the Claimant relied on the decision of Hamblen, J in *SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP* [2015] EWHC 1124 (Comm). In that case, the Court held that there were four reasons why there was a real risk of dissipation of assets, namely (a) the trial judge's assessment of such a risk, (b) the very strong findings of dishonesty made in the judgment, (c) certain dealings with assets by the respondents, and (d) the fact that the respondent was a "*man of financial sophistication*", having a breadth of knowledge and experience of financial services. Hamblen, J concluded that these four grounds provided "*compelling reasons for justifying the conclusion that there is a real risk of dissipation here*" (para. 29). Mr Akkouh submitted that the second and fourth of these considerations apply equally to the case at hand. Indeed, the second consideration was one which weighed heavily in the balance with the Court. At para. 19-20, Hamblen, J said of this second consideration:

> "*As Mr Gwynne puts it in his first affidavit at paragraph 57.1:*
>
> > *"The court can infer the risk of dissipation from the findings made against Mr Farrell in the judgment. I refer in particular to the finding at paragraph*

> *282 that the court had "no doubt that Mr Farrell assisted Arch FP to breach its duty in both these respects: he was in charge of the extraction venture on behalf of Arch FP throughout August 2007 and he ensured that it was carried through during the months which followed". The court then found, at paragraph 282, that it was "driven to the conclusion that he knew that what he was doing was wrong". Those findings amount to findings that Mr Farrell engaged in the improper extraction of funds from the cells for the benefit of Arch FP and that he was involved in that extraction knowing very well that what he was doing was wrong. Such conduct justifies an inference that Mr Farrell would be willing to manipulate and transfer his own assets for the purpose of avoiding the enforcement of the judgment which has been obtained against him."*
>
> *Those findings do, I accept, provide a strong basis for the claimant's case that it would be appropriate to draw the inference that there is in this case a real risk of dissipation.*"

41. In this case, I am satisfied that there was and remains a real risk that Mr Ohmura will dissipate his assets to avoid the enforcement or execution of the judgment against him, because:

    (1) Mr Ohmura has been found guilty of dishonest conduct which entails the transfer of property surreptitiously using fronting companies with a view to keeping such transactions secret, in this case from the Claimant.

    (2) Mr Ohmura was an experienced banker and was not only adept and skilled in the carrying out of financial transfers and transactions and the use of corporate structures to achieve such surreptitious ends, but was found by the Court to have done so.

    (3) Mr Ohmura was also found to have created false and sham documents to achieve such ends.

    (4) Mr Ohmura was willing to disguise his role in such dishonest conduct by evidence which the Court found not to be credible and to be a deliberate evasion of the truth in order to avoid being held liable to the Claimant. If Mr Ohmura was prepared to engage in such conduct whilst giving oral testimony under oath to avoid being liable to remedy the Claimant, it is difficult to ignore the risk of Mr Ohmura engaging in similar conduct after judgment has been entered.

    (5) Mr Ohmura has disclosed, in answer to the Court's order, that he has some assets but he has taken no steps yet to satisfy the judgment.

The disclosure of Mr Ohmura's assets

42. As explained above, the worldwide freezing order required Mr Ohmura to disclose his assets. Mr Ohmura's solicitors provided this information to the Claimant's solicitors and Mr Ohmura swore an affidavit as required by the Court's order.

43. The Claimant contended that there is reason to believe that Mr Ohmura's disclosure of assets was not complete in that his companies received and retained US$2.91 million

by way of secret commissions (para. 47, 247, 357-362 of the judgment), and Mr Ohmura is reluctant to supply any meaningful information as to Conquest's work, not having referred to any customers or deals or provided any accounts or turnover or profit figures; Mr Ohmura has a very expensive motor-racing hobby, but provided little detail in this respect; and Mr Ohmura has disclosed only one personal bank account and no other real estate assets. In addition, Mr Akkouh submitted that Mr Ohmura failed to comply with the disclosure order in that no estimated valuation was provided by him of his shareholdings in his various companies, as required by the order.

44. Having heard Mr Akkouh, I am not convinced that there is any evidence that Mr Ohmura has not satisfactorily complied with the order for disclosure, save in one respect. There may be an explanation for each of the other matters on which the Claimant relied, but while each of these circumstances may give rise to a suspicion that Mr Ohmura's disclosure of assets was incomplete, it does not establish that the order was not complied with. The one respect where I consider that Mr Ohmura has not complied with the Court's order is in failing to provide, in accordance with para. 8(iv) of the order, an estimated value of his shareholding in Conquest and the other companies referred to in the order. Mr Emmett argued that this information was speculative and of little assistance. Whether or not that is the case, the order is clear and Mr Ohmura has failed to comply with the order in this respect. Mr Emmett referred to the fact that Mr Ohmura's solicitors have informed the Claimant's solicitors, by letter dated 26th September 2018, that they will consider with Mr Ohmura "*the question as to the up-to-date estimated valuation of the shareholdings, in order to provide your client with further guidance as available*". In drawing my conclusion as to the risk of dissipation of assets, I have not taken this consideration into account but, if I had taken it into account, it would have reinforced my conclusion.

Delay

45. Mr Emmett on behalf of Mr Ohmura relied on the fact that the Claimant did not make an application for a worldwide freezing order at any time before judgment and was aware of the potential sale of the Swiss Property, having been put on the market by Mr and Mrs Ohmura, back in May 2018. In addition, it is said that the Claimant's reasons for not having made the application for a freezing order earlier - before the Court's judgment on 11th July 2018 - do not make sense. Further, Mr Emmett submitted that such delay reflects the Claimant's perception of the existence of the risk of dissipation. To this end, Mr Emmett relied on Bean, LJ's decision in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906; [2015] WTLR 1759, where it was said (at para. 34) that:

> "*In any event it is not generally the rule that delay in applying for a freezing injunction or an extension of a freezing injunction is a bar in itself to the obtaining of relief. It may mean in some cases that there is no real risk of dissipation and that if the claimant had seriously thought that there was, an application would have been made earlier. But that cannot possibly be said in the present case. I agree with the observations on this topic made by Flaux J in Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm). If the court is satisfied on the evidence that there remains a real risk of dissipation it should grant an order, notwithstanding delay, even if only limited assets are ultimately frozen by it*."

46. I do not consider that any delay on the part of the Claimant in applying for and obtaining a worldwide freezing order prior to judgment affords a reason to decline to continue the worldwide freezing order after the Court's judgment, whether as a reason for coming to a different conclusion as to the existence of a real risk of dissipation of assets, or as a discretionary consideration, given that I cannot discern any prejudice to Mr Ohmura by reason of such delay. Indeed, it is inherent in the Court's jurisdiction to grant a post-judgment freezing order that it can be made even where no earlier freezing order has been granted (*SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP* [2015] EWHC 1124 (Comm), para. 9).

47. The fact remains that a judgment has been obtained by the Claimant against Mr Ohmura and there have been findings of dishonesty on the part of Mr Ohmura both in respect of the matters which are the basis of his liability to the Claimant and his giving of evidence before the Court. These are matters which may materially alter the assessment of the prospects of success of the Claimant's application after the judgment.

48. I do not see how, at least in most cases, if there has been delay on the part of the applicant in obtaining relief, that should affect the existence of the risk of dissipation of assets on the part of the respondent, no matter how the applicant assessed the risk. While I can see that delay might be relevant to the exercise of the Court's discretion in granting or refusing a freezing order, I have difficulty in understanding its relevance to assessing the risk of dissipation in most cases.

49. In *Ras Al Khaimah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014; [2018] 1 WLR 1099, Longmore, LJ commented on the relevance of delay in this respect at para. 55:

> "*Delay on the part of a party applying for a freezing injunction gives rise to rather more elusive considerations. It can be said that any serious delay means that an applicant does not genuinely believe there is any risk of dissipation or conversely (and more cynically) that, if a defendant is prone to dissipate his assets, such dissipation will have already occurred by the time a court is asked to intervene. This latter argument assumes that a defendant is already of dubious probity and it is a curious principle that would allow such a defendant to rely on his own dubious probity to avoid an order being made against him. The former argument is also open to the objection that it is the fact of the risk rather than a claimant's apprehension of it that should govern the court's decision.*"

50. In any event, I do not consider that any delay on the part of the Claimant in applying for a freezing order affects my conclusion that there is a real risk of dissipation of assets.

The Court's discretion

51. In my judgment, there is a real risk of dissipation of assets on the part of Mr Ohmura, meaning that there is a real risk that the judgment against Mr Ohmura may not be satisfied because of an unjustified or unjustifiable disposal of or dealing with Mr Ohmura's assets. That consideration together with Mr Ohmura's liability as established by the Court's judgment dated 11th July 2018 compel the conclusion that the worldwide freezing order should be continued.

52. Mr Emmett relied on additional considerations which should be taken into account, in the exercise of the Court's discretion, to discharging the worldwide freezing order. As mentioned, I do not consider that any delay on the part of the Claimant in applying for a worldwide freezing order outweighs the considerations in favour of continuing the order. Mr Ohmura's application notice also referred to delay on the part of the Claimant in enforcing the judgment as a reason to discharge the order, but I do not consider that there has been any delay on the part of the Claimant in enforcing the judgment for the reasons given by Mr Akkouh.

53. In addition, Mr Emmett submitted that there is a very real risk that the provisions of the order concerning company assets will impede the ability of Mr Ohmura's companies to conduct business in that the banks operating accounts for the various companies may choose to close the accounts upon notification of the worldwide freezing order, rather than assume responsibility for scrutinising whether transactions fall within the ordinary course of those companies' businesses. I suspect that this is a matter concerned with the variation of the order, rather than its discharge. In any case, whether or not there is any adverse impact on Mr Ohmura's companies, I do not consider that that is a reason which should dissuade me from continuing the worldwide freezing order.

54. In *Great Station Properties SA v UMS Holdings Ltd* [2017] EWHC 3330 (Comm), Teare, J said (at para. 63) that "*In circumstances where judgment has been given and there is solid evidence of a real risk of dissipation there would have to be particularly strong grounds for refusing freezing order relief*". I am aware of no such strong grounds for refusing to continue the worldwide freezing order.

Conclusion

55. For the reasons explained above, I dismiss Mr Ohmura's application to discharge the worldwide freezing order and order that it be continued until further order.

56. I await to hear the parties' submissions on consequential matters and the applications to vary the worldwide freezing order.