IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

HC/OC /2024
HC/SUM /2024

Between

NOTIONAL PTE LTD
(Singapore UEN No. 202226456W)

…*Claimant*

And

PERSONS UNKNOWN
(ID No. Unknown)

… *Defendant(s)*

CLAIMANT'S BUNDLE OF AUTHORITIES

Solicitors for the Claimant
Mr Adrian Aw / Mr Anand Tiwari / Ms Tessa Lim
Resource Law LLC
Ref: AA/AT/407595.00001

7 May 2024

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Service out of Singapore with Court's approval (O. 8, r. 1)

1.—(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.

(2) To obtain the Court's approval, the claimant must apply to the Court by summons without notice and supported by affidavit which must state —

(*a*) why the Court has the jurisdiction or is the appropriate court to hear the action;

(*b*) in which country or place the defendant is, or probably may be found; and

(*c*) whether the validity of the originating process needs to be extended.

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

(4) The Court's approval is not required for service of court documents other than the originating process if the Court's approval has been granted for service of the originating process out of Singapore.

(5) On the appointed date, the person accompanying the Court process server should call at the Registry. The party requesting service to be effected by the Court process server will be responsible for all transport charges incurred for the purposes of effecting service.

63. Application for service out of Singapore of originating process or other court document and for extension of validity of originating process

(1) Under Order 8, Rule 1(2) of the Rules of Court 2021, a claimant applying for the Court's approval to serve an originating process or other court document out of Singapore must file a supporting affidavit stating, among others, why the Court has the jurisdiction, or is the appropriate court, to hear the action.

(2) For the purposes of showing why the Court is the appropriate court to hear the action, the claimant should include in the supporting affidavit any relevant information showing that:

> (a) there is a good arguable case that there is sufficient nexus to Singapore;
> (b) Singapore is the *forum conveniens*; and
> (c) there is a serious question to be tried on the merits of the claim.

(3) For the purposes of sub-paragraph 2(a), the claimant should refer to any of the following non-exhaustive list of factors (as may be applicable) in the supporting affidavit:

> (a) relief is sought against a person who is domiciled, ordinarily resident or carrying on business in Singapore, or who has property in Singapore;
> (b) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
> (c) the claim is brought against a person duly served in or outside Singapore, and a person outside Singapore is a necessary or proper party to the claim;

(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —

> (i) was made in Singapore, or was made as a result of an essential step being taken in Singapore;
> (ii) was made by or through an agent trading or residing in Singapore on behalf of a principal trading or residing out of Singapore;
> (iii) is by its terms, or by implication, governed by the law of Singapore; or
> (iv) contains a term to the effect that that Court will have jurisdiction to hear and determine any action in respect of the contract;

(e) the claim is brought in respect of a breach committed in Singapore of a contract made in or outside Singapore and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed outside Singapore that rendered impossible the performance of so much of the contract as ought to have been performed in Singapore;
(f) the claim:

> (i) is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore; or
> (ii) is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring

(g) the whole subject matter is immovable property situated in Singapore (with or without rents or profits) or the perpetuation of testimony relating to immovable property so situated;
(h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting immovable property situated in Singapore;
(i) the claim is made for a debt secured on immovable property situated in Singapore, or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situated in Singapore;
(j) the claim is brought to execute the trusts of a written instrument, being trusts that ought to be executed according to the law of Singapore and of

which the person to be served with the originating process is a trustee, or for any relief or remedy which might be obtained in any such action;
(k) the claim is made for the administration of the estate of a person who died domiciled in Singapore or for any relief or remedy which might be obtained in any such action;
(l) the claim is brought in an administration action within the meaning of Order 32 of the Rules of Court 2021;
(m) the claim is brought to enforce any judgment or arbitral award, or any adjudication determination within the meaning of the Building and Construction Industry Security of Payment Act 2004;
(n) the claim is made under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992, the Terrorism (Suppression of Financing) Act 2002 or any other written law;
(o) the claim is a restitutionary one (including a claim for quantum meruit or quantum valebat) or for an account or other relief against the defendant as trustee or fiduciary, and the defendant’s alleged liability arises out of any act done, whether by the defendant or otherwise, in Singapore;
(p) the claim is founded on a cause of action arising in Singapore;
(q) the claim is for a contribution or an indemnity in respect of a liability enforceable by proceedings in Singapore;
(r) the claim is in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court;
(s) the claim concerns the construction, effect or enforcement of any written law;
(t) the claim is for a committal order under Order 23 of the Rules of Court 2021; or
(u) the application is for the production of documents or information:

> (i) to identify possible parties to proceedings before the commencement of those proceedings in Singapore;
> (ii) to enable tracing of property before the commencement of proceedings in Singapore relating to the property; or
> (iii) where the production of the documents or information is in the interests of justice.

(4) A claimant applying for the Court's approval to serve an originating process out of Singapore should consider whether an application should also be made to extend the validity of the originating process. If the claimant is able to demonstrate that the originating process will not or is not likely to be served on all or any of the defendants out of Singapore before the originating process expires, the claimant is to consider making the application for the extension of the validity of the originating process in a single summons, together with the application for approval to serve the originating process out of Singapore, notwithstanding the provisions of paragraph 67 of these Practice Directions. In any application for an extension of the validity of the originating process, the claimant is to seek a period of extension which is appropriate by reference to the length of time which is likely to be needed to effect service on all or any of the defendants out of Singapore.

64. Court's power to dismiss an action if no reasonable steps taken to serve originating process expeditiously

(1) Under Order 2, Rule 3(2) of the Rules of Court 2021, the claimant has to take reasonable steps to serve the originating claim with a statement of claim, or the originating application supported by affidavit, on a defendant expeditiously:

> (a) Order 6, Rule 5(6) and (7) of the Rules of Court 2021 set out the relevant periods within which reasonable steps to serve the originating claim on the defendant, whether in or out of Singapore, must be made; and
> (b) Order 6, Rule 11(4) and (5) of the Rules of Court 2021 set out the relevant periods within which reasonable steps to serve the originating application and the supporting affidavit on the defendant, whether in or out of Singapore, must be made.

(2) Under Order 2, Rule 6(3)(a) and/or Order 9, Rule 5(1)(a) of the Rules of Court 2021, the Court may dismiss the action if it is not satisfied that the claimant has taken reasonable steps to effect service of the originating claim or originating application expeditiously. Whether a claimant has taken reasonable steps to serve the originating claim or originating application on the defendant expeditiously

raises a strong inference that assets may be removed from the jurisdiction; and I agree that this appeal should be allowed.

DUNN L.J. I also agree.

Appeal allowed.
Injunction granted until further order.
Costs in action.
Leave to appeal refused.

Solicitors: *Peter T. James & Co; Joynson-Hicks & Co.*

A. H. B.

[COURT OF APPEAL]

* BANKERS TRUST CO. *v.* SHAPIRA AND OTHERS

[1980 B. No. 3116]

1980 June 4

Lord Denning M.R., Waller and Dunn L.JJ.

Practice—Discovery—Motion for Bank's customers obtaining moneys by forgery—Injured party's action seeking reimbursement—Interlocutory claim for bank to disclose confidential information concerning customers—Customers neither within jurisdiction nor served with notice of motion—Whether obligation on bank to assist in tracing action

On September 20, 1979, two men presented to the plaintiff bank in New York two cheques, each for half a million dollars purportedly drawn on a bank in Saudi Arabia and made payable to one of the men. The bank paid over the million dollars and on instructions from the two men credited $600,000 and later $108,203 to accounts of the two men at the London branch of the D bank, the third defendants. In April 1980, the bank in Saudi Arabia informed the plaintiff bank that the cheques were obvious forgeries. The plaintiff bank reimbursed the bank in Saudi Arabia in the sum of one million dollars, and on May 20, 1980, issued a writ in London with statement of claim in an action to trace and recover the moneys, and on the same date, by a notice of motion against the two men (who were by then outside the jurisdiction) and against the D Bank in the Commercial Court, asked, inter alia, for injunctions to prevent any dealings with the funds in the D bank. They obtained a Mareva injunction from Robert Goff J. on May 21; and before Mustill J. sought, inter alia, an interlocutory order that the D bank should disclose and permit the plaintiff bank to inspect and take copies of (i) all correspondence between the two men and the D bank relating to any account in either of the two men's names, (ii) all cheques drawn on such accounts, and (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account standing in the names of either of the two men at the D bank, all as from September 20, 1979, onwards. Mustill J. refused the relief by way of disclosure of confidential banker/customer information at the

A early interlocutory stage, a fortiori because the two men had not been served with notice of the motion.

On appeal by the plaintiff bank: —

Held, allowing the appeal and granting the order sought against the D bank, that though the court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stages of an
B action where plaintiffs sought to trace funds which in equity belonged to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in the dissipation of the funds before the action came to trial; and that in the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the where-
C abouts and prevent the disposal of such property; but that the plaintiffs should be correspondingly bound to undertake that such information would be used only for the purposes of the action to trace the funds and not for any other purpose.

Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133, H.L.(E.) applied.

Decision of Mustill J. reversed.

D The following cases are referred to in the judgments:

A v. *C* (unreported), March 18, 1980, Robert Goff J.

Anton Piller K.G. v. *Manufacturing Processes Ltd.* [1976] Ch. 55; [1976] 2 W.L.R. 162; [1976] 1 All E.R. 779, C.A.

Banque Belge pour L'Etranger v. *Hambrouck* [1921] 1 K.B. 321, C.A.

Initial Services Ltd. v. *Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.

E *London and Counties Securities Ltd. (In Liquidation)* v. *Caplan* (unreported), May 26, 1978, Templeman J.

Mediterranea Raffineria Siciliana Petroli S.p.a. v. *Mabanaft G.m.b.H.* December 1, 1978, Court of Appeal (Civil Division) Transcript No. 816 of 1978, C.A.

Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, H.L.(E.).

F *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.

The following additional cases were cited in argument:

Chase Manhattan Bank N.A. v. *Israel-British Bank (London) Ltd.* [1980] 2 W.L.R. 202; [1979] 3 All E.R. 1025.

E.M.I. Ltd. v. *Pandit* [1975] 1 W.L.R. 302; [1975] 1 All E.R. 418.

G *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] Q.B. 645; [1979] 3 W.L.R. 122; [1979] 2 All E.R. 972, Mustill J. and C.A.

Tournier v. *National Provincial & Union Bank of England* [1924] 1 K.B. 461, C.A.

INTERLOCUTORY APPEAL from Mustill J.

H The plaintiffs, the Bankers Trust Co. of New York, a company incorporated under the laws of the United States and having a place of business at 9, Queen Victoria Street, London E.C.4, issued a writ on May 20, 1980, against one Walter Shapira and one Max Frei, as first and second defendants, and against the Discount Bank (Overseas) Ltd. ("Discount Bank"), a Swiss bank having a London branch at 63, Hatton Garden, London E.C.1, as third defendants. They claimed relief against all three defendants in their statement of claim in an action to trace

funds of $1,000,000 as money had and received by Shapira and Frei to the A
use of the plaintiffs, or alternatively paid to them under a mistake of fact, and damages for deceit and/or conspiracy as against Shapira and Frei to defraud the plaintiffs. By a motion of the same date they applied ex parte in the Commercial Court for relief (A) as against Shapira and Frei for (1) an injunction restraining them from removing from the jurisdiction or otherwise disposing of or dealing with any of their assets B
within the jurisdiction including and in particular any credit balance or balances in any account in either of their names at Discount Bank save and in so far as such assets did not exceed in value the sum of U.S. $1,000.000; and (B) as against all three defendants (2) an order that each of the defendants disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of Shapira and Frei at Discount Bank; (C) as against Discount Bank, the C
third defendants (3) an order that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents (i) all correspondence passing between Discount Bank and Shapira and Frei relating to any account at Discount Bank in the names of either Shapira and/or Frei from July 15, 1979, onwards, (ii) all cheques drawn on any account at Discount Bank in the names of either Shapira and/or D
Frei from July 15, 1979, onwards, (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at Discount Bank in the names of either Shapira and/or Frei from July 15, 1979, onwards; (4) an injunction restraining Discount Bank from making any payment or transfer out of any account in the name or names of Shapira and/or Frei at Discount Bank's branch at 63, Hatton Garden, London E.C.1, or otherwise dealing with such accounts save for payment E
to the plaintiffs of any sum found due to them or otherwise pursuant to order of the court.

The motion was supported by an affidavit of the legal adviser to the London branch of Bankers Trust Co. setting out the allegations as to the matters set out in the judgment of Lord Denning M.R. and adding that it appears (i) that Shapira was now in jail in Switzerland as a F
result of a fraud investigation by the Swiss police; and (ii) Frei was presently believed to be in Liechtenstein.

On May 21, 1980, Robert Goff J. in chambers granted *Mareva* injunctions to the plaintiffs ex parte (subject to an undertaking to amend the writ to include a claim for the injunctions being granted by Robert Goff J. and to abidc by any order the court or a judge might make as to damages in case it should be held that the defendants or any of them G
should have sustained any damages by reason of the orders) as follows: (i) that the first and second defendants be restrained from removing from the jurisdiction or otherwise disposing of or dealing with any of the assets within the jurisdiction, including any credit balance or balances in any account in either of their names at Discount Bank (Overseas) Ltd. save and in so far as such assets did not exceed in value the sum of H
U.S. $1,000,000 until after trial of the action or further order, with liberty to apply; and (ii) as against Discount Bank (Overseas) Ltd. as third defendants an injunction restraining the bank from making any payment or transfer out of any account in the name or names of Shapira or Frei at their Hatton Garden branch or otherwise dealing with such accounts until after the hearing of a summons returnable on May 22, 1980.

Mustill J. on May 23, 1980, on the hearing of the summons declined

A to make any order under paragraphs (2) and (3) of the statement of claim. His reasons, as noted by counsel for the parties before him, were:

> " First, it is a very extreme form of relief and should only be ordered where it is necessary to prevent injustice. This is plain from the judgment of Robert Goff J. in *A* v. *C* (unreported). B March 18, 1980. Secondly, although a banker can properly be a respondent to such an application care should be taken not unnecessarily to put at risk that confidentiality which is an essential part of banking. The question is where, as here, the true defendants have not been served is it necessary to grant relief against the bank at the present stage? There is no risk of the bank destroying documents. There is no need to make an order for disclosure C to forestall the disposition of money onwards since the events in question happened eight months ago. The money would have vanished long since. Nor is there any need to grant pre-emptive discovery to support the plaintiff's action against the true defendants or the bank. The actions can proceed in a normal manner, no doubt marked by default on the part of the first two defendants. It D may be difficult to serve the first two defendants, but substituted service can be granted if necessary. There is no reason why discovery against them should not take place at the normal time. Similarly, in regard to the bank, since the action against it is not necessarily at all a foregone conclusion. It may take the plaintiffs some time to get their money—Discount Bank have disclosed there is some money—but the suggested order would not accelerate the E process, and even if it would, a court should be very careful not to order a banker to disclose the state of a customer's account unless it is urgently necessary to prevent injustice (which is not the case here), or if the customer is present before the court to make representations. Unlike *A* v. *C* the true defendants are not yet before the court. This is a very important distinction. Accordingly, I F propose to make no order on the present application at this stage; the plaintiffs can renew their application when the first and second defendants can be present and bound by any decision of the court.
>
> " Leave to appeal to raise questions of principle involved in decision in *A* v. *C*. Costs reserved. Liberty to apply."

The plaintiff bank appealed from so much of the order of Mustill J. G whereby he made no order on the application of the plaintiffs (a) for an order against all three defendants that each of them disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants; (b) for an order against the third defendants that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the documents specified in the order sought in paragraph (2) of the H notice of appeal, as follows: (1) against the first, second and third defendants that each of them disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants; (2) against the third defendants that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents: (i) all correspondence passing between the third defendants and the first and second defendants relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, A onwards; (ii) all cheques drawn on any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards; (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards.

B
The grounds of the appeal were that the judge, in making no order on the plaintiffs' application (a) exercised his discretion wrongly in disregard of principle and/or (b) misdirected himself in law and/or (c) thereby produced a result leading to injustice to the plaintiffs in support whereof the plaintiffs would rely, inter alia, upon the following matters—(i) the plaintiffs' claim, inter alia, to trace, follow and recover such proportion of the U.S. $1,000,000 paid to the first and/or second defendants on September 20, 1979, and remitted by the first and/or second C defendants to the third defendants within the jurisdiction of the court and/or thereafter disposed of by the first and/or second defendants elsewhere; (ii) the books, papers and records of the third defendants would disclose what happened to such proportion of the U.S. $1,000,000 remitted as aforesaid and thereafter disposed of by the first and/or second defendants elsewhere; (iii) the judge in requiring the first and/or second D defendants to be served with the proceedings as a pre-requisite to the making of the order sought by the plaintiffs was thereby giving the first and/or second defendants even more time to ensure that any dispositions by them or either of them from any account with the third defendants could not be capable of being traced, followed and recovered by the plaintiffs; (iv) as a matter of principle the court should be astute to E provide all such assistance as it properly could to persons in the position of the plaintiffs to enable them to obtain such information as was reasonable and proper at the earliest practicable opportunity to enable them to discover the whereabouts of and/or to follow and recover a trust fund or any remaining part thereof; (v) the approach of the judge in determining that the principle of the decision of Robert Goff J. in F *A* v. *C* (unreported), March 18, 1980, only applied where persons such as the first and/or second defendants had been served with a notice of an application such as that made to the judge by the plaintiffs on May 23, 1980, was unnecessarily restrictive of such decision and/or was wrong in law.

Michael Crystal for the plaintiffs. G
Nicholas Elliott for the third defendants.

LORD DENNING M.R. This is a new case. It illustrates something that happens from time to time—frauds made upon banks. It appears that last September—on September 20, 1979—two men (Walter Shapira and Max Frei) went into a bank in New York, the Bankers Trust Co. H They went into the Middle East section. They presented two apparent cheques—each for a half a million dollars—for payment. The cheques purported to be drawn on the Mecca branch of the National Commercial Bank in Saudi Arabia to the Bankers Trust Co. of 16, Wall Street, New York. One of them was for $500,000 to be paid to Mr. Shapira. The other was also for $500,000 to be paid to Mr. Shapira.

The Bankers Trust Co. of New York honoured the cheques. They let these men have $1,000,000. They acted on the instructions of the two men. I will not go into detail: but I will mention two particular matters: $600,000 was credited to Mr. Shapira's account at the London branch of a Swiss bank in Hatton Garden—the Discount Bank (Overseas) Ltd. They asked that another sum of $108,203 should be credited to Mr. Frei's account at a bank in the Cayman Islands. But as he had no such account there, that sum was also transferred to the Discount Bank (Overseas) Ltd. in Hatton Garden. So, on the face of it, $708,203 was sent over to the Discount Bank in Hatton Garden. That was in September 1979.

In some way those cheques got over to the Mecca branch of the Saudi Arabian bank. They apparently honoured them at the time. But six months later, on April 10, 1980, the head office of the National Commercial Bank in Saudi Arabia found that those two cheques were forgeries. They immediately took the matter up with the Bankers Trust Co. of New York. I will read part of the letter they wrote:

> " On looking into these drafts you will find that signatures do not conform in any way to the signatures number 140 and 141 of our officers in our Mecca Branch, that the validating numbers in red do not compare in any way to our validity machine which has the name of our bank on it, that the draft forms are on poor quality paper while our drafts are printed on safety paper with our logo water mark. We therefore consider these drafts are clearly forged and you should have exercised care in encashing them."

When the Bankers Trust Co. of New York received that letter, they felt that they were not free from blame themselves. It appears that they did re-credit the Saudi Arabian Bank with the money. So the Bankers Trust Co. of New York have lost $1,000,000.

They then looked round to see if they could find these rogues. (I call them " rogues " although it has not been proved yet: but the prima facie evidence against them is strong). On May 20, 1980, the Bankers Trust Co. of New York brought an action. The first defendant was Mr. Walter Shapira: the second defendant was Mr. Max Frei: and the third defendant was the Discount Bank (Overseas) Ltd., with which the moneys were deposited. They did not serve the documents on either Mr. Shapira or Mr. Frei. We are told, on the evidence, that they investigated the matter. Mr. Shapira is now in jail in Switzerland as a result of a fraud investigation by the Swiss police. Mr. Frei is presently believed to be in Liechtenstein. So they have not served those two. But they have served the Discount Bank (Overseas) Ltd. The action they have brought is quite clearly to trace and follow these funds which the Bankers Trust Co. have been fraudulently deprived of. It operates in common law and in equity as a right to follow and trace the moneys. So they brought this action on May 20, 1980.

The Bankers Trust Co. obtained a *Mareva* injunction in the usual form to stop the bank from disposing of any of the moneys which they had at that time—which Shapira and Frei had paid into the bank. That is common form nowadays in the Commercial Court when it is desired to prevent money being abstracted from the true creditor.

But this case brings out a new point which we have not had before: because the Bankers Trust Co. of New York want more information from the Discount Bank (Overseas) Ltd. They want information as to these accounts. They want to know how much money is now in the

accounts. Money has been taken out in the last six months. They want A
to know what has happened to the money in the accounts. It may have been paid over to third persons: and they may want to follow the money into the hands of those third persons. So they have asked for discovery of the documents relating to the moneys which the bank had, and what has happened to them.

As the question of the form of order has come into question in some B
of the cases, I would like to read the actual form of order which is sought in this regard by the Bankers Trust Co. of New York:

> "For an order (1) Against the first, second and third defendants that each of them do disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants.
> (2) Against the third defendants"—that is, the bank—"that they C
> do disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents: —(i) all correspondence passing between the third defendants and the first and second defendants relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards: (ii) all cheques drawn on any account at the third defendants D
> in the names of either the first and/or second defendants from September 20, 1979, onwards: (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards."

That is what they applied for in addition to the ordinary *Mareva* in- E
junction.

The matter came before Mustill J. He refused to make any such order, his reason being that he thought it should not be made while the first and second defendants (Mr. Shapira and Mr. Frei) had not been served.

Mr. Crystal has come here today on behalf of the Bankers Trust Co. F
of New York, and asks us to reverse that decision. He has brought to our attention—very usefully—three recent cases (none of them reported) in which a similar point has arisen. The first one was on May 26, 1978, before Templeman J.: *London and Counties Securities (In Liquidation)* v. *Caplan.* The plaintiff company had been defrauded by a Mr. Caplan in the sum of £5,000,000. Mr. Caplan was said to have embezzled it. It was desired to obtain information as to the whereabouts of the moneys G
and what had been done with them. The plaintiffs wanted to trace the moneys to see where they had gone. Templeman J., having considered the matter very carefully, made an order under which the bank was to disclose all the documents and accounts showing where the money had gone.

Then there was a case before this court on December 1, 1978— H
Mediterranea Raffineria Siciliana Petroli S.p.a. v. *Mabanaft G.m.b.H.* Court of Appeal (Civil Division) Transcript No. 816 of 1978. It was not a fraud on a bank. Nor a fraud at all. Owing to a mistake in a commercial transaction, moneys payable to the plaintiffs were paid to other people. It was desired to trace them. A *Mareva* injunction was granted and also an order for discovery of documents to discover where the money had gone. Templeman L.J. said:

A " As Lord Denning M.R. said, it is a strong order, but the plaintiffs' case is that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action B comes to trial, equity will have been invoked in vain."

The last of the three cases was on March 18, 1980, before Robert Goff J., entitled *A* v. *C.* That was a case again of a fraud on a bank. A very large sum of money was involved. It seems to be a case very similar to the present, but in which the fraudulent rogues—as they may well turn out to be—had been served. It is on that ground distinguishable C from the present case. The rogues were served together with the bank. Robert Goff J. after considering the two cases which I have mentioned, said:

" There is no doubt that this jurisdiction is in a process of development; and that it is still in the course of throwing up problems which have yet to be solved."

D

He granted a *Mareva* injunction: but in addition he made an order for discovery of documents. He did so in order to enable the plaintiffs to trace what had happened to the moneys.

Mustill J. had *A* v. *C.* case before him. He thought it was distinguishable on the ground that in that case the " rogues " had been served. He refused to order discovery in this case: but he gave leave to appeal E in order that the questions of principle could be discussed.

We have had the matter fully argued before us. I would like to express our gratitude to Mr. Crystal for all the submissions he has made in support of the order. Equally to Mr. Elliott, for the bank, who has taken a very proper attitude. He said that the bank are neutral in this matter: but they felt it right to put forward to the court various con- F siderations, such as the confidential relationship between the bank and their customers.

Having heard all that has been said, it seems to me that Mustill J. was too hesitant in this matter. In order to enable justice to be done—in order to enable these funds to be traced—it is a very important part of the court's armoury to be able to order discovery. The powers in this G regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] A.C. 133. The Customs authorities were perfectly innocent: but they had to disclose the names of infringers of patents whose goods had passed through their hands. Lord Reid said, at p. 175:

" They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious H acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers "

referring to the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.

A So here the Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men: and they come under a duty to assist the Bankers Trust Co. of New York by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is "full information."

B This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrongdoing—and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin's words, C to lift the latch of the banker's door: see *Banque Belge pour l'Etranger* v. *Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff's equity is to be of any avail, he must D be given access to the bank's books and documents—for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Raffineria Siciliana Petroli S.p.a.* v. *Mabanaft G.m.b.H.* (unreported). So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is E put in making the discovery: and the documents, once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose. With these safeguards, I think the new jurisdiction—already exercised in the three unreported cases—should be affirmed by this court.

F Applying this principle, I think the court should go to the aid of the Bankers Trust Co. It should help them follow the money which is clearly theirs: to follow it to the hands in which it is: and to find out what has become of it since it was put into the Discount Bank (Overseas) Ltd.

If the courts were to wait until these two men were served, goodness knows how many weeks might elapse. Meanwhile, if some of it has got into the hands of third persons, they may dispose of it elsewhere. It G seems to me that the fact that these two men have not been served does not deprive the court of its power to make such an order. These two men have gone out of the jurisdiction in circumstances in which it is clear that the court should do all it can to help the innocent people to find out where their money has gone.

H In those circumstances—while expressing our indebtedness to both counsel—I would allow the appeal and make the order as asked in the notice of appeal.

WALLER L.J. I agree. I only add a word or two about three points which were made by Mr. Elliott, appearing on behalf of the bank and taking, so far as he could, a neutral attitude in this matter. He first of all emphasised that where the other two parties had not been served, it

A was very strong action on the part of the court to order the bank to
break their duty of confidentiality. It was going further, he said, than
an *Anton Piller* order [*Anton Piller K.G.* v. *Manufacturing Processes Ltd.*
[1976] Ch. 55], because when an *Anton Piller* order is made, there remains
the opportunity of disobeying it or appealing against it.

Clearly it is undesirable that an order such as this should be lightly
made. But the answer to this part of Mr. Elliott's submission, in my
B judgment, is that here there is very strong evidence indeed of fraud on
the part of the other two defendants—the first and second defendants.
They presented two forged cheques, each for half a million dollars, and
as a result a total of $1,000,000 was transferred to accounts in their
names or from which they would benefit.

Secondly, Mr. Elliott submitted that, having regard to the amount
C of time which had gone by, there was no case for making this order
now; it could wait until the normal time for discovery; and indeed
Mustill J. in his decision adverted to that. But again, in my opinion,
where you have a fraud of this nature, although it may be late and
although much or perhaps all of the money may be now gone, the sooner
that steps are taken to try and trace where it is the better. If steps are
going to be taken, it is important that they should be taken at the earliest
D possible moment.

Thirdly, Mr. Elliott expressed concern at the wideness of the order
which it was sought to make—one which required the bank to permit
the plaintiffs to take copies of all correspondence, for example, all debit
vouchers, transfer applications and orders, and internal memoranda. He
submitted that the breadth of that order went far beyond the disclosure
E which would have to be made under the Bankers' Books Evidence Act
1879. Again, in my opinion, an order of that breadth is completely
justified in a case of this sort because, unless there is the fullest possible
information, the difficulties of tracing the funds will be well-nigh impossible.

On the other side of the coin in relation to that, there must be an
implied undertaking on the part of the plaintiffs that the information
F which they obtain will only be used for the purposes of this action and
of course will not be disclosed otherwise.

DUNN L.J. I agree for the reasons given by Lord Denning M.R. and
Waller L.J. that this appeal should be allowed.

G

Appeal allowed.
No order for costs as between plaintiffs and third defendants.
Costs in action reserved.

Solicitors: *Linklaters & Paines; Dawson & Co.*

H

M. M. H.

Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal

[2015] SGCA 45

Court of Appeal — Civil Appeals Nos 80 and 81 of 2015, and Summonses Nos 235 and 256 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
6, 7 July; 21 August 2015

***Injunctions** — Mareva injunction — Respondents claiming against appellants for breach of fiduciary duty, dishonest assistance and knowing receipt — Respondents alleging appellants acted dishonestly — Whether allegation of dishonesty could ground inference of real risk of dissipation for grant of Mareva injunction*

***Injunctions** — Proprietary injunction — Respondents claiming proprietary relief against appellants — Whether balance of convenience lying in favour of grant of proprietary injunctions*

Facts

The appeals were against a judge's refusal to set aside Mareva injunctions and ancillary disclosure orders that the respondents had earlier obtained *ex parte* against the appellants. The Mareva injunctions were obtained in support of the respondents' claims against the appellants for, amongst others, breach of fiduciary duty, dishonest assistance, knowing receipt and conspiracy. The respondents also argued in the alternative for proprietary injunctions in respect of their claim for proprietary relief against the appellants (the proprietary injunctions were, however, not granted by the judge).

The respondents' position was that Yves Charles Edgar Bouvier, the first appellant in Civil Appeal No 80 of 2015, was their agent in transactions for their purchase of artworks. In these transactions, Mr Bouvier often acted through MEI Invest Pte Ltd ("MEI Invest"), the second appellant, which he had control over. The respondents alleged that Mr Bouvier had, dishonestly and in breach of his fiduciary duty, made secret profits by selling the artworks to the respondents at substantial markups from the prices he obtained the artworks for. MEI Invest had dishonestly assisted in Mr Bouvier's breach of fiduciary duty. Mr Bouvier did not dispute having sold the artworks to the respondents at markups. His position was that he was entitled to do so because he was acting as an independent seller and not an agent. He could sell the artworks to the respondents at any price he thought they would pay.

The respondents also claimed that Mr Bouvier had made payments out of the secret profits to Tania Rappo, the appellant in Civil Appeal No 81 of 2015. The respondents alleged that Mrs Rappo was liable for, amongst others, knowing receipt of property obtained in breach of Mr Bouvier's fiduciary duty. Mr Bouvier and Mrs Rappo did not dispute, respectively, having made or received the payments. They said that the payments were an innocuous "finder's fee", which was common in the art world.

The respondents claimed that they had discovered Mr Bouvier's wrongdoing in late 2014. This led to them filing a criminal complaint against him in the Principality of Monaco on 9 January 2015. As a consequence, Mr Bouvier and Mrs Rappo were arrested and detained for questioning in Monaco between 25 and 28 February 2015, after which they were released on bail. The respondents thereafter applied to the Singapore High Court and obtained the Mareva injunctions *ex parte* against the appellants on 12 March 2015.

The central question in the appeals was whether there was a real risk that the appellants would dissipate their assets to frustrate the enforcement of an anticipated judgment of the court. The respondents' main argument against the discharge of the Mareva injunctions was that there were well-substantiated allegations that the appellants had acted dishonestly, and that the court was entitled to infer a real risk of dissipation from those allegations.

Held, allowing the appeals:

(1) If there was a unifying principle that could adequately rationalise and explain the circumstances in which a court could legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it was that the alleged dishonesty had to be of such a nature that it had a real and material bearing on the risk of dissipation: at [93].

(2) A well-substantiated allegation that a defendant had acted dishonestly could and often *would* be relevant to whether there was a real risk that the defendant would dissipate his assets. But it was incumbent on the court to examine the precise nature of the dishonesty alleged and the strength of the evidence relied on in support of the allegation, keeping fully in mind that the proceedings were only at an interlocutory stage and assessing, in that light, whether there was a sufficient basis to find a real risk of dissipation: at [94].

(3) It had not been shown that there was a real risk that Mr Bouvier or MEI Invest would dissipate their assets. The respondents had established a good arguable case of dishonesty, but it could not be put higher than that. The allegations of dishonesty levelled at Mr Bouvier also did not have a real and material bearing upon the risk of dissipation. The alleged dishonesty was not in the nature of a complex machination or an elaborate scheme. The ultimate outcome in this case turned on the true characterisation of the relationship between Mr Bouvier and the respondents. In that light, it would also have been wrong to infer a real risk of dissipation from the fact that Mr Bouvier was wealthy, sophisticated and well-advised. He had not misused his international financial expertise in the commission or furtherance of the allegedly deceitful behaviour: at [62], and [95] to [97].

(4) Information about a defendant's assets that was disclosed pursuant to an ancillary disclosure order would often have little, if any, bearing on a real risk of dissipation, except in two narrow situations: first, where the defendant refused to provide any disclosure of his assets at all; and, second, where the disclosed information revealed assets that were so glaringly inadequate or suspicious that the deficiencies could not be attributed to the urgency of the disclosures or

accounting or valuation inaccuracies. Even in those situations the court had to carefully consider whether, in all the circumstances, an inference of a real risk of dissipation could appropriately be drawn. The information disclosed by Mr Bouvier in this case was not suspicious; his disclosure affidavits were timeous and detailed: at [103] to [105].

(5) It had not been shown that there was a real risk that Mrs Rappo would dissipate her assets. The nature of the allegations against Mrs Rappo suggested negligence or wilful blindness rather than dishonesty. There was also no evidence that Mrs Rappo had attempted to conceal the payments she received from Mr Bouvier. The respondents' allegation that Mrs Rappo was experienced in international finance was irrelevant and, in any event, unsubstantiated: at [138] to [141].

(6) The Mareva injunctions against the appellants were an abuse of the court's process, which was an independent ground for setting them aside. This was borne out by four factors. First, there was an inexplicable delay in the respondents' application for the Mareva injunctions. Second, the respondents failed to comply with the Supreme Court Practice Directions. They did not give prior notice to the appellants or explain why such notice was not given. Third, the Mareva injunctions sought were unjustifiably wide in their scope. Fourth, the respondents put the Mareva injunctions into wider circulation than was necessary and disseminated information in a misleading manner. The cumulative picture that emerged from these factors was that the respondents did not obtain the Mareva injunctions out of a genuine fear that the appellants would dissipate their assets, but, instead, obtained them to oppress the appellants: at [108], [130] and [134].

(7) The proprietary injunctions that the respondents sought should not be granted. The respondents had not established that the balance of convenience lay in favour of the grant of the proprietary injunctions: at [164].

[Observation: Where a plaintiff seeks a worldwide Mareva injunction from a Singapore court, the plaintiff should ordinarily undertake to the court that it shall not, without the court's leave, enforce the injunction or seek an order of a similar nature in any jurisdiction outside Singapore. This undertaking plays a vital role because it protects a defendant from the risk of oppression which may arise from a multiplicity of suits: at [131].]

Case(s) referred to

A v C [1981] QB 956; [1980] 2 Lloyd's Rep 200 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Art Trend Ltd v Blue Dolphin (Pte) Ltd [1981–1982] SLR(R) 633; [1982–1983] SLR 362, HC (folld)

Art Trend Ltd v Blue Dolphin (Pte) Ltd [1983–1984] SLR(R) 105; [1982–1983] SLR 156, CA (refd)

Ashtiani v Kashi [1987] QB 888 (refd)

Babanaft International Co SA v Bassatne [1990] Ch 13 (refd)

Bank Mellat v Nikpour [1985] FSR 87 (refd)

Bank of Credit and Commerce International SA, Re [1994] 1 WLR 708; [1994] 3 All ER 764 (refd)

Cherney v Neuman [2009] EWHC 1743 (Ch) (refd)

Choy Chee Keen Collin v Public Utilities Board [1996] 3 SLR(R) 812; [1997] 1 SLR 604 (refd)

Dadourian Group International Inc v Simms [2006] 1 WLR 2499 (refd)

Derby & Co Ltd v Weldon [1990] Ch 48 (refd)

Derby & Co Ltd v Weldon (Nos 3 and 4) [1990] Ch 65 (folld)

European Grain & Shipping Ltd v Compania Naviera Euro-Asia SA [1989] 2 SLR(R) 445; [1989] SLR 1001 (refd)

FHR European Ventures LLP v Cedar Capital Partners LLC [2015] AC 250 (refd)

Grupo Torras SA v Shiekh Fahad Mohammed Al Sabah (16 February 1994) (refd)

Grupo Torras SA v Sheikh Fahad Mohammed Al Sabah 1997 WL 1105536 (21 March 1997) (refd)

Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA [2003] 1 SLR(R) 157; [2003] 1 SLR 157 (refd)

Irish Response Ltd v Direct Beauty Products Ltd [2011] EWHC 37 (QB) (refd)

Jarvis Field Press Ltd v Chelton [2003] EWHC 2674 (Ch) (refd)

Madoff Securities International Ltd v Stephen Ernest John Raven [2011] EWHC 3102 (not folld)

Media World Communications Ltd v Clark [2004] FCA 1609 (folld)

Meespierson NV v Industrial Commercial Bank of Vietnam [1998] 1 SLR(R) 287; [1998] 2 SLR 632 (refd)

Motorola Credit Corp v Cem Cegiz Uzan [2002] EWCA Civ 989 (refd)

Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon [2009] 1 SLR(R) 1000; [2009] 1 SLR 1000 (refd)

Ninemia Maritime Corp v Trave Schiffahrtgesellschaft mbH und Co KG (The Niedersachsen) [1983] 1 WLR 1412; [1983] 2 Lloyd's Rep 600 (refd)

Nippon Yusen Kaisha v Karageorgis [1975] 1 WLR 1093 (refd)

OCM Opportunities Fund II, LP v Burhan Uray [2004] 4 SLR(R) 74; [2004] 4 SLR 74, HC (refd)

OCM Opportunities Fund II, LP v Burhan Uray [2004] SGHC 115 (overd)

Patterson v BTR Engineering (Aust) Ltd (1989) 18 NSWLR 319 (refd)

Petromar Energy Resources Pte Ltd v Glencore International AG [1999] 1 SLR(R) 1152; [1999] 2 SLR 609 (refd)

Polly Peck International plc v Nadir [1992] 2 Lloyd's Rep 238 (folld)

PT Sariwiguna Binasentosa v Sindo Damai Shipping Ltd [2015] SGHC 195 (folld)

Republic of Haiti v Duvalier [1990] 1 QB 202 (refd)

Rickshaw Investments Ltd v Nicolai Baron von Uexkull [2007] 1 SLR(R) 377; [2007] 1 SLR 377 (refd)

SCF Finance Co Ltd v Masri [1985] 1 WLR 876; [1985] 2 All ER 747 (refd)
Spectramed Pte Ltd v Lek Puay Puay [2010] SGHC 112 (overd)
Teo Siew Har v Lee Kuan Yew [1999] 3 SLR(R) 410; [1999] 4 SLR 560 (refd)
Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina) [1994] 3 SLR(R) 312; [1994] 3 SLR 257 (refd)
Thane Investments Ltd v Tomlinson [2003] EWCA Civ 1272 (refd)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245 (refd)
VTB Capital plc v Nutritek International Corp [2011] EWHC 3107 (Ch) (refd)
VTB Capital plc v Nutritek International Corp [2012] 2 Lloyd's Rep 313, CA (Eng) (refd)
VTB Capital plc v Nutritek International Corp [2013] 2 AC 337; [2013] 1 Lloyd's Rep 466, SC (Eng) (refd)
Z Ltd v A [1982] QB 558; [1982] 1 All ER 556 (refd)

Edwin Tong SC, Kristy Tan, Peh Aik Hin and Leong Yi-Ming (Allen & Gledhill LLP) for the appellants in CA 80/2015;
Tan Wee Kheng Kenneth Michael SC (Kenneth Tan Partnership), Seah Zhen Wei Paul, Liang Hanwen Calvin, Ho Xin Ling and Lau Qiuyu (Tan Kok Quan Partnership) for the appellant in CA 81/2015;
Alvin Yeo SC, Monica Chong, Wendy Lin, Chan Xiao Wei, Jill Ann Koh and Reka Mohan (WongPartnership LLP) for the respondents in CA 80/2015 and CA 81/2015.

21 August 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Judges and lawyers, when speaking of Mareva injunctions, often allude to the famous description of them as one of the "nuclear weapons" of civil litigation: *Bank Mellat v Nikpour* [1985] FSR 87 at 92 *per* Donaldson LJ (as he then was). A worldwide Mareva injunction is that and even more. The reach of such an injunction, stretching far beyond the geographical confines of the jurisdiction of the court making the order, is such that it can have a crippling effect on those against whom it is directed. This underscores the need to scrutinise the basis for such an injunction with utmost care.

2 Even the English courts, which, in 1975, had been the first to articulate the court's power to grant Mareva injunctions (see *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 at 1095 *per* Lord Denning MR), for some time resisted extending the exercise of that power to assets worldwide (see *Ashtiani v Kashi* [1987] QB 888 at 899F–899G and 900G–902B *per* Dillon LJ). The English Court of Appeal departed from this only in 1988 in a trilogy of judgments handed down within just over a month of each other, namely: *Babanaft International Co SA v Bassatne*

[1990] Ch 13; *Republic of Haiti v Duvalier* [1990] 1 QB 202 ("*Republic of Haiti v Duvalier*"); and *Derby & Co Ltd v Weldon (No 1)* [1990] Ch 48 ("*Derby v Weldon (No 1)*").

3 Lawrence Collins, writing before his elevation to the bench, described this trilogy of cases as the English Court of Appeal's response to the widespread abolition of exchange controls and the growth of offshore tax havens for cash and securities. These developments, he said, "made it easier for defaulters involved in international business to make themselves judgment proof, and for dishonest fiduciaries to enjoy the illegal fruits of breaches of trust": "The Territorial Reach of Mareva Injunctions" (1989) 105 LQR 262 at 262.

4 The present case concerns two appeals brought by three well-heeled appellants against the refusal of a High Court judge ("the Judge") to set aside worldwide Mareva injunctions and ancillary disclosure orders that she had earlier made *ex parte* against them. The appellants are involved in international business and operate through companies, some of which are incorporated in offshore tax havens. The respondents' claims against the appellants include allegations that the latter were fraudulent or had dishonestly breached their fiduciary duties. The sums involved are also sizeable. The cumulative value of the assets subject to the worldwide Mareva injunctions is US$1.1bn.

5 The central question in these appeals is whether it has been sufficiently shown that there is a real risk that the appellants will dissipate their assets to frustrate the enforcement of an anticipated judgment of the court. This requirement lies at the heart of the court's power to grant Mareva injunctions. In our judgment, the respondents have failed to establish that risk. For this and other reasons, which we elaborate on below, we allow both appeals and set aside the Mareva injunctions as well as the ancillary disclosure orders made against the appellants.

The facts

The parties

6 The appellants in Civil Appeal No 80 of 2015 are Yves Charles Edgar Bouvier and MEI Invest Limited ("MEI Invest"). Mr Bouvier is a Swiss businessman who runs an art-related transport and storage business. He also invests and deals in art. He resides in Singapore and holds a Singapore permanent residency. Mr Bouvier has control over and often acts through MEI Invest, a company incorporated in the Hong Kong Special Administrative Region. He also holds substantial shareholdings in companies across multiple jurisdictions, including the British Virgin Islands ("BVI"), Seychelles and the Isle of Man.

7 The appellant in Civil Appeal No 81 of 2015 is Tania Rappo. She plays a subsidiary part in the dispute between the parties. She resides in Monaco and holds dual Swiss and Bulgarian citizenships. Her assets appear to be located predominantly in Monaco and are held in the names of Monegasque companies. Her assets are managed by asset management agencies in Monaco.

8 The respondents in both appeals are Accent Delight International Ltd ("Accent Delight") and Xitrans Finance Ltd ("Xitrans Finance"). Both are BVI companies owned wholly by the family trusts of a well-known Russian billionaire, Dmitry Rybolovlev. The trusts are constituted under Cypriot law. The respondents appear to be controlled by Mr Rybolovlev or, at the very least, have issued powers of attorney for Mr Rybolovlev to act on their behalf. Mr Rybolovlev resides in Monaco. He was previously resident in Switzerland until 2011.

Outline of the dispute between the parties

9 The dispute between the parties arises out of the respondents' acquisition of 38 art masterpieces between 2003 and 2014. These are highly-prized pieces and include the works of Picasso, van Gogh, da Vinci, Modigliani and Rothko. All the acquisitions were arranged (to use a neutral term) by Mr Bouvier, who was responsible for locating and obtaining the artworks that the respondents wished to purchase. Mr Bouvier in turn acted through either MEI Invest (which was the case for most of the 38 acquisitions) or one of his associated companies. As it is not necessary to distinguish between MEI Invest and these associated companies for the purposes of the present appeals, we shall, for ease of narration, refer solely to MEI Invest as the corporate vehicle which Mr Bouvier used in respect of the acquisition of the 38 artworks.

10 The respondents contend that unbeknownst to them until late 2014, when it came to light, Mr Bouvier had secured these artworks at prices that were considerably less than those at which he told the respondents he had secured them. The nub of the dispute between Mr Bouvier and the respondents comes down to the capacity in which Mr Bouvier was acting when he arranged the respondents' acquisitions. Was Mr Bouvier acting as an *agent* who negotiated for and obtained the target artworks on behalf of the respondents, and who therefore owed the latter fiduciary duties? Or was Mr Bouvier acting as an *independent seller* transacting at arm's length with the respondents, such that he was entitled to sell the artworks to the respondents at the highest price he thought they would pay?

11 This dispute as to the true nature of the relationship between Mr Bouvier and the respondents is the subject of Suit No 236 of 2015 ("the Singapore action"), in which the respondents are the plaintiffs and the appellants are the defendants. The worldwide Mareva injunctions and ancillary disclosure orders mentioned at [4] above were obtained by the

respondents in support of the claims which they make in that suit. The appellants have separately applied for a stay of the Singapore action on the ground of *lis alibi pendens* or *forum non conveniens*. These applications are pending and have been fixed to be heard by a High Court judge.

12 We will begin by tracing the relationship between Mr Bouvier and the respondents, which will set the context for their dispute. Next, we will set out the history of the litigation between the parties. It began in Monaco and eventually found its way to Singapore. The respondents also appear to have commenced related proceedings in France and Hong Kong. We will then consider the orders that were made in the court below by the Judge before explaining our decision in these appeals.

The acquisition of the 38 artworks

13 Mr Rybolovlev began collecting art in the early part of this century. He was introduced to Mr Bouvier in 2003 by Mrs Rappo on Mr Bouvier's request. Mrs Rappo was a close family friend of the Rybolovlevs and is the godmother of one of Mr Rybolovlev's children.

14 From the time of their introduction in 2003, Mr Bouvier played a critical role in helping Mr Rybolovlev build his private art collection. The 38 artworks which the latter acquired (using the respondents as his corporate vehicles) were all purchased through Mr Bouvier (acting through MEI Invest). These transactions appear to have followed a common pattern. Once Mr Rybolovlev confirmed his interest in a particular artwork, Mr Bouvier would locate it and try to persuade the owner to agree to sell it. The paperwork suggested that the artwork would be purchased by MEI Invest from the original owner; MEI Invest would then issue a sales invoice to either of the respondents for the purchase price. Once MEI Invest received payment, it would deliver the artwork to the respondents. The respondents paid Mr Bouvier a sum equivalent to 2% of the value of the artwork on each transaction that he arranged. The respondents say that this was a commission and was the extent of the profit that Mr Bouvier was entitled to earn on each transaction. Mr Bouvier, however, says that this was only an administrative fee paid to cover expenses such as shipment, storage and other miscellaneous expenses.

15 As a result of the way in which the transactions were arranged, the respondents acquired the 38 artworks from MEI Invest without knowing the identity of the original sellers from whom MEI Invest had obtained the artworks. Mr Bouvier was the only person whom the respondents dealt with. It appears that Mr Rybolovlev decided to make all his acquisitions through Mr Bouvier because it was more convenient than sourcing for each piece separately through multiple dealers. The only difference in the way the transactions were arranged over the years is that the earlier few were documented in formal written contracts between MEI Invest as the seller and the respondent concerned as the buyer, and these appear to have been

specifically negotiated. This gave way to more informal dealings through e-mails and invoices that served to document the transactions, and this came to characterise all the transactions subsequent to 2007 or 2008.

16 It is not clear whether the acquisitions over the years were initiated by Mr Bouvier or Mr Rybolovlev. Mr Bouvier paints Mr Rybolovlev as an art aficionado who had definite ideas as to what he liked and formed his own opinions as to which masterpieces he wished to acquire. Mr Bouvier claims that it was always Mr Rybolovlev who gave instructions as to the artworks he wished to purchase. The respondents, on the other hand, say that the spark for their acquisitions invariably came from Mr Bouvier. On their version of the events, Mr Bouvier would inform Mr Rybolovlev or his principal intermediary, Mikhail Anatolievitch Sazonov, of the opportunity to acquire artworks whenever this arose. Mr Bouvier would also advise Mr Rybolovlev and Mr Sazonov as to the approximate value of the artwork in question and the price at which it could be obtained. We digress to mention that Mr Sazonov is a business associate of Mr Rybolovlev. He is employed by the Rybolovlev family trusts and was the sole director of Xitrans Finance, the second respondent in these appeals, until 2009. Mr Sazonov was the main representative of the respondents in their dealings with Mr Bouvier. This was because both Mr Sazonov and Mr Bouvier were conversant in English and French, whereas Mr Rybolovlev spoke only Russian. Mr Sazonov affirmed the affidavits that were filed on behalf of the respondents in these proceedings.

17 On either version of the facts, Mr Bouvier's role in the acquisition of the 38 artworks was a crucial one. It appears that buyers and sellers of art masterpieces prize secrecy and discretion, and as a result, masterpieces usually change hands in discreet private sales, presumably so that the wealth of the parties concerned will not be made public. But, this also means that the ownership of many of these paintings is opaque. Mr Bouvier was able to locate the target artworks, identify their owners and make the acquisitions concerned due to his extensive network of contacts in the international art market. The respondents say that this climate of secrecy and discretion was the reason why they never had any direct dealings with the original sellers of the artworks, and why the acquisitions were routed through MEI Invest. This also protected Mr Rybolovlev's privacy as the ultimate purchaser of these artworks.

18 Mr Bouvier's contacts arose from his well-established business conducted through the Natural Le Coultre group of companies, which specialises in the storage, packing and shipping of artworks. Natural Le Coultre operates out of the Geneva "freeport", which is a secure and confidential facility used by the wealthy to store expensive artworks, fine wines and other luxury items. Mr Bouvier is credited with having successfully transplanted the freeport model from Geneva to Singapore and Luxembourg.

Mr Bouvier and Mr Rybolovlev fall out with each other

19 Mr Bouvier and Mr Rybolovlev fell out with each other in late 2014. They disagree over how this came to pass.

20 Mr Bouvier says that in September 2014, Mr Rybolovlev ran into financial difficulties following his divorce settlement and was unable to finance the purchase of a Rothko, *No 6 (Violet, vert et rouge)*. The purchase of that artwork was the last acquisition that Mr Bouvier arranged for the respondents. MEI Invest did not receive the full purchase price of €140m from Accent Delight, and so did not deliver the masterpiece to the respondents. This apparently upset Mr Rybolovlev, and caused his relationship with Mr Bouvier to sour.

21 The respondents, on the other hand, say that Mr Bouvier and Mr Rybolovlev fell out with each other when the latter discovered that Mr Bouvier had been fraudulently inflating the prices of artworks that he had acquired for and on behalf of the respondents. On 31 December 2014, Mr Rybolovlev apparently found out that a Modigliani which Accent Delight had obtained through Mr Bouvier in January 2012 for US$118m had in fact been sold by the original seller for only US$93.5m. This meant that MEI Invest had sold the painting to Accent Delight at more than US$24m in excess of the price that it had paid for the painting. Mr Rybolovlev claims that he discovered this at a meeting which he had with an art expert, Sanford Heller, on 31 December 2014. Mr Heller was the art dealer representing the original seller of the Modigliani in that transaction, and he therefore knew the price at which it had in fact been sold. Sometime in late 2014, Mr Rybolovlev also discovered that the respondents had fallen for a similar ruse in respect of a da Vinci, *Le Christ comme Salvator Mundi* ("*Salvator Mundi*"), which had been bought through Mr Bouvier in May 2013. Accent Delight paid MEI Invest US$127.5m for the painting, which MEI Invest had obtained from the original seller for a sum of between US$75m and US$80m. According to the respondents, this is what led to the breakdown of Mr Rybolovlev's relationship with Mr Bouvier.

22 The respondents say that by selling the paintings at undisclosed markups, Mr Bouvier had breached the fiduciary duties which he owed them as their agent. Mr Bouvier, they say, was in Mr Rybolovlev's "inner circle" and was someone whom Mr Rybolovlev and the respondents trusted. Mr Bouvier negotiated the price of the paintings on the respondents' behalf and was not entitled to profit from the transactions beyond the 2% commission that he was paid by the respondents.

23 The respondents also allege that Mr Bouvier's "fraud [or] deceit is not limited to [these two paintings] but extends to all, or many of, the other paintings which [the respondents] purchased through him". We shall refer to the markups that Mr Bouvier imposed as "the Excess Payments". The

Excess Payments are said to amount in total to around US$1bn. In the Singapore action, the respondents make personal claims against Mr Bouvier and MEI Invest for breach of fiduciary duties and dishonest assistance respectively. There are also conspiracy claims against both Mr Bouvier and MEI Invest. The respondents alternatively assert a proprietary interest in the Excess Payments and their traceable proceeds.

24 Mr Bouvier does not dispute having received the Excess Payments. His position is that he was perfectly entitled to receive those payments. Mr Bouvier denies having acted as the respondents' agent. According to him, the transactions between MEI Invest and the respondents took place on a "willing buyer-willing seller basis", with the respondents as the purchasers and MEI Invest as the seller. Mr Bouvier, through MEI Invest, would acquire any artwork that Mr Rybolovlev expressed sufficient interest in. Mr Bouvier would bear all the "risks of the acquisition" of the artwork from the original seller. If Mr Rybolovlev eventually decided not to purchase the artwork or if there were defaults in the payment obligations to Mr Bouvier, then Mr Bouvier would be solely and wholly liable to the original seller for the artwork. Mr Bouvier therefore says that he was entitled to sell the artworks to the respondents at any price which he wanted to. The respondents obtained the masterpieces, which were precisely what they wanted, and these were all transacted at the prices they had agreed to pay.

Mrs Rappo's involvement

25 Mrs Rappo was drawn into the dispute because she received payments from Mr Bouvier upon the completion of each acquisition that Mr Bouvier arranged with or for the respondents. Mrs Rappo is alleged to have received tens of millions of euros from Mr Bouvier in this way. The respondents say that Mrs Rappo "must have known what Mr Bouvier [was] up to". They also suggest that she deliberately concealed from the Rybolovlevs the fact that she was receiving payments from Mr Bouvier. In the Singapore action, the respondents make personal claims against Mrs Rappo for knowing receipt and conspiracy. They assert, alternatively, a proprietary interest in the payments made by Mr Bouvier to Mrs Rappo out of the Excess Payments and their traceable proceeds.

26 Mr Bouvier and Mrs Rappo do not deny having, respectively, made and received these payments. However, they say that these payments were innocuous. Mr Bouvier's position is that he paid Mrs Rappo because he considered her to be a "business finder". She had a good relationship with Mr Rybolovlev and could have influenced Mr Rybolovlev away from transacting with Mr Bouvier if she had wanted to. As for Mrs Rappo, she says that the payments were to be seen as a "commercial arrangement" and represented a "finder's fee" that Mr Bouvier paid her. As far as she was aware, the payment of such fees was a regular practice in the art world. She

had never actively concealed the fact of these payments from the Rybolovlevs. On the other hand, she never considered that she was under any obligation to inform them of the payments.

The proceedings in Monaco

27 These events eventually culminated in the respondents filing a criminal complaint against Mr Bouvier "and any participant" in the Principality of Monaco on 9 January 2015 for fraud and complicity in money laundering. The criminal complaint set in motion a chain of investigative and judicial proceedings in Monaco. The Monaco authorities commenced initial investigations into the complaint on 12 January 2015. This in turn led to Mrs Rappo being investigated for money laundering on the basis that she was a "participant" in Mr Bouvier's activities. On 24 February 2015, the Monaco Public Prosecutor's Office requested the appointment of an investigating judge and also requested the investigating judge to initiate proceedings against Mr Bouvier and Mrs Rappo. It appears that during this period up to the time of their subsequent arrest, Mr Bouvier and Mrs Rappo were not aware of the criminal complaint or the investigations.

28 Mr Bouvier was arrested by the Monaco police in a sting operation on 25 February 2015 at Mr Rybolovlev's Monaco residence. Mr Rybolovlev had invited Mr Bouvier to his home under the pretext of discussing business. The Monaco police lay in wait at Mr Rybolovlev's residence and arrested Mr Bouvier when he arrived. Mr Bouvier was detained for questioning for three days, and was only released on 28 February 2015 on bail of €10m and with reporting conditions. Mrs Rappo was also arrested by the Monaco police and brought before an investigating judge for questioning on 25 February 2015. She was similarly detained for three days, and was released from police custody on 28 February 2015 with reporting conditions. The Monaco authorities have frozen Mrs Rappo's bank accounts in Monaco in the wake of the proceedings there.

The proceedings in Singapore

29 On 12 March 2015, the respondents commenced the Singapore action and simultaneously applied *ex parte* to the Singapore High Court for Mareva injunctions and ancillary disclosure orders against the appellants. This was a little less than two weeks after Mr Bouvier and Mrs Rappo had been released from detention in Monaco. The appellants were not given notice of either the application or the hearing. On the same day (*ie*, 12 March 2015), the Judge granted the Mareva injunctions and the ancillary disclosure orders sought. She also gave leave for the court papers to be served either out of jurisdiction or through substituted means. In addition, orders were made for the delivery up of the Rothko, *No 6 (Violet, vert et rouge)*.

30 The worldwide Mareva injunctions against Mr Bouvier, MEI Invest and Mrs Rappo prevented them from disposing of or dealing with any of their assets in Singapore or worldwide up to the sums of US$500m (in respect of each of Mr Bouvier and MEI Invest) and US$100m (in Mrs Rappo's case) respectively. There were also orders requiring them to disclose their assets worldwide and other documents relating to the subject matter of the parties' dispute.

31 Mr Bouvier, MEI Invest and Mrs Rappo applied to set aside the Mareva injunctions and the ancillary disclosure orders. Their applications ("the appellants' setting-aside applications") were heard *inter partes* by the Judge on 25 March, and 6–8 and 10 April 2015. The Judge did not set aside either the Mareva injunctions or the ancillary disclosure orders, but attenuated them. Among other things, the carve-outs built into the Mareva injunctions for Mr Bouvier's and Mrs Rappo's ordinary expenses were increased to €50,000 per month. Exceptions were also made for the payment of the legal fees of the appellants' solicitors.

32 In addition, the scope of the ancillary disclosure orders was pared down and conditions were imposed on the disclosure of information. These conditions were put in place to meet the appellants' concern that the respondents would make public the disclosed information or use it for improper purposes. The ancillary disclosure orders were made conditional on an undertaking by the respondents' solicitors that the affidavits filed pursuant to those orders would be disclosed only to them (*ie*, the respondents' solicitors) and no one else unless leave from the court was obtained. These conditions prevented the disclosed information from being released to even the respondents or their foreign lawyers, except for Ms Tetiana Bersheda, the respondents' Swiss lawyer who was at that time (and currently is still) instructing their Singapore solicitors. The Judge also ordered the respondents to fortify their undertaking as to damages by providing a banker's guarantee in the sum of US$20m.

33 It is against these orders that Mr Bouvier, MEI Invest and Mrs Rappo have appealed. We did not have the benefit of a reasoned judgment from the Judge because of the expedition with which these appeals were brought and heard. We were nonetheless assisted by the Judge's comprehensive notes of the arguments made at the *inter partes* hearing of the appellants' setting-aside applications.

The issues before this court

34 Two broad issues arise for our consideration. The first is whether the requirements for the grant of Mareva relief have been satisfied. The second is whether we should alternatively grant interlocutory proprietary injunctions to prevent the appellants from dealing with the Excess Payments and their traceable proceeds pending the resolution of the dispute. In respect of the latter, we note that the summons which the

respondents filed in the court below in applying for the Mareva injunctions did not include a prayer for interlocutory proprietary injunctions. The respondents, nonetheless, presented arguments on such injunctions before the Judge, although, ultimately, no orders were made on it. Each of the two broad issues we have just outlined in turn raises subsidiary factual and legal issues. We will elaborate on these subsidiary issues together with the parties' submissions in the course of our analysis.

35 Mr Bouvier and MEI Invest were jointly represented in the court below as well as in these appeals. As their positions are aligned, we will use Mr Bouvier as shorthand for both unless it is necessary to distinguish between them. Thus, when we refer to the respondents' claims and the Mareva injunction against Mr Bouvier, we include their claims and the Mareva injunction against MEI Invest; references to Mr Bouvier's assets include MEI Invest's assets; and so on. This is purely for the sake of convenience, and is not the result of a finding that there is no separate personality between them. Also before us were two applications by Mrs Rappo. One was for the introduction of further evidence on appeal, which the respondents consented to. The other was for a stay, pending the resolution of these appeals, of the disclosure orders made against her by the Judge, which she has yet to comply with. We make no order on the latter application since it has become academic in the light of our decision to allow these appeals.

Whether the requirements for the grant of Mareva relief have been satisfied

36 The requirements for the grant of Mareva relief are well established. Two are relevant to these appeals, namely: (a) a good arguable case on the merits of the plaintiff's claim; and (b) a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the court (referred to hereafter as a "real risk of dissipation" for short where appropriate to the context). A good arguable case is one which is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success": *Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft mbH und Co KG (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 at 605 *per* Mustill J. In respect of a real risk of dissipation, there must be some "solid evidence" to demonstrate the risk, and not just bare assertions to that effect: *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [18] *per* Chao Hick Tin JA.

37 Worldwide Mareva injunctions have rightly been said to be exceptional, but the same rationale and test informs the grant of a Mareva injunction, whether over assets within the jurisdiction or over assets without. Lord Donaldson of Lymington MR put it this way in *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65 at 79D–79F:

> [T]he key requirement for any *Mareva* injunction, *whether or not it extends to foreign assets*, is that it shall accord with the rationale upon which *Mareva* relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely, that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is *necessary* to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law. [emphasis added]

While the legal test for a worldwide Mareva injunction may be the same as that for a Mareva injunction over assets within the jurisdiction, the circumstances that will have to be established in order to cross the threshold of necessity will likely be more exacting where a worldwide Mareva injunction is concerned.

38 The appellants challenge the satisfaction of both requirements set out at [36] above. For reasons that will become apparent, we are unimpressed by their arguments that there is no good arguable case on the merits of the respondents' claims against them. The main focus at the hearing of these appeals was, instead, on the real risk of dissipation. We will address, first, the arguments made by Mr Bouvier and then the arguments made by Mrs Rappo, because they engage somewhat different factual considerations. We should also add that the analysis at [39]–[142] below proceeds on the assumption that Singapore law governs the respondents' claims as that is the basis on which the arguments were presented to us. We are nonetheless aware that there are cogent arguments that Swiss law should govern the respondents' claims instead. These arguments on the applicable law are touched on in greater detail in the context of our analysis of the respondents' alternative request for interlocutory proprietary injunctions.

The arguments by Mr Bouvier

Overview

39 Mr Bouvier says that there is no real risk of dissipation in his case for three main reasons. The first is his international standing. He runs a successful, well-established and reputable business that operates in multiple countries. Second, Mr Bouvier relies on his punctilious compliance with the asset disclosures ordered by the Judge. This, he contends, evinces his intention to "participate fully in [the] proceedings and to clear his name [through] the legal process". Third, Mr Bouvier says that a good arguable case of dishonesty is by itself insufficient to give rise to a real risk of dissipation. He argues that the High Court decision of *Spectramed Pte Ltd v Lek Puay Puay* [2010] SGHC 112 ("*Spectramed*") is wrong. *Spectramed* is a decision which, on one reading, appears to obviate the requirement of showing a real risk of dissipation once the court is satisfied that a good arguable case of dishonesty or unconscionability on the defendant's part has been established.

40 The respondents advance the contrary position, also in three parts. First, they contend that they have established a good arguable case of dishonesty against Mr Bouvier, in that he perpetrated the sophisticated fraud which lies at the heart of their claims in the Singapore action. This alone warrants an inference of a real risk of dissipation. The respondents say that *Spectramed* is consistent with authority and does "no more than apply the general principles" pertaining to Mareva injunctions. Second, the respondents highlight that Mr Bouvier is a sophisticated international businessman who is capable of moving about large sums of money globally. In this regard, the respondents point to his shareholdings in companies across multiple jurisdictions. Third, the respondents argue that Mr Bouvier has been untruthful in his asset disclosures. This contributes to the degree of risk of dissipation by Mr Bouvier.

41 In our judgment, the Mareva injunction against Mr Bouvier should be discharged, and we arrive at this conclusion for these reasons. We accept that the respondents have established a good arguable case of dishonesty against Mr Bouvier, but it cannot be put higher than that. And it is insufficient to stop there. Rather, it is necessary to go further and inquire into the nature of the dishonesty that is alleged. As we see it, the nature of the dishonesty that is alleged against Mr Bouvier is not such that it can in itself fairly ground an inference of a real risk of dissipation. We are also not persuaded that the bare fact that Mr Bouvier operates through companies internationally is on its own relevant. The combined effect of these points is that the respondents have failed to establish a real risk that Mr Bouvier will dissipate his assets. We deal with these points in the two sections that follow (*ie*, [44]–[97] below).

42 We also find that the respondents' argument predicated on Mr Bouvier's asset disclosures is wrong in principle and is, in any event, unconvincing. We deal with this argument in the third section that follows (*ie*, [98]–[106] below).

43 The final reason why we discharge the Mareva injunction against Mr Bouvier is that it was an abuse of the court's process, and we deal with this point in the fourth and final section (at [107]–[130] below) of our analysis of Mr Bouvier's arguments.

Good arguable case but no higher

44 We mentioned at [10] above that the nub of the dispute between Mr Bouvier and the respondents turns on the characterisation of their relationship. The question is whether it was an agent-principal relationship or a principal-to-principal relationship. There is e-mail correspondence which very strongly favours the former characterisation. But, in our view, the circumstances of the transactions concerned as a whole cast doubt on such a characterisation. While the respondents assert, and we agree, that

their claims against Mr Bouvier cross the threshold of a good arguable case, there remain too many gaps in the evidence to put it any higher than that.

45 In support of the agent-principal characterisation, counsel for the respondents, Mr Alvin Yeo SC, took the court through numerous e-mails between Mr Bouvier and Mr Sazonov. These were communications between them in which they discussed the price and payment terms for the artworks, as well as the negotiating strategy that would be adopted when dealing with the original owners. We agree with Mr Yeo that the e-mail correspondence appears damning and does suggest that Mr Bouvier presented himself to Mr Rybolovlev and Mr Sazonov as though he was negotiating on the respondents' behalf.

46 In this regard, there is no trace in the e-mail correspondence of Mr Bouvier (or, for that matter, MEI Invest) being addressed as the "sellers". Instead, references to the "sellers" are consistently to third parties whose identities were not known to the respondents. There were numerous instances where Mr Bouvier held himself out as negotiating for the respondents with the "sellers". Mr Bouvier invariably also sought authorisation from Mr Rybolovlev, through Mr Sazonov, as to the maximum permitted price at which he could deal before he met with the "sellers". Mr Bouvier, on most occasions, described to Mr Sazonov the negotiation strategy which he intended to employ in order to coax the "sellers" to bring down the prices of the artworks for the respondents' benefit. The complexion of the e-mail correspondence as a whole strongly suggests that Mr Bouvier was acting as an agent of the respondents and was negotiating for the artworks on their behalf. It is thus consistent with the agent-principal relationship that the respondents are contending for.

47 The respondents' characterisation of the relationship between themselves and Mr Bouvier is that it was one built entirely on trust. There was no written agency agreement between them because they were prepared to work on the basis of a standing informal oral agreement. Among the essential terms of that agreement was one that they would pay Mr Bouvier a 2% commission for each transaction that he arranged. They and Mr Rybolovlev relied solely and entirely on Mr Bouvier for advice on which paintings to purchase and for how much. In short, they had complete confidence in Mr Bouvier.

48 However, the e-mail correspondence, which we have referred to and which seems to corroborate the respondents' version of what transpired, presents at most a partial view of the entire factual landscape that is relevant to this dispute; and when the dealings are viewed in their totality, other aspects of them raise questions that hint at dealings on a principal-to-principal basis, or at the very least, that Mr Rybolovlev and the respondents were aware of and thus acquiesced in the profit which Mr Bouvier was making on the transactions concerned. Three points stand out in particular.

49 First, it is at least doubtful, even if not wholly incredible, that the respondents genuinely believed that the remuneration for Mr Bouvier's services was limited to the 2% fee that the respondents plainly knew they were paying him. There is a dispute over whether that amount represented a commission or payment for administrative and other related services. Both sides claim that there is documentary evidence in support of their respective positions. But, putting that dispute aside, it was urged upon us by Mr Bouvier's counsel, Mr Edwin Tong SC, that the 2% commission, if that was indeed the entirety of Mr Bouvier's return, would have been an implausibly slim margin for the expertise, experience and value that Mr Bouvier had to bring to bear in order to source and then secure the target artworks that Mr Rybolovlev was seeking.

50 There was evidence before the court which indicated that art houses such as Sotheby's and Christie's typically charged a buyer's premium that was upwards of 20% for art auctions. The exact percentage varied according to the price at which the particular piece was sold. Mr Bouvier also told the Monaco authorities that it was "impossible" and "unimaginable" that Mr Rybolovlev could think he (Mr Bouvier) was not making money from the transactions. According to Mr Bouvier, Mr Rybolovlev "knows the market practices, he knows the rates of the sales houses". If that was the case, then in the absence of any other explanation, it seemed to us improbable that the respondents could reasonably have thought that Mr Bouvier, who was acting for them to source specific artworks, negotiate the price, secure the artworks and then make them available to the respondents, would limit his takings to the 2% payment that was made on these transactions.

51 Second, the respondents' account of their discovery of Mr Bouvier's fraud in late 2014 leaves a number of unanswered questions as to the true characterisation of the relationship between Mr Bouvier and the respondents. This point will require us to delve somewhat deeply into the events surrounding the respondents' purchase of the da Vinci, *Salvator Mundi*, which was made through Mr Bouvier in May 2013 (and which we have alluded to at [21] above).

52 The respondents purchased *Salvator Mundi* on 3 May 2013 for US$127.5m. About a year later, on 3 March 2014, the *New York Times* reported that *Salvator Mundi* "was bought by an unidentified collector for between *$75 million and $80 million in May 2013*, in a private sale" [emphasis added]. This article ("the NYT article") is of considerable significance. Had Mr Rybolovlev read the article, then in the absence of any compelling explanation, he must have known that it was describing *his* purchase of *Salvator Mundi*. The NYT article pinpointed the painting as well as the month of the transaction through which the respondents purchased the painting. But, there was one jarring discrepancy: the price

that the respondents paid was about US$50m in excess of the amount reported by the *New York Times*.

53 The evidence is unclear as to when the NYT article actually came to Mr Rybolovlev's attention, although it was common ground that he became aware of it at some stage before the end of 2014. Mr Rybolovlev told the Monaco authorities that he read it when an associate, Yuri Bogdanov, showed it to him "[s]ome time later" after the respondents had purchased *Salvator Mundi*. What is clear is that Mr Rybolovlev brought up the NYT article and its reference to *Salvator Mundi* at a meeting with Mr Bouvier in Monaco on 22 November 2014.

54 At that meeting, it does not appear that there was any serious argument or disagreement between Mr Rybolovlev and Mr Bouvier. The statements which Mr Rybolovlev gave to the Monaco authorities suggest that he was more concerned with the possibility of having overpaid for some of the artworks which he had acquired than the possibility of having been defrauded. He cited a Modigliani sculpture that he had purchased through Mr Bouvier which "sold at auction below the acquisition price". This is also consistent with Mr Bouvier's statements that when Mr Rybolovlev brought up the NYT article, Mr Rybolovlev expressed his concern over whether the respondents had purchased *Salvator Mundi* at "too high a price". But, it did not go further than that. Mr Rybolovlev did not think it necessary to inquire further into the purchase of *Salvator Mundi* or press Mr Bouvier for written proof of the amount that he had paid the original seller for the painting. It appears that Mr Bouvier was able to assuage Mr Rybolovlev's concerns by explaining that the art market at that time was "very difficult". Mr Bouvier told Mr Rybolovlev that "the Russians are no longer buying, the stock markets are weak, the Greek crisis is here, there is also the fall in oil prices, and the market in China has yet to be created". At the meeting on 22 November 2014, Mr Bouvier and Mr Rybolovlev also discussed other matters, including the financing for the purchase of the Rothko, *No 6 (Violet, vert et rouge)*.

55 It is notable, in this connection, that after the 22 November 2014 meeting, business continued as usual between the parties. There was upbeat correspondence between Mr Bouvier and Mr Sazonov in mid- and late December 2014 discussing the respondents' purchase of *No 6 (Violet, vert et rouge)*. The exchanges were convivial and nothing appeared out of the ordinary; indeed, one of the e-mail threads was titled "Re: How are things going? :-)".

56 On the respondents' version of the events, the relationship between Mr Rybolovlev and Mr Bouvier only broke down on or after 31 December 2014, when Mr Rybolovlev met Mr Heller and discovered that he had overpaid for a Modigliani (see [21] above). Mr Yeo argued that the conversation between Mr Rybolovlev and Mr Bouvier on 22 November 2014 marked only the beginning of suspicions that took shape and

eventually developed into a deep sense of betrayal, resulting in an irretrievable fissure by the end of that year. It was therefore not unusual that business carried on as usual after the 22 November 2014 meeting. As Mr Yeo put it, a relationship of trust that had been built up over many years did not simply "fall off a cliff".

57 With great respect, we find it impossible to accept this account of the events. If the characterisation of the relationship between Mr Bouvier and the respondents is as the latter suggest, Mr Rybolovlev could not possibly have been satisfied by *any* explanation of the market value of *Salvator Mundi* that Mr Bouvier might have given at or after the 22 November 2014 meeting. This is all the more so because based on Mr Bogdanov's statements to the Monaco authorities, there were already "some doubts [about Mr Bouvier] in *September or October 2014*" [emphasis added]. If that was true, then the discovery (assuming this was the first time Mr Rybolovlev found out) in November 2014 that there was a gulf of approximately US$50m between the price which the respondents had paid for *Salvator Mundi* and the reported selling price of that painting could not possibly be explained away on the basis of a residual sense of trust.

58 On the respondents' version of the facts, the question in Mr Rybolovlev's mind at the 22 November 2014 meeting could not have been whether he had overpaid for *Salvator Mundi* by reference to its market value. The foremost – indeed, the *only* – question on Mr Rybolovlev's mind must have been whether and, if so, how he had been cheated by Mr Bouvier. Mr Bouvier would not have been able to give *any* convincing explanation of this marked price differential when he was confronted with these facts by Mr Rybolovlev at the 22 November 2014 meeting. Significantly, there is nothing in the evidence to suggest that Mr Bouvier tried to deny the accuracy of the NYT article or any of the details contained therein. This seems almost impossible to reconcile with the notion that the respondents and Mr Rybolovlev all thought that Mr Bouvier was purely the fiduciary agent of the respondents earning nothing but the 2% "commission". Moreover, it seems to us inexplicable that business between the parties could carry on as usual after the 22 November 2014 meeting if the respondents' version is accepted.

59 We accept that we should not wade into the merits in a case such as this, which is very much at an interlocutory stage. But, we have examined the underlying evidence on the characterisation of the relationship between Mr Bouvier and Mr Rybolovlev in some detail because whereas the e-mails that we referred to at [45]–[46] above seem to weigh strongly in favour of the respondents' agent-principal characterisation, this aspect of the case seems to weigh just as strongly in the opposite direction.

60 The third and final reason why we consider that the respondents do no more than cross the threshold of a good arguable case is that the early transactions between the respondents and Mr Bouvier, at least, do not

appear to have rested on a relationship built solely on trust. It will be recalled that Mr Bouvier was introduced to Mr Rybolovlev in 2003. The first of the 38 artworks that the respondents purchased through Mr Bouvier was a van Gogh on 26 August 2003. There is no documentation of that transaction in the evidence. But, the next three transactions, which involved, respectively, a Picasso (on 4 November 2004), a Modigliani (on 10 April 2006) and another Picasso (on 25 October 2006), were all documented with formal contracts. For each of these transactions, the respondents sent the contracts to their Swiss lawyers, Lenz & Staehelin (Switzerland's largest law firm), for comment and review before they were concluded. The e-mail correspondence between Mr Bouvier and Mr Sazonov in relation to these transactions was cordial and polite, but reserved. The fifth to seventh transactions were for, respectively, two pieces of furniture (one on 2 March 2007 and the other on 10 July 2007) and a Modigliani sculpture (on 25 October 2007). These transactions were documented by invoices, and there is little correspondence relating to them in the evidence.

61 It was only in the correspondence for the eighth transaction (dated 21 December 2007) for a Modigliani and onward that Mr Bouvier began to employ language which suggested that he was negotiating as the agent for the respondents. Even then, the e-mail correspondence relating to that transaction was warm, but not yet informal. The relationship between Mr Bouvier and the respondents was therefore not a uniform one. If the relationship had started on one footing, then there would have to be some explanation as to how that changed. However, no evidence was put before the court to explain this. The respondents' position before us was simply that the relationship between Mr Bouvier and the respondents was a fiduciary one that was built on trust from the outset.

62 We recognise that seven artworks are but a fraction of the 38 artworks which the respondents purchased through Mr Bouvier. But, these concerns add up. Together, they bring home the point that at the interlocutory stage, the court must tread cautiously. It must not treat allegations of dishonesty as established. This is not a case where the uncontroverted documentary evidence is so firmly in the respondents' favour that the court can comfortably descend into the merits and conclude that Mr Bouvier was dishonest, and then assess on this basis whether his dishonesty suggests a real risk of dissipation. There yet remain inflections in the narrative and gaps in the plot, which will have to be filled in due course. All that can be said at this stage is that there is a good arguable case of dishonesty on Mr Bouvier's part.

Dishonesty and a real risk of dissipation

63 The respondents argue that the court may infer a real risk of dissipation just from the fact that a good arguable case of dishonesty has

been put forward against Mr Bouvier. The argument is grounded in part on the following passage in *Spectramed* ([39] *supra*) at [19]:

> From the cases cited above, it is clear that allegations of dishonesty are relevant to the issue of whether there is a risk of dissipation of assets. *If there is a good arguable case in support of an allegation that* ***the defendant has acted fraudulently, dishonestly or unconscionably****, it is* ***unnecessary for there to be any further specific evidence on risk of dissipation*** *for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief* (see [Steven] Gee, *Mareva Injunctions and Anton Piller Relief* (Sweet & Maxwell, 4th ed, 1998 … at 198). [emphasis in original omitted; emphasis added in italics and bold italics]

We refer to this as "the *Spectramed* proviso". It appears to obviate the need to *separately* establish a real risk of dissipation once a good arguable case of dishonesty against the defendant has been established.

64 Chan Seng Onn J ("Chan J"), who decided *Spectramed*, cited two cases in support of this proviso. The first was his own earlier decision in *Multi-Code Electronics Electronic Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 ("*Multi-Code Electronics*"), and the second, the decision of the New South Wales Court of Appeal in *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 ("*Patterson v BTR Engineering*"). Chan J also referred to the monograph by Steven Gee QC, *Mareva Injunctions and Anton Piller Relief* (Sweet & Maxwell, 4th Ed, 1998), which makes a statement (at p 198) to a similar effect. The same passage from *Mareva Injunctions and Anton Piller Relief* had been cited with approval in the earlier decision of the Singapore High Court in *OCM Opportunities Fund II, LP v Burhan Uray* [2004] SGHC 115 ("*OCM Opportunities*") at [73], where it was said to be "trite law" that "an appropriate case of risk of dissipation is made out, evidentially, where there is a good arguable case of fraud".

65 In our judgment, the *Spectramed* proviso goes too far. An allegation of dishonesty cannot obviate the need to establish a real risk of dissipation. This conclusion stands on three planks. The first is a matter of common sense. The fact that a defendant might be crooked does not in and of itself establish that there is therefore a real risk that he will bury his spoils to defeat a judgment that may in due course be rendered against him. The *Spectramed* proviso fails to distinguish between a defendant against whom a plausible allegation of dishonesty is made but who may turn out otherwise after defending the suit, and one who might be motivated by the pending litigation against him to behave even more dishonestly. Moreover, dishonest conduct can come in different shades and hues. The *Spectramed* proviso fails to distinguish between different types of dishonest conduct, some of which might more readily support an inference of a real risk of dissipation than others. To take an obvious example, it seems to us wrong in principle to treat a case where there is really no dispute that a grave fraud

has been committed with the defendant's involvement, leaving only the precise nature of his role to be determined, in precisely the same way as a case where there may or may not have been fraud or dishonest conduct on the defendant's part at all, that being a matter which can only be determined at the trial.

66 This leads us to our second point, which is that it is incorrect for the court to treat allegations of dishonesty made at an interlocutory stage as if they have already been established. Such allegations may eventually be refuted. As a matter of principle therefore, the grant of Mareva relief should not generally be *wholly* founded upon an unproven allegation of dishonesty. This does not mean that the evidence provided in support of an allegation of dishonesty is irrelevant. But, the objection from principle dictates that the existence of a real risk of dissipation must be assessed *independently* from the prospect of the plaintiff's eventual success (or failure) in establishing an allegation of dishonesty. This point was made by Chan Sek Keong J (as he then was) in *European Grain & Shipping Ltd v Compania Naviera Euro-Asia SA* [1989] 2 SLR(R) 445 ("*European Grain*") at [21], where he refused to consider allegations of fraud directed at a defendant when determining whether there was a real risk of dissipation. *European Grain* was not considered by the court in either *Spectramed* or *OCM Opportunities*.

67 Third, the *Spectramed* proviso is not borne out by either the case law cited in support of it or the larger body of jurisprudence dealing with Mareva injunctions. The fifth edition of Steven Gee's monograph on Mareva injunctions and Anton Piller relief, which was renamed *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004), pulls back (at para 12.040) from the absolute position that the fourth edition of the work (*ie*, *Mareva Injunctions and Anton Piller Relief* (cited earlier at [64] above)) took. *Commercial Injunctions* does not appear to have been drawn at all to the court's attention in *Spectramed*, and it had not been published yet when *OCM Opportunities* was decided.

68 We will discuss decisions from Singapore as well as other jurisdictions in terms of how they weigh in on this third point. Many of these decisions were raised either in counsel's written submissions or in the oral arguments before us. We summarise our detailed observations on the relationship between allegations of dishonesty and a real risk of dissipation at [93]–[94] below. Following that, at [95]–[97] below, we examine the facts before us against the backdrop of our review of the jurisprudence.

69 It will be evident from what we have said that our case law has not taken a uniform approach to whether and, if so, when allegations of dishonesty may in themselves ground an inference of a real risk of dissipation. In *European Grain*, the plaintiff charterers brought claims against a defendant shipowner for, among other things, damages for breach of a charterparty. The plaintiffs argued that there was a real risk of

dissipation because: (a) the defendant was a Panamanian trading company with little or no assets to its name and a small market capitalisation; (b) the defendant had not been forthcoming with its financial records; and (c) the defendant was dishonest and was being sued for fraudulent conspiracy in a separate pending suit. Chan Sek Keong J disagreed with the plaintiffs and discharged the Mareva injunction that they had obtained *ex parte*. He pointed out that the fact that the defendant was a Panamanian one-ship company was not at all unusual. The defendant had also been candid in its compliance with the asset disclosures that were ordered as ancillaries to the Mareva injunction. As for the allegation of dishonesty, this was given short shrift, as we have already noted (see [66] above). In our judgment, it was material that in *European Grain*, no allegation of dishonesty was made in the action in which the injunction was sought. Rather, the allegation of dishonesty was the subject of a separate, and as yet unconcluded, suit.

70 In *OCM Opportunities*, the plaintiff investors brought claims against the first to eleventh defendants for fraudulent misrepresentations. The misrepresentations allegedly induced the plaintiffs to invest in sophisticated financial instruments issued by the seventh and eighth defendants. The misrepresentations were said to include the following, amongst others:

(a) Third-party receivables were reflected in the seventh defendant's financial statements when they were actually owed by parties related to or controlled by the first defendant's family.

(b) Fictitious transactions were entered in the seventh defendant's accounts with the intent that they should create the appearance of genuine commercial sales.

(c) The invested funds were not channelled into the seventh defendant's expansion plans as represented. They were instead diverted to illegal logging activities, and the proceeds from those activities were channelled back to the fourteenth and fifteenth defendants.

The defendants "categorically denied any wrongdoing", and alleged that the plaintiffs' losses were no more than investment losses incurred in the distressed debt market: *OCM Opportunities* at [20]. The judge refused to discharge the Mareva injunctions which had earlier been granted to the plaintiffs because she thought that a good arguable case of fraud had been made out, and that was "evidentially" sufficient to establish a real risk of dissipation: *OCM Opportunities* at [73]. It seems to us that the judge may have been swayed by the passage in the fourth edition of Steven Gee's monograph (*viz*, *Mareva Injunctions and Anton Piller Relief*), but, as we have noted, this was later revised in the next edition (*viz*, *Commercial Injunctions*).

71 In *Multi-Code Electronics* ([64] *supra*), the plaintiff companies alleged that their assets had been misappropriated by the first and second

defendants. The first defendant was the managing director of the first plaintiff and a director of the second plaintiff. The second defendant was a director of the second plaintiff. Together, they allegedly caused the plaintiffs to make unauthorised payments totalling about RM44m out of the plaintiffs' accounts. The plaintiffs asserted on affidavit that these payments were made against forged or fictitious documents. This was not disputed by the defendants: *Multi-Code Electronics* at [11]. The plaintiffs sought and obtained *ex parte* Mareva injunctions against the first and fourth defendants, amongst others. Chan J refused to discharge the Mareva injunctions. He said, after a close examination of the documents, that there was "more than *prima facie* evidence … of [the first and fourth defendants'] participation in the alleged fraud": *Multi-Code Electronics* at [150]. The first defendant appeared to be the mastermind using the fourth defendant as a vehicle for his fraudulent conspiracy. Chan J concluded at [151]:

> The plaintiffs clearly had more than an arguable case against the first and fourth defendants. I would not need the plaintiffs to show me further evidence of the propensity or the risk of dissipation of assets to maintain the Mareva injunction against them. The probity, honesty and integrity of the first and fourth defendants, their trustworthiness and reliability to engage in fair dealing had already been called into question because of the nature of the claim based on their participation in a conspiracy to defraud. *The risk of dissipation of assets was no longer in the realm of mere possibility or imagination. In my view, it was very real in the case of the first and fourth defendants, given what they had done to defraud the plaintiffs as alleged.* [emphasis added]

In our judgment, it is evident from this passage as well as the other references we have made above to the decision, that Chan J was satisfied, having regard to: (a) the particular allegations of dishonesty; (b) the strength of the evidence before him; and (c) the absence of any denial by the defendants of some of the key damning facts, that there was more than sufficient basis to infer a real risk of dissipation. We see no difficulty with this, but we do not read it as supporting the broader statement of the law that is set out in *Spectramed*.

72 Chan J issued his decision in *Spectramed* more than a year after he decided *Multi-Code Electronics*. In *Spectramed*, the plaintiff company brought claims against the defendants for systematically and deceitfully running the company to the ground by diverting its business to a competing company. The first defendant and her husband, the second defendant, were employed by the plaintiff as the managing director and the marketing manager respectively. The third defendant was an administrator employed by the plaintiff. The second defendant incorporated the fourth defendant while he was still in the employ of the plaintiff, and, together with the first and third defendants, diverted the plaintiff's business to the fourth defendant over a period of time. The first to third defendants were alleged to have taken active steps to dishonestly conceal their actions. The

plaintiff sought Mareva injunctions against the first, second and fourth defendants. These defendants argued that they had not done anything to dissipate their assets. Chan J disagreed and granted the Mareva injunctions. He held that there was a *prima facie* case that the defendants had dishonestly misappropriated the plaintiff's assets such that a risk of dissipation existed: *Spectramed* at [20].

73 Despite articulating the *Spectramed* proviso (which, on the face of its wording, should have been sufficient to dispose of the case since there was a good arguable case of dishonesty), Chan J *in fact* went on to consider evidence from the defendants as to the type of assets they held: *Spectramed* at [21]. He observed that a large part of their assets were held in bank accounts and unit trusts, and that these could be spirited away with ease. He also thought that there was a danger of the fourth defendant transferring its distributorships and goodwill (which were alleged to have been misappropriated from the plaintiff) to another company in the same way as they had allegedly been diverted from the plaintiff. Based on all these factors, Chan J concluded that there was a real risk of dissipation and granted the Mareva injunctions sought. Hence, it seems to us that the learned judge, despite having articulated the *Spectramed* proviso, did not base his decision solely on it, but went on to assess the evidence to determine whether it supported the inference that there was a sufficient risk or likelihood of dissipation of assets.

74 We turn, next, to the English authorities, which likewise have not been entirely consistent in their approach to the weight that the court may attribute to allegations of dishonesty when considering whether there is sufficient basis to infer a real risk of dissipation. Five cases stand out, and we take them in chronological order. They serve to illustrate the ebb and flow of English legal opinion on this point.

75 The first case is *Grupo Torras SA v Sheikh Fahad Mohammed Al Sabah* 1997 WL 1105536 (21 March 1997) ("*Grupo Torras*"), a decision of the English Court of Appeal. The plaintiffs in that case claimed that they had been defrauded of a sum of about US$300m. US$20m of that larger sum was routed through a Swiss lawyer's client account and distributed on the instructions of Sheikh Fahad Mohammed al Sabah. The person responsible for distributing the money on the Sheikh's instructions was a Mr Dawson, who himself received US$2m out of the US$20m sum. The plaintiffs brought a claim against Mr Dawson based on, amongst other causes of action, conspiracy, dishonest assistance and knowing receipt. The plaintiffs obtained a Mareva injunction against Mr Dawson. On appeal by the latter against the grant of that injunction, one of the questions before the English Court of Appeal was whether there was a real risk of dissipation. Mr Dawson argued that the judge below had erred in concluding that such a risk existed merely because the case involved allegations of fraud.

76 The English Court of Appeal rejected Mr Dawson's argument. Saville LJ, with whom Judge LJ and Sir Patrick Russell agreed, said that in the light of the nature of the fraud which was alleged, it was not surprising that the judge concluded that there was "a strong fear of dissipation":

> What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the fraud; and that ***the nature of the allegations was such that there was a strong fear of dissipation***. *Since it is part of Mr Dawson's own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes*, I am not in the least surprised that the judge reached the conclusion that he did. In short I remain wholly unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this court to interfere. [emphasis added in italics and bold italics]

The Mareva injunction was therefore upheld by the English Court of Appeal, but we pause to observe that what seemed to have been decisive was the nature of the conduct that was at issue and how it bore on the inference of a real risk of dissipation.

77 The next case is *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 ("*Thane Investments*"), also a decision of the English Court of Appeal, which seemed to curtail any trend there might have been towards generously drawing inferences of a real risk of dissipation whenever dishonesty or fraud had been alleged and found to be seriously arguable. In that case, the plaintiff companies brought proceedings against two former directors, Mr Tomlinson and Mr Knopp, for misfeasance and breach of fiduciary duties. The English High Court had found, in separate proceedings which were already concluded, that Mr Tomlinson and Mr Knopp were errant directors who had run the plaintiff companies like "their private fiefdom". Mr Tomlinson was not a defendant in those earlier proceedings, although he did give evidence therein. After the judgment in those earlier proceedings was issued, the plaintiffs applied *ex parte* and obtained a worldwide Mareva injunction against Mr Tomlinson and Reyall, a company alleged to be controlled by him. Mr Tomlinson was resident in the Isle of Man, and Reyall was also incorporated there. The application to discharge the Mareva injunction was heard *inter partes* and dismissed by Neuberger J (as he then was). Mr Tomlinson and Reyall appealed.

78 The English Court of Appeal made some strongly-worded remarks on the procedural breaches occasioned at the *ex parte* hearing of the plaintiffs' injunction application. But, putting those breaches aside, the English Court of Appeal turned to consider whether it should continue the Mareva injunction against Mr Tomlinson and Reyall. It held that there was no real risk of dissipation and set aside the Mareva injunction. Peter Gibson LJ, with whom Sir Anthony Evans agreed, said at [28]:

> I regret that I do not see that the judgment [in the earlier proceedings] does support a conclusion that in the particular circumstances of Mr Tomlinson and Reyall there was a real risk of assets being dissipated. *[Counsel for the plaintiffs] 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 … 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 in italics and bold italics]

The English Court of Appeal also did not think it persuasive that Mr Tomlinson was resident in the Isle of Man or that Reyall was a Manx corporation. Peter Gibson LJ said that there was nothing to suggest any difficulty in enforcing English judgments in the Isle of Man. We note that the English Court of Appeal, in coming to its decision to set aside the Mareva injunction, did not appear to have cited or considered *Grupo Torras*.

79 Subsequent first-instance English decisions have cited *Thane Investments* with approval, for instance, *Cherney v Neuman* [2009] EWHC 1743 (Ch) ("*Cherney v Neuman*") and *Irish Response Limited v Direct Beauty Products Limited* [2011] EWHC 37 (QB) ("*Irish Response*"). In both cases, the court refused to infer a real risk of dissipation even though there was a good arguable case of dishonest conduct by the defendant. In the former, the defendant was alleged to have taken inconsistent positions in related proceedings in Spain (see *Cherney v Neuman* at [78]–[90]); in the latter, the defendant was alleged to have perjured himself before a Danish court in proceedings that had already concluded and that arose from a connected dispute (see *Irish Response* at [69]–[77]).

80 The third case that we consider is the English High Court decision of Patten J in *Jarvis Field Press Limited v Chelton* [2003] EWHC 2674 (Ch) ("*Jarvis Field Press*"). In that case, the plaintiff company ("Jarvis") sought the continuance of a Mareva injunction which it had previously obtained *ex parte* against the defendants, Mrs Chelton and Mr Long. Mrs Chelton was a director of Jarvis. Jarvis alleged that Mrs Chelton and Mr Long had made unauthorised and unlawful payments out of its assets over a period of two years. Mrs Chelton was also alleged to have caused Jarvis, through deception, to make a loan to a third company, CSM Group Limited. Most of the loan moneys, however, were not paid to CSM Group Limited, but were instead paid to Glenwise Limited, a company owned wholly by Mrs Chelton. The documentary evidence and the particulars of claim against Mrs Chelton were said to disclose (*Jarvis Field Press* at [5]):

> … a consistent and determined fraud on the part of Mrs Chelton and those associated with her, whereby significant sums of money were extracted from the claimant company in a devious and secret way, utilising in effect a secret account, with a total absence of disclosure to the board of the claimant company, or indeed to anybody else.

Jarvis asked the court to infer that there was a real risk of dissipation based on the alleged dishonest conduct on Mrs Chelton's part and the fact that the liquidator of CSM Group Limited had recently commenced proceedings against Mrs Chelton: *Jarvis Field Press* at [8].

81 Patten J cited the passage from *Thane Investments* quoted at [78] above, but did not consider it at odds with the proposition that an allegation of dishonesty *could in itself* justify an inference of a real risk of dissipation (*Jarvis Field Press* at [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 freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself *whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson 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 in italics and bold italics]

Patten J maintained the Mareva injunction which Jarvis had earlier obtained because he thought that there was a real risk of dissipation. He emphasised that there was a good arguable case that Mrs Chelton "will have systematically defrauded the claimant company in a dishonest and secretive way, and in a way that has every indication of being relatively sophisticated": *Jarvis Field Press* at [11]. He said that there was an "appreciable risk" in the case of a defendant who "appears to be guilty not merely of dishonesty, but [of] dishonesty in financial dealings in relation to the use or misuse of assets, that she will take steps to put some of those assets … out of the [plaintiff's] reach": *Jarvis Field Press* at [17]. It is plain to see that it was the nature of the dishonesty alleged in *Jarvis Field Press* that led Patten J to conclude that there was a sufficiently real risk of dissipation to warrant the Mareva injunction being maintained.

82 The fourth case is *Madoff Securities International Limited v Stephen Ernest John Raven* [2011] EWHC 3102 ("*Madoff Securities*"), a decision of Flaux J. The two plaintiffs in that case were the liquidators of the Madoff group of companies and were seeking to claw back payments made to the defendants. Amongst the defendants was Sonja Kohn, an Austrian who

"lived and conducted her affairs internationally through a series of corporate vehicles" (she and her corporate vehicles were collectively referred to by Flaux J as "the Kohn defendants"): *Madoff Securities* at [4]. The Kohn defendants had received millions in payments from the Madoff group over the course of some 30 years for introducing investors to Bernard Madoff. The claimants did not plead that the Kohn defendants were actually party to Mr Madoff's fraud, nor did they allege that the Kohn defendants ought to have been aware of the fraud: *Madoff Securities* at [5]. Rather, the allegation of dishonesty arose from the fact that none of the invoices which the Kohn defendants issued for the payments from the Madoff group indicated that the payments were in the nature of commissions. The invoices contained, instead, vague references to "research, analysis and consulting", "market researching" and "strategic consulting and market researches": *Madoff Securities* at [7]. The plaintiffs alleged that these sham invoices were intended to conceal the true nature of the payments (*Madoff Securities* at [8]):

> [T]he payments were illegitimate payments amounting to secret kickbacks to Mrs Kohn for introducing money into Mr Madoff's scheme and … Mrs Kohn knew that the real reason for the payments was secretly to pay her for introducing money into the scheme and that the various invoices were sham documents intended to hide the true nature of the payments to the Kohn defendants.

The plaintiffs applied for proprietary and Mareva injunctions against the Kohn defendants. On a jurisdictional point, Flaux J found that he had jurisdiction only over the claims made by one of the two plaintiffs. That plaintiff argued that there was a real risk of dissipation by the Kohn defendants as they had issued "a whole raft of sham invoices and disguised the true nature of payments received"; this was said to be "evidence of deliberate misconduct on a grand scale over a long period of time": *Madoff Securities* at [161].

83 Flaux J was referred to *Grupo Torras* ([75] *supra*), *Thane Investments* ([77] *supra*) and *Jarvis Field Press*. He agreed with Patten J's analysis in *Jarvis Field Press*. Flaux J did not accept the Kohn defendants' submission that the fact of Mrs Kohn's cooperation with the authorities upon Mr Madoff's arrest showed that there was no real risk of dissipation. Flaux J said that Mrs Kohn's cooperation was outweighed by her refusal to voluntarily disclose her assets. She had also been evasive when questioned by an Austrian state prosecutor in separate proceedings. Flaux J said that the false invoices which Mrs Kohn had produced over many years "crie[d] out for a proper explanation". He concluded at [169]:

> … It seems to me that what emerges is a sufficiently arguable case of deliberate wrongdoing, *the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars made to the Kohn defendants*

> *over many years*. This demonstrates *in itself* a serious risk of dissipation. [emphasis added]

Flaux J granted the proprietary and Mareva injunctions sought, and also made ancillary disclosure orders against the Kohn defendants. Once again, it will be evident from the passage we have just quoted that what was material about the nature of the alleged fraud in *Madoff Securities* is that it suggested a propensity to conceal assets and payments through the device of fictitious instruments. In that sense, the link to an inference of a real risk of dissipation was clear. Moreover, Mrs Kohn put forward no reason or explanation for what appeared to be a string of sham invoices issued by the Kohn defendants that were intended to conceal the nature of the payments to them.

84 The final case is the decision of the English Court of Appeal in *VTB Capital plc v Nutritek International Corporation* [2012] 2 Lloyd's Rep 313 ("*VTB v Nutritek (CA)*"). The plaintiff ("VTB"), a bank incorporated in London, lent a sum of more than US$220m to a Russian company ("RAP") for the purchase of Russian dairy plants from a BVI company ("Nutritek"). Nutritek was owned by Marcap BVI and Marcap Moscow, which were a BVI company and a Russian company respectively. RAP defaulted on the loan, and VTB only managed to recover US$40.5m. It subsequently transpired that the same person, Konstantin Malofeev, was effectively in control of RAP, Nutritek, Marcap BVI and Marcap Moscow, the parties on both sides of the transaction. VTB brought claims against Nutritek, Marcap BVI, Marcap Moscow and Mr Malofeev alleging conspiracy and joint liability for deceit. VTB obtained an *ex parte* worldwide Mareva injunction against Mr Malofeev.

85 Two applications by the defendants were before the court. The first was a challenge to the service of the writs out of jurisdiction. The second was an application to discharge the worldwide Mareva injunction against Mr Malofeev, who was resident in Russia. In the English High Court, Arnold J decided both issues in favour of the defendants. On the Mareva injunction, Arnold J said that the fact that Mr Malofeev had allegedly engaged in a major fraud and operated a "complex web of companies" was not sufficient to establish a real risk of dissipation: *VTB Capital plc v Nutritek International Corp* [2011] EWHC 3107 (Ch) ("*VTB v Nutritek (HC)*") at [233]. Arnold J said that Mr Malofeev's operation of a web of companies was relevant, but "not a strong pointer towards a risk of dissipation" as "[i]t is not uncommon for international businessmen, and indeed quoted UK companies, to use offshore vehicles for their operations, particularly for tax reasons": *VTB v Nutritek (HC)* at [233].

86 On appeal by VTB, the English Court of Appeal agreed with Arnold J's decision on jurisdiction and set aside the service of the writs out of jurisdiction. Since the court no longer had personal jurisdiction over the defendants, the issue of the Mareva injunction fell away. The English Court

of Appeal nonetheless made some observations on the grant of the Mareva injunction since it had heard full arguments on the point. The English Court of Appeal thought that there was a real risk of dissipation and would not have set aside the Mareva injunction against Mr Malofeev. Lloyd LJ's observations on this point (at [172]–[175] of *VTB v Nutritek (CA)*) are instructive and bear setting out in full:

> 172. If the question [of the Mareva injunction] had arisen, it would have been on the footing that VTB has a seriously arguable case for saying that Mr Malofeev had been engaged in a major fraud against VTB, by which VTB was persuaded to lend RAP US$220 million to fund what was represented as a sale of assets worth substantially more than that amount, whereas in fact, first, the assets were worth a great deal less, and secondly the transaction was not a true sale, and moreover a substantial part of the proceeds of the loan (it can be assumed) disappeared into the complex web of corporate entities in various jurisdictions, including several offshore, for the benefit of Mr Malofeev, and maybe for that of others involved. Furthermore, not only was the use of that web of corporate entities a significant part of the means whereby the fraud was committed, by concealing the true ownership of RAP, but it would also make it difficult for VTB to enforce any judgment that it was able to obtain. …
>
> 173. It seems to us that these propositions would have provided a strong starting point for a case in favour of the grant of a [worldwide Mareva injunction]. It could be inferred that *a wealthy individual who uses such methods to defraud a bank in this way and on this scale might readily resort to similar methods to render his major assets proof against enforcement in response to proceedings being taken against him, at any rate if he had reason to fear that the proceedings might be pursued effectively.*
>
> 174. The judge attached little, if any, weight to those basic elements of the situation, as regards the application for the [worldwide Mareva injunction], for particular reasons to do with the evidence and the presentation of the case, to which we need not refer. In addition to discounting, for those reasons, the factors to which we have referred at para 172 above, the judge observed at para 233 that it was common for international businessmen to use offshore vehicles for their operations, particularly for tax reasons, and that this may make it difficult to enforce a judgment, but that claimants such as VTB 'have to take defendants such as Mr Malofeev as they find them', the use of offshore companies not being sufficient evidence of a risk of dissipation. *It seems to us that while that may be a fair comment as regards international businessmen generally, the factor of a good arguable case as to fraud against the person in question, and the use of a web of offshore companies in connection with the fraud, could properly provide a basis for taking this into account in favour of the grant of an injunction.*
>
> 175. Given that there is (as the judge held) a good arguable case against Mr Malofeev on an allegation of fraudulent misrepresentation used to procure a loan of US$220 million against wholly inadequate (and itself misrepresented) security, *on the part of a businessman with international connections and assets, using offshore companies in many parts of the world, it*

> *might not be difficult to suppose that, if Mr Malofeev thought he was at risk of having his assets seized to answer a judgment against him, he would dispose of those assets, or move them into a situation in which it would be difficult or impossible for the claimant to reach them.*
>
> [emphasis added]

87 Lloyd LJ also cited Flaux J's judgment in *Madoff Securities* at length and with approval. The appeal against the English Court of Appeal's decision in *VTB v Nutritek (CA)* was dismissed on the jurisdictional point by a majority of the UK Supreme Court: *VTB Capital plc v Nutritek International Corporation* [2013] 1 Lloyd's Rep 466. The UK Supreme Court did not make any substantive remarks on the English Court of Appeal's observations on the Mareva injunction against Mr Malofeev: at [72] *per* Lord Mance JSC, at [150] *per* Lord Neuberger of Abbotsbury PSC and at [159]–[160] *per* Lord Wilson JSC. It is evident once again that the material considerations identified by Lloyd LJ included the fact that the methods allegedly used to defraud VTB were precisely the sort of methods that could be used to put Mr Malofeev's assets beyond the reach of a judgment creditor (*VTB v Nutritek (CA)* at [173]), and that Mr Malofeev allegedly used a web of companies to defraud VTB. These factors in turn could then be a basis for inferring a real risk of dissipation (*VTB v Nutritek (CA)* at [174]–[175]).

88 We turn, finally, to two Australian cases. The first is *Patterson v BTR Engineering* ([64] *supra*), one of the two cases relied on by Chan J in *Spectramed* ([39] *supra*) (see [64] above). In *Patterson v BTR Engineering*, the plaintiff company obtained a Mareva injunction against a former senior employee. The ex-employee was alleged to have interposed the fourth defendant, a company which he apparently indirectly controlled, between the plaintiff and certain overseas suppliers while he was still in the plaintiff's employ. Through this scheme, he made a secret profit by fraudulently procuring the plaintiff to overpay on equipment purchases which were routed through the fourth defendant. There was little or no direct evidence showing a risk of the ex-employee dissipating his assets. The Court of Appeal of New South Wales nonetheless upheld the decision of the first-instance judge, Giles J, to maintain the Mareva injunction which had been granted to the plaintiff. The appellate court inferred a real risk of dissipation from the allegations and the evidence placed before it. The decision was unanimous, but there were differences in the reasoning of Gleeson CJ and Meagher JA, who each delivered a judgment on the point. Rogers AJA, the third member of the court, agreed with Gleeson CJ.

89 Gleeson CJ said at 325E–326A:

> I consider that Giles J was correct in taking the view that *the evidence as to the nature of the scheme in which the [defendant ex-employee] was allegedly involved*, which established a prima facie case against him, *was such as to justify the conclusion that there was a danger that the [defendant] would*

> *dispose of assets in order to defeat any judgment that might be obtained against him and that such danger was sufficiently substantial to warrant the injunction. There is no reason in principle why the evidence which is relevant to the first [issue of establishing a* prima facie *case] might not also have a bearing on the second, and this will especially be so where the prima facie case that is made out against a defendant is one of serious dishonesty involving diversion of money from its proper channels. …* This is a case in which the plaintiff claims that the defendant, making use of a corporation controlled by him, fraudulently misappropriated a large sum of money which, if it is still under the control of the [defendant], would be quite likely to constitute, directly or indirectly, the bulk of his assets. *As Giles J held, the nature of the scheme in which, on the evidence to date, the [defendant] appears to have engaged, is such that it is reasonable to infer that he is not the sort of person who would, unless retrained, preserve his assets intact so that they might be available to his judgment creditor.* [emphasis added]

90 Meagher JA put the proposition more broadly. He said at 326C–326E:

> Normally proof of [a *prima facie* case] alone will not suffice; normally one cannot infer a risk of dissipation of assets from the mere fact that the plaintiff has a prima facie cause of action. In normal circumstances this is particularly so in cases like the present, where there is no evidence at all what the defendant's assets are. However, in *exceptional* cases (of which the present is unfortunately one) *one can infer the existence of the latter ingredient partly or wholly from proof of the former. This may well be the situation in all cases where the plaintiff's prima facie case against the defendant involves proof of gross dishonesty.* [emphasis added]

91 The way in which the point was put by Gleeson CJ is entirely consistent with the approach taken in *Grupo Torras* ([75] *supra*), *Jarvis Field Press* ([80] *supra*) and *Madoff Securities*, as well as with the observations of Lloyd LJ in *VTB v Nutritek (CA)*, which we cited earlier. In these instances, the focus of attention was on the *nature* of the alleged fraud and whether it supported the drawing of an inference of a real risk of dissipation. Meagher JA's *dictum*, in contrast, was framed in wider terms. It formed the basis of an argument by the plaintiffs in *Media World Communications Ltd (Administrator Appointed) v Clark* [2004] FCA 1609 ("*Media World*") in their application for a Mareva injunction. *Media World* was a first-instance decision of the Federal Court of Australia. The plaintiffs in that case had, in a series of transactions, purchased what was referred to as "the AP Technology" from the first defendant, Adam Clark, and his associated companies, which were the corporate defendants. The plaintiffs' suspicions were subsequently aroused and confirmed when they discovered that the AP Technology was sub-optimal and did not perform as represented. The plaintiffs argued that there was a strong case of serious dishonesty and fraud against Mr Clark and the corporate defendants. Mr Clark had made representations to the plaintiffs about the performance of the AP Technology knowing that those representations were false. The plaintiffs argued that the court could "infer a risk [of dissipation] from the

nature of the cause of action raised against the defendants": *Media World* at [22].

92 Goldberg J rejected the argument and refused to grant the Mareva injunction sought. He pointed out that Meagher JA's reasoning in *Patterson v BTR Engineering* differed "in a number of … respects" from Gleeson CJ's: *Media World* at [23]. Goldberg J then distinguished *Patterson v BTR Engineering* as a case that "involve[d] a diversion of funds". He said that cases where the courts had been prepared to draw an inference of a real risk of dissipation based on substantiated allegations of dishonesty and nothing more, were those that "involved … cause[s] of action *which had a characteristic bearing upon dissipation*" [emphasis added]: *Media World* at [26]. Goldberg J thought that although the case before him included "appellations such as 'fraud' and 'serious dishonesty', the case [was] essentially one of misrepresentation": *Media World* at [27]. In the absence of other evidence pointing to a real risk of dissipation, Goldberg J dismissed the application for a Mareva injunction against the defendants.

93 It is time to round off this extended review of the authorities with some observations, and we begin with the last of the cases we have reviewed, namely, *Media World*. In our judgment, if there is a unifying principle that can adequately rationalise and explain the circumstances in which a court may legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it is this – the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation. It will be evident from our analysis of the cases that it is in such circumstances that the courts have been willing to draw the necessary inference. This is sensible because whether or not such an inference may be drawn is ultimately a question of fact. In assessing whether the inference is warranted as a matter of fact, it is appropriate, in our judgment, for the court to *segregate* the two questions (*ie*, whether there is a good arguable case on the merits of the plaintiff's claim and whether it has been shown that there is a real risk of dissipation) and answer them *separately*. We accept that the evidence relied on to answer the first question may be the same as that relied on to answer the second. But, once the inquiries are segregated, it will be clear that whether the evidence pertinent to the first stage of the inquiry is sufficient also for the purposes of the second stage is an assessment that cannot – and emphatically must not – be made mechanistically; and in that context, if an allegation of dishonesty is all that is relied on, that allegation must be such as to say enough about a real risk of dissipation in the circumstances.

94 In our judgment, a well-substantiated allegation that a defendant has acted dishonestly can and often *will*, as we have said, be relevant to whether there is a real risk that the defendant may dissipate his assets. But, we reiterate that in each case, it is incumbent on the court to examine the precise nature of the dishonesty that is alleged and the strength of the

evidence relied on in support of the allegation, keeping fully in mind that the proceedings are only at an interlocutory stage and assessing, in that light, whether there is sufficient basis to find a real risk of dissipation. That alone is the justification which lies at the heart of the court's jurisdiction to grant Mareva injunctions. An allegation of dishonesty does not in itself form a substitute for an examination of the degree of risk of dissipation unless, as we have said, that allegation is of a nature or characteristic that sufficiently bears upon the risk of dissipation. In this regard, we endorse the views of Choo Han Teck J in *PT Sariwiguna Binasentosa v Sindo Damai Shipping Ltd* [2015] SGHC 195, where he made observations to a similar effect at [10]–[14]. That judgment was handed down shortly after we heard the oral arguments in these appeals.

95 On the facts before us, we do not consider that the allegations of dishonesty levelled at Mr Bouvier have a real and material bearing upon the risk of dissipation. This is not a case where Mr Bouvier misappropriated the respondents' assets through a series of fictitious or illusory transactions. Nor is this case akin to *Patterson v BTR Engineering*, where a former senior employee of the plaintiff company exploited his position to procure the plaintiff to purchase equipment from him at a markup by interposing an entity that he was thought to indirectly control, thus enabling him to make a secret profit by the "diversion of money from its proper channels". In the present case, the respondents, which are controlled by Mr Rybolovlev, are independent entities that received what they bargained for and at the price they were willing to pay. They knew that they were dealing with Mr Bouvier, and that he was sourcing the artworks concerned from others. The real issue is as to the legal nature of the respondents' relationship with Mr Bouvier.

96 The fraud or dishonesty that is alleged in this case is not in the nature of a complex machination or an elaborate scheme. The ploy in this case, if proved, was deceptively simple: Mr Bouvier exploited the asymmetries of information inherent in an opaque market to turn a profit. As we have already observed, the ultimate outcome in this case turns on the true characterisation of the relationship between Mr Bouvier and the respondents. On one view, there will be no fraud at all: Mr Bouvier can be seen as a wily businessman who employed a questionable (and perhaps barely legal), although ultimately profitable, approach to business. On another, Mr Bouvier can be seen as an errant agent who is liable to the respondents for fraudulent misrepresentation or breach of fiduciary duties.

97 We also consider it significant that there was, in this case, no use of a complex web of companies to conceal the dealings in question. Mr Bouvier made no attempt to conceal his identity or mask his connection with the transactions through which the 38 artworks were acquired by the respondents. He always dealt in person, acting through MEI Invest. The payments from the respondents were made over the course of a decade or

so into the same bank accounts held by MEI Invest at the Geneva branches of Banque SCS Alliance and Compagnie Bancaire Helvétique. Mr Bouvier may be wealthy, well-advised and sophisticated; he may also be experienced in international financial transactions and corporate structures. But, to infer a real risk of dissipation from these factors alone would be to penalise him for what some may say are no more than the ordinary concomitants of his good fortune or his success in plying his craft. In *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1981–1982] SLR(R) 633 ("*Art Trend*"), Lai Kew Chai J frowned on a similar argument, stating at [37] that experience or "knowledge of the practice of international finance and transfers of funds is not evidence of a predisposition to remove assets to frustrate any judgment". His decision was upheld on appeal: *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1983–1984] SLR(R) 105. In our view, Mr Bouvier has not misused his international financial expertise in the commission or furtherance of the allegedly deceitful behaviour, nor is there any solid evidence which suggests a real risk of dissipation on his part.

Unsatisfactory asset disclosures

98 The ground that we have covered thus far is ground that was traversed before the Judge, and we have, with respect, come to a different conclusion from the Judge in this regard.

99 On appeal, the respondents added a new argument which was not before the Judge. Indeed, there was no material to support such an argument before the Judge. This argument is based on the information that Mr Bouvier disclosed pursuant to the ancillary disclosure orders made by the Judge in support of the Mareva injunction against him. The respondents argue that there are doubts over how forthright Mr Bouvier has been in his asset disclosures; on this basis, they seek to persuade us to draw the necessary inference of a real risk of dissipation. This argument is cast in two ways. First, the respondents compare the amount of the Excess Payments that Mr Bouvier received over the years (alleged to be about US$1bn) with the total value of the assets that Mr Bouvier has disclosed. They say that there is a disparity between these two figures, which suggests that Mr Bouvier has not accounted for all his assets. Second, they raise questions over the type of assets that Mr Bouvier holds. They say that these assets are suspicious. Both these points feed into the respondents' broader argument attacking the veracity of Mr Bouvier's asset disclosures, which is in turn said to support an inference of a real risk of dissipation.

100 Arguments of this nature are not uncommon. Similar lines of attack were pursued by the plaintiffs in *European Grain* ([66] *supra*) at [13], *VTB v Nutritek (HC)* ([85] *supra*) at [242] and *Choy Chee Keen Collin v Public Utilities Board* [1996] 3 SLR(R) 812 at [16]–[18]. When one sets this type of argument against the purpose of ancillary disclosure orders and the nature

of the information that is usually required to be disclosed, it is unsurprising that such arguments have generally not met with much success.

101 In *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 1 SLR(R) 115, this court cautioned (at [21] *per* L P Thean JA) that the disclosure order that is granted ancillary to a Mareva injunction serves a limited but focused purpose:

> [T]he disclosure order is merely an ancillary order made in aid of a Mareva injunction in order for the plaintiff to determine the location of the defendant's assets and take appropriate steps to preserve them pending trial.

It aims to give the plaintiff a snapshot of the defendant's assets at the time of disclosure. This is to enable the plaintiff to police the injunction and ensure that the defendant's assets are kept at the steady state which the Mareva injunction seeks to preserve. After all, if the court is satisfied that there is a real risk of dissipation, then it generally follows, as a matter of logic, that there should be a capability to police the Mareva injunction granted. The ancillary asset disclosure order is thus an integral part of the court's Mareva jurisdiction and an ordinary adjunct to a Mareva injunction: *Grupo Torras SA v Shiekh Fahad Mohammed Al Sabah* (16 February 1994); *Motorola Credit Corporation v Cem Cegiz Uzan* [2002] EWCA Civ 989 at [28]–[29].

102 Where the Mareva injunction itself is ultimately found not to have been justified on the basis of the material before the court at the time it was granted, it seems to us inherently unfair to nonetheless allow the plaintiff to use information that he has obtained through the ancillary disclosure orders to try to shore up a case for a real risk of dissipation. Ancillary disclosure orders have been recognised to be highly intrusive and can entail potentially severe ramifications. But, these severe intrusions on privacy are tolerated because a Mareva injunction without an accompanying disclosure order will often be toothless. To further prejudice the defendant by allowing the plaintiff to use information extracted from an ancillary disclosure order to support an otherwise unsustainable Mareva injunction would be to provide the plaintiff with an unfair and improper advantage.

103 Further, the information obtained from an ancillary disclosure order will often have little, if any, bearing on a real risk of dissipation. The disclosed information does not provide a longitudinal view of the defendant's assets. All that is disclosed are the assets standing to the defendant's name at the time disclosure is made. The information will not show whether there has been a systematic and unexplained attrition of the defendant's assets over time, which, presumably, would be the justification for inferring a real risk of dissipation. The disclosed information is also often rough and ready. Given that the disclosure affidavits usually have to be compiled and filed under stringent timelines, the information set out therein is not the type of information that tends to stand up well to the microscopic scrutiny of lawyers and forensic accountants. For example, in

the present case, the value of Mr Bouvier's private companies was estimated based on either the amounts standing to their bank accounts or their net asset values at the time Mr Bouvier prepared his disclosure affidavits. These are by any measure an incomplete reflection of the true value of those companies. It will be unreliable or even misleading to rely on information of this nature to establish whether or not a defendant has been concealing his assets.

104 In our judgment, ancillary disclosure orders may only be relevant to the risk of dissipation in two narrow situations. The first is where the defendant refuses to provide any disclosure of his assets at all. This might, in appropriate circumstances, found the inference that there is a real risk that the defendant may dissipate his assets (see *Z Ltd v A* [1982] 1 All ER 556 at 566B–566C *per* Lord Denning; *Jarvis Field Press* ([80] *supra*) at [14]; *Madoff Securities* ([82] *supra*) at [172]–[173]). The second is where the information disclosed by the defendant reveals assets which are so glaringly inadequate or suspicious that the deficiencies cannot be attributed to the urgency with which the disclosures were made or other accounting or valuation inaccuracies. This latter situation would rarely arise because if the defendant were truly minded to conceal his assets, the likelihood is that he would not provide any disclosure at all. Even in these situations, the court would have to carefully consider whether, in all the circumstances, an inference of a real risk of dissipation may appropriately be drawn.

105 On the facts before us, we are not satisfied that the information disclosed by Mr Bouvier is suspicious. We shall not descend into the minutiae because the disclosures were ordered on condition of strict confidentiality. But, it suffices to say that the disclosure affidavits provided by Mr Bouvier were timeous and detailed. If the respondents had any doubts about the disclosed information, it was open to them to apply to cross-examine Mr Bouvier on it: *OCM Opportunities Fund II, LP v Burhan Uray* [2004] 4 SLR(R) 74 at [34]–[35]. They did not, however, do so.

106 This brings us to Mr Bouvier's argument pertaining to his asset disclosures, which is an inversion of that made by the respondents. He argues that his exemplary compliance with the Judge's ancillary disclosure orders militates against the conclusion that there is a real risk of his dissipating his assets. Instead, he submits, his compliance with those orders evinces his intention to "participate fully in [the] proceedings and to clear his name [through] the legal process". We respectfully disagree. The court is entitled to expect from litigants nothing less than punctilious compliance with the orders that it makes. The fact that a litigant complies with an asset disclosure order does not necessarily diminish the risk of dissipation if it existed in the first place, just as his non-compliance would not necessarily fortify that risk if it was not sufficiently established to begin with.

Abuse of process

107 Mareva injunctions have been discharged where the applicants failed to "apply for the relief promptly", or used the Mareva injunction concerned to "oppress the defendants" (see *Meespierson NV v Industrial Commercial Bank of Vietnam* [1998] 1 SLR(R) 287 at [29] *per* Judith Prakash J) in the sense of the injunction being "calculated to pressurise the defendants and bring them to their knees" (see *Art Trend* ([97] *supra*) at [41]).

108 In our judgment, the Mareva injunction obtained against Mr Bouvier in this case was an abuse of the court's process. The injunction was not obtained by the respondents to prevent the enforcement of an anticipated judgment from being frustrated. Instead, we are satisfied that it was deployed as an instrument of oppression to inflict commercial prejudice on Mr Bouvier. Four factors lead us to this conclusion:

(a) The first is the respondents' delay in making their application for a Mareva injunction and ancillary disclosure orders against Mr Bouvier. The lack of urgency in their application suggests that, in fact, the respondents did not genuinely believe there was a real risk that Mr Bouvier would dissipate his assets.

(b) This shades into the second factor, which is the respondents' failure to comply with the Supreme Court Practice Directions ("the Practice Directions"). There was, in the present circumstances, no reason for the respondents to make their injunction application *ex parte* without giving Mr Bouvier notice.

(c) The third factor is the unjustifiable breadth of the Mareva injunction against Mr Bouvier. For no apparent reason, the respondents included the assets and bank accounts of 14 companies owned by Mr Bouvier (the 14 "affected companies") in the Mareva injunction as it was worded when it was granted by the Judge on 12 March 2015.

(d) The final factor is the respondents' conduct subsequent to their obtaining the Mareva injunction against Mr Bouvier.

We elaborate on each of these factors below.

(1) Delay in making the application

109 A plaintiff who is genuinely concerned that the defendant will dissipate his assets would be expected to act with urgency in seeking Mareva relief. Of course, delay by itself will not be dispositive of the plaintiff's application for such relief. The length of the delay and any explanations for it should be considered against all the circumstances of the case: *Madoff Securities* ([82] *supra*) at [156]–[157].

110 In our judgment, the relevant period of delay in this case is between, at the latest, the time Mr Rybolovlev first confronted Mr Bouvier with the NYT article on 22 November 2014 (see [53] above) and the time the respondents' *ex parte* application for a Mareva injunction was made on 12 March 2015, a little under four months later. A few significant events occurred between these dates:

(a) On 31 December 2014, Mr Rybolovlev met Mr Heller. The respondents' counsel, Mr Yeo, submitted that this was the first time Mr Rybolovlev actually understood what Mr Bouvier had been up to and how the latter had been defrauding him.

(b) On 9 January 2015, the respondents filed the criminal complaint against Mr Bouvier with the Monegasque authorities.

(c) From 25 to 28 February 2015, Mr Bouvier was detained by the Monaco police for questioning.

(d) On 28 February 2015, Judge Loïc Malbrancke, the Monaco investigating judge, released Mr Bouvier on bail. Judge Malbrancke granted bail because he considered that Mr Bouvier posed only a limited risk of flight, and because the investigations were "to continue into the relatively distant future given their highly international dimension".

111 Mr Yeo argued that the respondents had in fact applied for Mareva relief promptly. As noted above, he argued that Mr Rybolovlev only uncovered the fraud on 31 December 2014, and that should therefore be taken as the relevant date from which to assess the promptness (or otherwise) of the respondents' reaction. Mr Yeo submitted that the respondents acted swiftly thereafter to prepare and file the criminal complaint against Mr Bouvier in Monaco on 9 January 2015. After doing that, the respondents did not commence proceedings elsewhere because they were waiting for the Monaco proceedings to be resolved. They also did not want to tip Mr Bouvier off as to the investigations by the Monaco authorities. According to Mr Yeo, the real urgency to prevent Mr Bouvier from dissipating his assets arose only after he was released on bail on 28 February 2015. The respondents thereafter immediately instructed solicitors in Singapore in early March 2015 and made their injunction application on 12 March 2015.

112 With respect, we do not find this explanation persuasive at all. We have explained at [51]–[58] above that if the facts are indeed as the respondents contend, then Mr Rybolovlev *must* have known or at least had very strong reason to suspect Mr Bouvier's alleged fraud by the time he discussed the NYT article with Mr Bouvier on 22 November 2014. We reiterate that there is nothing in the evidence to suggest that Mr Bouvier ever denied the accuracy of the NYT article. Moreover, if the facts are as the respondents contend, then by 22 November 2014, from Mr Bouvier's

perspective, he must have known that the game was nearly up and that it was only a matter of time before the truth was uncovered. He would have been improbably naïve to think otherwise. The necessity to prevent Mr Bouvier from dissipating his assets, if there was one, would have crystallised at that point in time.

113 We also do not find persuasive the respondents' explanation for holding off their injunction application between 9 January and 28 February 2015 during the pendency of the Monaco criminal proceedings, until Mr Bouvier was released on bail on the latter date. This is because it was common ground before us that the Monaco courts do not have the power to grant worldwide freezing orders. No permutation of the possible outcomes of the proceedings in Monaco could have resulted in Mr Bouvier's assets being subject to a worldwide asset freeze by the Monaco courts. The respondents exhibited a legal opinion of their Monaco law expert, Dr Géraldine Gazo, in the affidavit which Mr Sazonov filed in support of their application for a Mareva injunction. Dr Gazo's legal opinion broached various issues, including the civil and criminal jurisdiction of the Monaco courts as well as the nature of the proceedings in Monaco. Significantly, the opinion also stated that "it is not possible under Monaco civil procedure to obtain orders which freeze a defendant's assets in another jurisdiction". There was therefore no good reason for the respondents to await the outcome of the Monaco proceedings before applying for a worldwide Mareva injunction against Mr Bouvier *if* they genuinely believed he would dissipate his assets. To put it plainly, there was no worldwide freezing order for the respondents to wait for or look forward to in the Monaco proceedings.

114 In our judgment, if the respondents were genuinely fearful of Mr Bouvier dissipating his assets, they would have instructed their solicitors to apply for a Mareva injunction immediately or shortly after the meeting between Mr Bouvier and Mr Rybolovlev on 22 November 2014. Even giving the respondents the benefit of any possible doubt, by the time they filed a criminal complaint against Mr Bouvier in Monaco on 9 January 2015, there was no basis to withhold seeking a worldwide freezing order against Mr Bouvier any further. Yet, they did not make the requisite application, and did not give any convincing explanation to account for this. Rather, it appears that the application for a Mareva injunction against Mr Bouvier was the respondents' response to his perhaps unanticipated release on bail on 28 February 2015. It is telling that no reason was ever put forward by the respondents as to why they waited until after that date before instructing lawyers here with a view to seeking a worldwide Mareva injunction against Mr Bouvier from our courts.

(2) Non-compliance with the Practice Directions

115 The respondents' delay in making their injunction application segues into the next point, which is their non-compliance with the relevant procedure. It is established practice that an applicant for an *ex parte* injunction, including a Mareva injunction, *must* give notice of the application to the other concerned parties prior to the hearing. Only in cases of "extreme urgency", or where the giving of prior notice would defeat the purpose of the *ex parte* application, will the applicant be excused from giving notice: paras 41(2) and 41(3) of the Practice Directions. In such cases, the affidavit in support of the *ex parte* application must give reasons for the urgency of the application (see para 42A of the Practice Directions) or explain why the giving of prior notice would defeat the purpose of the application (see para 41(3) of the Practice Directions).

116 In the present case, none of this was done. No justification was put forward by the respondents for not giving Mr Bouvier prior notice of their injunction application against him, or for contending that this was a case where giving prior notice would defeat the very purpose for which the application was being made. Indeed, given the progression of the litigation, it could not fairly be contended that this was either a case of extreme urgency or one where the giving of prior notice would have defeated the purpose of the application.

117 If Mr Bouvier was so naïve as to think the 22 November 2014 meeting was insignificant, he faced the virtual certainty of legal proceedings when he was arrested and detained by the Monaco police on 25 February 2015. Subsequent to his arrest, Mr Bouvier instructed lawyers who were present with him at the depositions before the Monaco authorities. On 28 February 2015, Mr Bouvier was released from custody and was presumably still getting legal advice. He was also informed that the investigations in Monaco would continue. Moreover, having filed a criminal complaint in Monaco, the respondents had applied to be joined as civil parties in the proceedings there.

118 On 1 March 2015, the respondents' Swiss lawyers wrote to banks in Geneva, St Gallen, Zurich, Paris and Hong Kong. These letters were titled "Urgent and anticipating the official requests from the authorities", and stated that Mr Bouvier and Mrs Rappo were facing fraud and money laundering charges in Monaco. The letters further stated:

> There are reasonable doubts that the above-mentioned persons would attempt to use your banking institution to impede the investigation of the currently pending criminal proceedings, in particular the identification and freezing of the products of the suspected criminal activities, which have already been discovered.

> We hereby put you on notice to **immediately** undertake all necessary measures to prevent this and draw your attention to the fact that any financial transaction on the accounts related to Mr Yves Bouvier and Mrs Tania Rappo risk to become [*sic*] part of the criminal investigation currently pending in Monaco and **therefore become the responsibility of your banking institution**.
>
> [emphasis in original in bold]

The letters also stated that copies had been "addressed to the Investigating Judge Loïc Malbrancke". Similar letters were sent on the same day to the police authorities in Bern, London and Singapore. The respondents' Swiss lawyers sent further letters to Singapore's Commercial Affairs Department on 4 March 2015 and to the legal department of a Swiss bank on 11 March 2015 (the letter to the Swiss bank additionally indicated that Ms Bersheda, one of the respondents' Swiss lawyers (see [32] above), had spoken to one of the bank's employees over the telephone earlier that day).

119 On 8 March 2015, a Swiss magazine, *Economie – Le Matin Dimanche*, published an article reporting the dispute between Mr Bouvier and Mr Rybolovlev. The article quoted a press release issued by Ms Bersheda, on 28 February 2015, which stated that "[a]t present [the respondents] are *looking into the possibility of starting parallel proceedings* in coordination with other victims of similar activities of which Mr Yves Bouvier has been accused" [emphasis added]. The article also reported that when Ms Bersheda was contacted the week before (*ie*, the week of 1 March 2015), she confirmed that "collaborative efforts coordinated with those parties have already been started".

120 In our judgment, the analysis of the events subsequent to Mr Bouvier's release on bail on 28 February 2015 confirms that by that stage, the respondents were in position for worldwide litigation against Mr Bouvier. The simple point of all this is that if the respondents believed that Mr Bouvier intended to dispose of his assets, they could not have missed the fact that he had ample opportunity to do so from the time of his release from detention on 28 February 2015. At that time, *both* criminal and civil proceedings initiated by the respondents were already afoot against Mr Bouvier in Monaco. In these circumstances, it is impossible for us to see how, at the time of the respondents' injunction application 12 days later, the matter could possibly be conceived as being of such extreme urgency or of such imminent risk that it excused the giving of prior notice. Nor could it reasonably have been thought that providing Mr Bouvier with notice at the time of the injunction application would have defeated the purpose of that application if, consistent with the fact of their making that application, the respondents thought Mr Bouvier had yet to dispose of his assets.

121 Mr Yeo said that it was the practice *not* to give notice whenever a Mareva injunction was sought. If that is true, it makes a mockery of the Practice Directions and is not a practice to be unthinkingly encouraged. In

this regard, we echo the views expressed by Sir Anthony in *Thane Investments* ([77] *supra*) at [35]:

> Counsel says that it is normal practice to apply ex parte for an order of this sort, and he said also that it is common for no notice to be given. I am sure that may be right – I do not suggest that it is not – because the very nature of a freezing order, for the reasons he explained, is that it may be necessary to apply without notice, hence the importance of [the provision] which requires an explanation of the reason why no notice has been given in the particular case. *I would be very surprised to hear that it is common or normal practice to make an application without notice and at the same time to disregard the rules which expressly cover that very situation.* [emphasis added]

There was not even a faint attempt in this case to justify or explain why the Mareva injunction against Mr Bouvier was applied for without giving him prior notice.

(3) Breadth of the Mareva injunction

122 We turn to the third point, which concerns the Mareva injunction against Mr Bouvier as it was worded when it was granted on 12 March 2015. To put it simply, the Mareva injunction, as worded at that time, was unnecessarily broad. Among other things, it prevented Mr Bouvier from dealing with the shares that he held in the 14 affected companies (as defined at [108(c)] above). This is not, in itself, objectionable. But, the Mareva injunction went further, and the schedule which was appended to it included the assets and bank accounts held in the names of those 14 companies.

123 There was no apparent reason for the respondents to disregard the separate legal personality of the 14 affected companies and include the assets and bank accounts held by them in the Mareva injunction against Mr Bouvier. Mr Sazonov asserted in the affidavit which he filed in support of the respondents' injunction application that *one* of the 14 affected companies, Art Family Pte Ltd ("Art Family"), had issued an invoice to Xitrans Finance in 2009 and had received payment for it. As Art Family was owned wholly by Mr Bouvier, the affidavit stated, there was reason to "believe therefore that Mr Bouvier [had] control of bank accounts and any assets in the name of [Art Family], with the power to dispose of or deal with them as if they were his own". No explanation was given for the inclusion in the Mareva injunction of the assets and bank accounts held by the other 13 affected companies, of which only some were wholly owned by Mr Bouvier.

124 In any case, we do not see how the fact of Art Family having issued an invoice to and received payment from Xitrans Finance in 2009 could have justified the inclusion of the assets and bank accounts held by Art Family, much less those held by any of the other 13 affected companies, in the respondents' injunction application and the ensuing Mareva injunction

granted. Art Family is not a party to the Singapore action. It is thus not subject to the *in personam* jurisdiction of the Singapore courts. There is no question that the court is entitled to exercise the jurisdiction articulated in *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747 and *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245 (see *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410 at [14]–[19]) to include in a court order assets belonging to a third party on the basis that the assets are "in truth the assets of the defendant". However, in the present case, there was no evidence that Art Family was a sham company; nor was there any evidence that its assets and bank accounts belonged to Mr Bouvier. At least eight of the 14 affected companies were going concerns. Yves Meyer, a director of five of the 14 affected companies (including Art Family), affirmed an affidavit testifying that the businesses of those companies had been adversely affected. Art Family had two employees in Singapore and owned a Swiss company, which in turn had seven employees. The Mareva injunction prevented Art Family from paying an invoice for IT engineering, and would have prevented it from paying the salaries of these employees if not for the attenuating orders made by the Judge pursuant to the appellants' setting-aside applications (see [31] above as well as [125] below).

125 The possible damage done to the 14 affected companies was mitigated by their early removal from the remit of the Mareva injunction against Mr Bouvier. As mentioned earlier at [31] above, the Judge subsequently varied the Mareva injunction as it was worded at the time of its grant on 12 March 2015. Among other things, on 25 March 2015 (the first of five days over which the *inter partes* hearing of the appellants' setting-aside applications took place), the Judge removed the 14 affected companies from the schedule to the Mareva injunction. However, it appears the respondents wrote to other parties appending the Mareva injunction against Mr Bouvier in a form that included the 14 affected companies as well as their assets and bank accounts in the accompanying schedule *even after* the Judge had varied the orders which she made on 12 March 2015 so as to remove them. We address this point at [128]–[129] below.

(4) Conduct subsequent to obtaining the Mareva injunction

126 We turn finally to the respondents' conduct subsequent to the grant of the Mareva injunction against Mr Bouvier, which we consider also to have been unsatisfactory. The Mareva injunction was put into wider circulation than was necessary for its efficacy, and information was disseminated in a misleading manner. We cite two instances of this.

127 First, the respondents publicised the Mareva injunction against Mr Bouvier just shortly after it was obtained. The *Financial Times* published an online report of the Mareva injunction within hours of its being granted. Ms Bersheda was quoted as saying that "'similar measures' were going to be taken around other jurisdictions 'shortly'". Nothing was

put forward by way of a reasonable explanation as to why it was thought necessary to inform the international press of the fact that a Mareva injunction and other ancillary orders had been made against Mr Bouvier.

128 Second, we noted above (at [31] and [125]) that the Mareva injunction against Mr Bouvier as it was worded at the time of its grant on 12 March 2015 was attenuated by various orders made by the Judge over the course of the *inter partes* hearing of the appellants' setting-aside applications on 25 March, and 6–8 and 10 April 2015. Among other things, some of the entities originally affected were removed from the schedule to the Mareva injunction, certain exemptions were provided for, restrictions on the disclosure of the information obtained were imposed and the scope of some of the disclosure orders made on 12 March 2015 was pared down. We reiterate that on 25 March 2015, the first day of the aforesaid five-day *inter partes* hearing, the 14 affected companies were removed from the schedule to the Mareva injunction. The last of the attenuating amendments by the Judge was made on 10 April 2015. Yet, as late as 26 June 2015, the respondents were still placing in circulation the Mareva injunction against Mr Bouvier in the way it was worded when it was granted on 12 March 2015, with the 14 affected companies as well as their assets and bank accounts listed in the accompanying schedule. This was more than three months after the orders originally made by the Judge on 12 March 2015 had been varied to remove those 14 companies, among other things.

129 In this regard, Mr Tong, counsel for Mr Bouvier, placed before us a letter from Herbert Smith Freehills LLP, the respondents' English solicitors, to Sotheby's dated 26 June 2015. The letter informed Sotheby's that the Singapore court had issued a worldwide Mareva injunction against Mr Bouvier, and appended the Mareva injunction as it was worded at the time of its grant on 12 March 2015, with (as we have just mentioned) the 14 affected companies as well as their assets and bank accounts listed in the schedule annexed thereto. Mr Tong went further to submit that this was done deliberately to damage the business interests of some of these companies, which had dealings with Sotheby's. We need not go that far. It is sufficient to note that the respondents had a powerful weapon in the form of a Mareva injunction (and a worldwide one at that) in their armoury, and it was incumbent on them to exercise due care to ensure that no greater damage was done than was *necessary* to uphold the efficacy of the injunction. The gravity of the consequences of a Mareva injunction, especially one that extends worldwide, mandates that close and careful consideration be given to details such as its proper scope and the parties who will be affected.

130 While it might be possible to discount one or another of the above factors had they transpired in isolation, the cumulative picture that emerges from their totality is that the Mareva injunction against Mr Bouvier was obtained by the respondents not out of a genuine fear that the enforcement

of an anticipated judgment of the court would be frustrated, but, rather, to oppress Mr Bouvier. This was an improper purpose and an abuse of the process of the court.

131 We will close off this discussion on the abuse of court process with an observation. When a plaintiff seeks a worldwide Mareva injunction from a Singapore court, the plaintiff should ordinarily undertake to the court that it shall not, without the court's leave, enforce the injunction or seek an order of a similar nature in any jurisdiction outside Singapore. This is a standard undertaking found in the prescribed form for a worldwide Mareva injunction: Form 7 of the Practice Directions at Sched 1, para 8. This undertaking plays a vital role because it protects a defendant from the risk of oppression which may arise from a multiplicity of suits: *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at [2] and [24]. Courts have gone so far as to say that a worldwide Mareva injunction should not be granted unless the plaintiff gives such an undertaking: *Re Bank of Credit and Commerce International SA* [1994] 3 All ER 764 at 794. This undertaking was not given by the respondents, and it appears that they have taken steps to enforce the Mareva injunction against Mr Bouvier overseas without obtaining any leave from the court to do so.

The arguments by Mrs Rappo

Overview

132 We turn now to the position in respect of Mrs Rappo. Her position is simpler than Mr Bouvier's. She argues that there is no real risk of dissipation in her case for three reasons. First, none of the pleaded allegations show that she was dishonest. The fact that she might have received tainted funds does not equate to dishonesty. Second, she says that even if there is a good arguable case of dishonesty against her, it does not equate to a real risk of dissipation. Third, she was not evasive about the sums of money which she received from Mr Bouvier. She voluntarily disclosed to the Monegasque police the fact that she had received payments from Mr Bouvier, and she was forthright with her banks in her receipt of those payments. These factors, Mrs Rappo submits, are inconsistent with a real risk of dissipation.

133 To this, the respondents make three main arguments in rebuttal. First, they contend that there is a good arguable case of dishonesty against Mrs Rappo. Second, they point out that Mrs Rappo "conducts her affairs internationally" through corporate vehicles. They contend that given this "web of offshore companies and accounts", Mrs Rappo "clearly has the means and ability to move about her funds". Third, the respondents allege that Mrs Rappo has been untruthful and evasive. They claim that she lied to the court about her expenses when she asked for an increase in the carve-out for personal expenses in the Mareva injunction made against her. She

has also not complied with the ancillary disclosure orders made by the Judge.

134 In our judgment, on the evidence before us, the respondents have not established a real risk that Mrs Rappo will dissipate her assets. There are two principal reasons that underlie our conclusion. First, the nature of the respondents' allegations against Mrs Rappo suggests a level of misfeasance akin to negligence or, perhaps, wilful blindness rather than dishonesty. Second, there is no basis for any suggestion that Mrs Rappo has attempted to conceal her assets. These two reasons are addressed at [135]–[142] below. In addition, the reasons which we gave at [108]–[130] above for finding the Mareva injunction against Mr Bouvier to be an abuse of court process, as well as a number of the points raised in those paragraphs, apply equally to Mrs Rappo. There is no need for us to repeat those reasons and the salient points here. They explain why we consider that the respondents' injunction application against Mrs Rappo was likewise motivated by an improper purpose. The respondents' abuse of court process therefore affords an independent basis for setting aside the Mareva injunction and the ancillary disclosure orders made against Mrs Rappo.

Nature of the allegations of dishonesty

135 The respondents' position is that Mrs Rappo had been dishonest in receiving the payments from Mr Bouvier. They invite us to draw this inference on the basis of the following four propositions:

(a) Mrs Rappo knew that Mr Bouvier was acting as an agent and not a seller.

(b) Mrs Rappo knew that Mr Bouvier was being paid a 2% commission for his services as an agent.

(c) Mrs Rappo knew the price which the respondents paid for the artworks, and so must have known that what she was being paid by Mr Bouvier was in excess of the 2% commission that he was receiving.

(d) Mrs Rappo lied to her bankers and told them that she was receiving substantial sums from Mr Rybolovlev in her capacity as his advisor.

The respondents' position is premised on the notion that Mrs Rappo had a keen understanding of the details of the commercial relationship between Mr Bouvier and the respondents.

136 In our judgment, support for that underlying notion is thin. Many of the source documents which the respondents rely on do not bear out the inference that Mrs Rappo had dishonestly received the payments from Mr Bouvier. For example, neither Mr Bouvier's nor Mrs Rappo's statements to the Monaco authorities suggest that Mrs Rappo was aware of the workings of the relationship between Mr Bouvier and the respondents.

The transcripts in fact show the opposite. As for the respondents' contention that Mrs Rappo lied to her bankers and informed them that the payments which she received from Mr Bouvier were from Mr Rybolovlev instead for acting as the latter's advisor, the bank documents tendered by the respondents in support of their position are mostly equivocal. One of them in fact refutes the respondents' contention as it states clearly that "TR [*ie*, Mrs Rappo] was paid by *YB* [*ie*, Mr Bouvier] for her contribution in the business … *YB* pays a commission to TR for the introduction of potential buyers …" [emphasis added].

137 Based on the evidence before us, an equally plausible account of Mrs Rappo's role is that she interacted with Mr Bouvier and Mr Rybolovlev primarily at a social level, but was not privy to their business dealings. She did not know how the actual purchases of the 38 artworks concerned were arranged. That was a matter between Mr Bouvier and Mr Rybolovlev (acting through the respondents). The extent of Mrs Rappo's involvement was limited to her facilitation of Mr Bouvier's access to the Rybolovlevs. In our view, this alternative account coheres more readily with the documentary evidence before us. Mr Rybolovlev's evidence to the Monaco police was that Mrs Rappo often spoke highly of Mr Bouvier, arranged meetings between him (Mr Rybolovlev) and Mr Bouvier, and was present at viewings with the Rybolovlevs and Mr Bouvier. This view is also consistent with Mr Bouvier's statements to the Monaco police that "without [Mrs Rappo,] [he] would not have maintained [his] relationship with Mr Rybolovlev", and that Mrs Rappo did not otherwise know much about the transactions between him (Mr Bouvier) and the respondents.

138 But, even if the respondents' case is taken at its highest, the dishonesty alleged against Mrs Rappo goes no further than her actual or imputed knowledge that she was receiving from Mr Bouvier money which was being paid out of the latter's undisclosed profits. The complaint is that she was content to receive the substantial sums that Mr Bouvier was paying her without inquiring further into the source of those payments. To put it another way, she might have known or had reason to suspect that the water supplied to her came from a tainted well, but she drank it anyway. This is not a situation where Mrs Rappo took any steps to deceive the respondents; nor is there anything to suggest that she was involved with Mr Bouvier in the perpetration of a fraudulent scheme against the respondents. It is telling that Mr Rybolovlev saw Mrs Rappo's dishonesty as stemming from (as he put it himself) her "betrayal". In our judgment, the allegations made against Mrs Rappo, even if eventually found to be true, fall far short of having a real and material bearing on the risk of her dissipating her assets.

Alleged concealment of assets

139 There is also no evidence which suggests that Mrs Rappo attempted to conceal the payments which she received from Mr Bouvier and what she did with them.

140 Mrs Rappo was transparent with the banks where she maintained the accounts into which Mr Bouvier's remittances were paid. She provided those banks with documentation relating to the payments, including descriptions of the payments as "commission[s]" from Mr Bouvier, the invoices that MEI Invest issued to the respondents, as well as descriptions of the artworks that had been sold. The money which Mrs Rappo received from Mr Bouvier was paid into bank accounts held by companies that she owned, and the visibility of her ownership of these companies was unobscured. Those companies listed either Mrs Rappo, or both her and her husband, Jacques Rappo, as the beneficiaries of the bank accounts concerned. Indeed, our attention was drawn to the fact that HSBC Monaco had erroneously informed the Monaco police that Mrs Rappo and *Mr Bouvier* were listed as joint beneficiaries for the accounts held by Mrs Rappo's companies at that bank. Mrs Rappo's counsel, Mr Kenneth Tan SC, suggested that this was the basis on which she had been detained by the Monaco authorities, and submitted that this was a consequence of the considerable influence which Mr Rybolovlev exercised in Monaco. We do not need to say much on this beyond observing that HSBC Monaco's statement to the above effect was found and later admitted to have been made in error – the other joint beneficiary of the bank accounts concerned was in fact *Mr Rappo* and not Mr Bouvier. Moreover, when Mrs Rappo was questioned by the Monaco authorities, she was candid in admitting that she had received payments from Mr Bouvier. She also gave information as to the bank accounts into which the money had been paid and what the money had been used for.

141 The respondents' assertion that Mrs Rappo is "experienced in intricate, sophisticated, international transactions involving movements of large sums of money" is irrelevant and also unsubstantiated. It is irrelevant because Mrs Rappo's alleged financial experience has nothing whatsoever to do with any allegedly fraudulent conduct on her part. And it is unsubstantiated because apart from the fact that Mrs Rappo holds her assets through Monaco companies, there is nothing to suggest that she in fact possesses unusual international financial expertise or sophistication. The evidence suggests, rather, that she leaves financial matters to her financial advisors, Monaco Asset Management and Moores & Rowland, who control her companies and manage her assets. Mrs Rappo's reason for holding her assets through companies instead of directly is, in her words, for the "transmission of wealth". Even if this may seem implausible, it nonetheless does not advance the respondents' case because we do not think that the mere fact that Mrs Rappo holds her assets through companies

is sufficient in itself to suggest anything sinister so as to warrant drawing the inference that she is therefore likely to dissipate her assets.

142 The respondents also rely on some inconsistencies in Mrs Rappo's position in the Monaco proceedings as compared to the Singapore proceedings. They further point to the fact that Mrs Rappo did not comply with the asset disclosures ordered by the Judge, even after her application for a stay of the ancillary disclosure orders against her was dismissed. These factors may in exceptional circumstances prove to be relevant, but, in the absence of little else to go on in the present case, they do not suffice to establish a real risk of dissipation where Mrs Rappo is concerned.

Whether interlocutory proprietary injunctions should be granted to prevent the appellants from dealing with the Excess Payments and their traceable proceeds

Overview

143 We turn to the second species of interlocutory injunctions sought by the respondents, namely, the interlocutory proprietary injunctions (see [34] above). These are different from Mareva injunctions, and the difference between them was elucidated by the English Court of Appeal in *Polly Peck International plc v Nadir* [1992] 2 Lloyd's Rep 238 ("*Polly Peck v Nadir*"). A Mareva injunction is granted in support of a claim for personal relief. It is ambulatory and does not latch on to any specific asset of the defendant. What it does is to prevent the defendant from dissipating his assets beyond a certain value to defeat a possible judgment that may in due course be rendered against him. The Mareva injunction is a specialised form of injunction to which the principles that generally govern interlocutory injunctions, as laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*"), have *no* application: *Polly Peck v Nadir* at 242.

144 An interlocutory proprietary injunction, on the other hand, is granted in support of a claim for proprietary relief. It is a prohibitory injunction that fastens on the specific asset in which the plaintiff asserts a proprietary interest. It prevents the defendant, pending the resolution of the dispute, from dealing with that asset and its traceable proceeds. An interlocutory proprietary injunction *is* governed by the *American Cyanamid* principles: *Polly Peck v Nadir* at 248 *per* Scott LJ and at 250 *per* Lord Donaldson.

145 The respondents, as an alternative to Mareva injunctions, seek interlocutory proprietary injunctions to protect their alleged equitable proprietary interest in the Excess Payments and their traceable proceeds. This is presumably on the basis that the Excess Payments (which, at present, have yet to be ascertained and quantified) are secret profits that were impressed with a constructive trust upon their receipt by Mr Bouvier in breach of his fiduciary duties (see *Thahir Kartika Ratna v PT*

Pertambangan Minyak dan Gas Bumi Negara (Pertamina) [1994] 3 SLR(R) 312 ("*Thahir v Pertamina*") at [57] *per* Thean JA; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [46]–[50] *per* Lord Neuberger). The respondents' claims for proprietary relief are *distinct from and made in the alternative* to their claims for personal relief against the appellants for breach of fiduciary duties, knowing assistance and knowing receipt.

146 The respondents argue that "the balance of convenience plainly lies in favour of granting" them the interlocutory proprietary injunctions sought. They rely on *Madoff Securities* ([82] *supra*), where Flaux J granted (among other freezing orders) interlocutory proprietary injunctions in similar circumstances. The respondents contend that if the interlocutory proprietary injunctions which they seek are not granted, the Excess Payments and their traceable proceeds may be disposed of, leaving the respondents with only claims for personal relief against the appellants.

147 Apart from seeking interlocutory proprietary injunctions in respect of the Excess Payments and their traceable proceeds, the respondents also seek an interlocutory proprietary injunction over a distinct and more limited pool of funds. The respondents claim that in December 2014, they instructed Mr Bouvier to sell a Toulouse-Lautrec which they owned. Mr Bouvier did so in February 2015 through his BVI company, Blanca Flor, at a public auction at Sotheby's. Blanca Flor then transferred the sale proceeds ("the Toulouse-Lautrec sale proceeds"), which amounted to £10,789,000, to a bank account held by MEI Invest. The respondents say that Mr Bouvier has refused to hand those sales proceeds over to them, which is in breach of his fiduciary duties. Mr Bouvier's position, on the other hand, is that he had agreed with Mr Rybolovlev that the Toulouse-Lautrec sale proceeds would be applied towards discharging the debt which the respondents owed for the Rothko, *No 6 (Violet, vert et rouge)*.

148 The appellants argue against the grant of interlocutory proprietary injunctions at two levels. First, both Mr Bouvier and Mrs Rappo argue that there is no serious question to be tried. Specifically, Mr Bouvier submits that there is no serious question that the respondents will *not* be able to establish a proprietary interest in the Excess Payments and their traceable proceeds. He says that the respondents' claims in respect of those payments are governed by Swiss law, which does not recognise proprietary claims. Under Swiss law, therefore, the respondents will be limited to claims for personal relief against him. It follows, Mr Bouvier submits, that the respondents' arguments in support of the interlocutory proprietary injunctions sought do not even get off the ground. As for Mrs Rappo, her argument is that there is no serious question to be tried that she is *not* liable for knowing receipt.

149 At the second level, Mr Bouvier argues that the balance of convenience does not lie in favour of granting the interlocutory proprietary

injunctions which the respondents seek. It would be oppressive to him if interlocutory proprietary injunctions were imposed on the Excess Payments and their traceable proceeds. No written submissions were filed on this second point, but Mr Bouvier's counsel, Mr Tong, made very brief oral arguments touching on it at the hearing of these appeals.

150 We have considerable reservations over whether Singapore law applies to the respondents' claims in respect of the Excess Payments, and, thus, whether the respondents have established a serious question to be tried that they have a proprietary interest in those payments and their traceable proceeds under the applicable law. Be that as it may, we need not dismiss the respondents' application for interlocutory proprietary injunctions on this basis. Rather, we are satisfied that that application should be dismissed because, on the facts of the present case, the balance of convenience does not lie in favour of granting the interlocutory proprietary injunctions sought.

A serious question to be tried

151 It is trite that the court does not engage in complex questions of law or fact at the interlocutory stage. In respect of an application for an interlocutory proprietary injunction, the first requirement of showing that there is a serious question to be tried will be satisfied as long as "the plaintiffs have a seriously arguable case that they [have] a proprietary interest": *Derby v Weldon (No 1)* ([2] *supra*) at 64A–64B *per* Nicholls LJ. It is also trite that if any question of foreign law arises in this regard, the foreign law concerned has to be pleaded and proved. In the absence of such proof, the law of the forum applies by default to the claim in respect of which the interlocutory proprietary injunction is sought.

152 In our judgment, there is some force in Mr Bouvier's argument that the governing law of the respondents' claims against him in respect of the Excess Payments is Swiss law. The first step in the choice of law methodology is the characterisation of the issue before the court. There are two possible characterisations of the respondents' claims in respect of the Excess Payments. The first characterisation is contractual, with the alleged breaches of fiduciary duties by Mr Bouvier arising out of and having their "root source" in the alleged agency contract between the respondents and Mr Bouvier. On this characterisation, the applicable choice of law rule will be the proper law of the contract: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [83]. The second possible characterisation of the respondents' claims in respect of the Excess Payments is restitutionary, with the claims being seen as an attempt to enforce an obligation to restore the benefit of an alleged unjust enrichment. On this characterisation, the applicable law will be: (a) the proper law of the contract (if the obligation to restore the alleged unjust benefit arises in

connection with a contract); or (b) the proper law of the country where the enrichment occurs: *Thahir v Pertamina* ([145] *supra*) at [37].

153 There are strong arguments that an application of any of these choice of law rules will lead to Swiss law as the applicable law for the respondents' claims in respect of the Excess Payments. There are multiple connections between Mr Bouvier's dealings with the respondents and Switzerland. The first few transactions between Mr Bouvier and the respondents, which we described at [60] above, were expressly stipulated to be governed by Swiss law and subject to the jurisdiction of the Geneva courts. The parties thereafter dealt on the basis of an alleged oral agency agreement as well as over e-mails and invoices, but on very similar terms. Many of the meetings between Mr Bouvier on the one hand and Mr Rybolovlev or Mr Sazonov on the other concerning the acquisition of the 38 artworks continued to take place in Geneva. The payment for these artworks was always made to MEI Invest's bank accounts in Geneva. We accept that the dealings in question also had links to other foreign jurisdictions apart from Switzerland. For example, there were meetings in Monaco between Mr Bouvier and Mr Rybolovlev at the latter's residence, but these were mostly for leisure; Mr Bouvier only went to Monaco to talk to Mr Rybolovlev solely about art on one or two occasions each year. The respondents also made payment for a number of the 38 artworks out of their bank accounts in Monaco. However, notwithstanding such links between the transactions concerned and foreign jurisdictions other than Switzerland, the facts before us suggest that Swiss law has the closest and most real connection to the relationship between Mr Bouvier and the respondents. It is also the law of the place where the enrichment occurred.

154 Swiss law does not recognise proprietary claims for breaches of fiduciary duties; nor does it recognise the concept of a constructive trust. Under Swiss law, any relief which the respondents may have for their claims in respect of the Excess Payments will be limited to a claim in damages. In the expert reports that were filed in the pending stay applications in Singapore mentioned at [11] above, both Prof Corinne Widmer Lüchinger (Mr Bouvier's expert) and Mr Marc Abby Joory (the respondents' expert) were in agreement on this point. Both acknowledged the non-availability of claims for proprietary relief and the absence of tracing rules under Swiss law.

155 But, we prefer not to dismiss the respondents' application for interlocutory proprietary injunctions solely on this ground because little, if any, argument was made on the governing law of the respondents' claims in respect of the Excess Payments. Mr Tong raised the applicability of Swiss law as the governing law as a parting shot towards the end of his oral arguments, and his written submissions on this point were very brief, consisting mostly of bare assertions. The respondents have not made any submissions on the law applicable to their claims in respect of the Excess

Payments. It suffices for us to say that even if the respondents' arguments in support of the governing law and the merits of their claims for proprietary relief cross the seriously arguable threshold, they do so only barely.

156 We turn to address the second requirement which must be satisfied before the interlocutory proprietary injunctions sought by the respondents can be granted, which is that the balance of convenience must lie in favour of granting them such injunctions, assuming that they have a seriously arguable case as to the existence of a proprietary interest in the Excess Payments and their traceable proceeds.

The balance of convenience

157 The balance of convenience affords a firmer basis for us to rest our decision to dismiss the respondents' application for interlocutory proprietary injunctions. We should emphasise that the respondents are asserting a proprietary interest in a fungible asset – money. They do not assert a proprietary interest in unique property, or property that cannot be readily purchased or substituted on the market.

158 There are benefits to asserting a proprietary interest in a specific ascertained pool of funds, in that the claimant will be able to prove as a secured creditor in the event of the defendant's insolvency, and will be entitled to any accretions traceable to that pool of funds. In the present case, however, there is nothing in the evidence that suggests that either Mr Bouvier or Mrs Rappo or any of their companies face the risk of bankruptcy or insolvency. There is no suggestion that either Mr Bouvier or Mrs Rappo has made a windfall from what they applied the Excess Payments (in Mr Bouvier's case) and the sums received out of the Excess Payments (in Mrs Rappo's case) to. Nor is the respondents' application for interlocutory proprietary injunctions made in respect of a specific ascertained pool of money, except where the Toulouse-Lautrec sale proceeds are concerned (see [159] below). The respondents have provided no justification as to why the balance of convenience lies in favour of granting them the interlocutory proprietary injunctions sought. All that their argument hangs on is an assertion in their submissions that:

> If the injunction[s] were not granted and the Respondents succeed in the Suit, the Excess Payments, the [Toulouse-Lautrec sale proceeds] (and any product in which they can be traced) may very well have been disposed of or are no longer traceable, leaving the Respondents with only a monetary claim, when such Payments, proceeds (and/or traceable product) belonged, in equity, to the Respondents.

In other words, according to the respondents, the only prejudice that will be caused by the court's refusal to grant them the interlocutory proprietary injunctions which they seek is the prejudice arising from their being *wrongly* refused the injunctions.

159 Of course, such prejudice can notionally constitute sufficient prejudice; but, stacked against this is the prejudice that would be occasioned to the appellants should the interlocutory proprietary injunctions sought eventually be found to have been wrongly granted. We have just highlighted (at [158] above) that, with the exception of the Toulouse-Lautrec sale proceeds, the interlocutory proprietary injunctions which the respondents seek are not directed at any specific and ascertained fund. Instead, the interlocutory proprietary injunctions sought cover vast and presently unquantified sums of money which were paid over the course of more than a decade. A concomitant to the grant of the interlocutory proprietary injunctions sought would be disclosure orders that would allow the respondents to locate the traceable proceeds of this undefined pool of money down to the last cent. This will place an immensely oppressive burden of disclosure on the appellants. The effort, expense and disruption that would be occasioned to the appellants by the grant of such interlocutory proprietary injunctions and ancillary disclosure orders will be considerable, to say the least. In our judgment, this shifts the balance of convenience decisively against granting the interlocutory proprietary injunctions which the respondents seek.

160 Against such a conclusion stands Flaux J's decision in *Madoff Securities* ([82] *supra*), which the respondents rely heavily on and which we have considered most anxiously because of the eminence and experience of the learned judge. We earlier set out the facts in *Madoff Securities* at [82] above. In that case, Flaux J granted interlocutory proprietary injunctions over millions of dollars that the Kohn defendants were alleged to have received in secret kickbacks over some 30 years. He also granted ancillary disclosure orders in support of the injunctions. At [140], Flaux J rejected the argument that the injunctions would be oppressive to the Kohn defendants:

> In my judgment, once the position has been reached, as it has in the present case, that the claimant shows a sufficiently arguable case for a proprietary remedy, then, as Staughton LJ stated in the Duvalier case [*ie*, *Republic of Haiti v Duvalier* (cited at [2] above)], the court will more readily afford that claimant with interim remedies by way of injunction and disclosure orders.

161 We respectfully part company with Flaux J on this point for three reasons. First, it is unclear whether Flaux J was applying the *American Cyanamid* ([143] *supra*) balance of convenience test at all. His answer to the potentially oppressive ramifications of the interlocutory proprietary injunctions sought by the plaintiffs is set out at [140] of *Madoff Securities* as follows:

> As I said during the course of the argument, given a sufficiently arguable case that the Kohn defendants have had [the plaintiffs'] money, arguments by Mrs Kohn along the lines of: 'it would be frightfully inconvenient to tell you what I've done with your money or to be prevented from continuing to use it'

> when, *on this hypothesis she should not have had the money in the first place, do not cut much ice*. [emphasis added]

With respect, the correct approach to assessing the balance of convenience, in our judgment, is to consider the prejudice to the defendant *in the event that the plaintiff's hypothesis is refuted at the trial*, rather than to analyse the matter primarily on the assumption that the plaintiff's hypothesis will eventually be proved. Perhaps, Flaux J adopted the approach which he took because the documentary evidence against the Kohn defendants was overwhelming (he said at [12] of *Madoff Securities* that some of the evidence against the Kohn defendants "crie[d] out for a proper explanation"), and he was therefore comfortable to proceed on the assumption that the plaintiffs would succeed at the trial given the exceptional circumstances of that case. In *Madoff Securities*, there was also no dispute that if the plaintiffs' allegations were proved, the plaintiffs would have been entitled to a proprietary interest in the moneys concerned. In the present appeals, in contrast, as we pointed out earlier, there remain many unanswered questions and, indeed, it is doubtful whether the respondents are even entitled to a proprietary remedy in respect of the Excess Payments (and their traceable proceeds) and the Toulouse-Lautrec sale proceeds even assuming they make good their factual allegations.

162 Second, Flaux J's reasoning in *Madoff Securities* was based in part on *Republic of Haiti v Duvalier* (cited earlier at [2] above), a decision of the English Court of Appeal. In the passage from *Madoff Securities* which we quoted at [160] above, Flaux J referred to what Staughton LJ "stated in the Duvalier case", *ie*, to Staughton LJ's judgment at 213–214 of *Republic of Haiti v Duvalier*:

> It may be that the powers of the court are wider, and certainly discretion is more readily exercised, if a plaintiff's claim is what is called a tracing claim. For my part, I think that the true distinction lies between a proprietary claim on the one hand, and a claim which seeks only a money judgment on the other. A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant.
>
> Thus far there is no difficulty. A plaintiff who seeks to enforce a claim of that kind will more readily be afforded interim remedies, in order to preserve the asset which he is seeking to recover, than one who merely seeks a judgment for debt or damages.

With respect, this passage must be considered in its proper context. Staughton LJ's remarks were not directed at the balance of convenience test in the context of an application for an interlocutory proprietary injunction. Instead, Staughton LJ was discussing the exercise of the court's *power* to grant interim relief in relation to assets outside the jurisdiction. The point which Staughton LJ was making was that the exercise of extraterritorial power at the interlocutory stage was less objectionable where a proprietary rather than a personal remedy was being asserted. The above *dictum* therefore does not support the view that the balance of convenience will always or even generally lie in favour of granting an interlocutory proprietary injunction whenever a proprietary claim is asserted.

163 Our third and final reason for distinguishing *Madoff Securities* is that we have found no other decision where an interlocutory proprietary injunction has been granted over a diffuse and unascertained pool of funds, although, even in the absence of this point, we would still not have granted the interlocutory proprietary injunctions sought by the respondents as the balance of convenience does not lie in their favour. In *Republic of Haiti v Duvalier*, Staughton LJ referred to "chattels or land" or "a specified debt" as being the possible subjects of an interlocutory proprietary injunction. In *A v C* [1980] 2 Lloyd's Rep 200, Goff J granted an interlocutory proprietary injunction over a specified sum of £383,872.44 in the account of the defendant bank or the traceable proceeds of that sum. In *Polly Peck v Nadir* ([143] *supra*), the interlocutory proprietary injunction sought was over a sum of £8.9m in the account of the defendant bank. In *Cherney v Neuman* ([79] *supra*), Judge Waksman QC granted an interlocutory proprietary injunction over a sum of £1m, being the amount received by the defendant from specific share purchases, and any value-added tax reclaim moneys arising from that. Judge Waksman QC was evidently persuaded to grant the interlocutory proprietary injunction because "[it was] much more *specific and limited* than the general freezing relief sought" [emphasis added]: *Cherney v Neuman* at [102].

164 We note that this final objection of the respondents seeking interlocutory proprietary injunctions over a diffuse and unquantified pool of funds does not apply with equal force to the Toulouse-Lautrec sale proceeds, which form a specific and quantified sum of money. But, we reiterate that even in the absence of this factor, we do not think the balance of convenience lies in favour of granting the respondents the interlocutory proprietary injunctions which they seek. The respondents' claims for proprietary relief in respect of the Excess Payments and their traceable proceeds are, as indicated earlier, barely arguable, and no cogent reasons have been proffered as to why the balance of convenience lies in favour of granting them the interlocutory proprietary injunctions sought. To the extent that the injunctions are sought in respect of the entirety of the Excess Payments and their traceable proceeds, we have explained our concerns in the context of orders which affect funds that are neither specific nor ascertained. And to the extent that the injunctions are limited to the Toulouse-Lautrec sale proceeds, even assuming there is a serious question to be tried as to the respondents' claims for proprietary relief in respect of those sale proceeds, two factors tilt the balance of convenience *against* granting even such limited injunctions, namely: (a) the Toulouse-Lautrec sale proceeds constitute a fungible asset – money – as opposed to unique

property or property that cannot be readily purchased or substituted on the market (see [157] above); and (b) on the evidence before us, there is simply *nothing* to suggest that it would be beyond Mr Bouvier's means to meet a monetary judgment for the amount of the Toulouse-Lautrec sale proceeds, and, in the final analysis, that is all that the respondents seek where those sale proceeds are concerned. We therefore refuse to grant the respondents the interlocutory proprietary injunctions which they seek.

Conclusion

165 In the circumstances, and for the reasons elaborated above, we allow the present appeals and discharge the Mareva injunctions and ancillary disclosure orders made by the Judge. We will hear the parties on costs and on whether an inquiry as to damages should be ordered.

Reported by Shaun Pereira.

Cheong Jun Yoong v Three Arrows Capital Ltd and others
[2024] SGHC 21

Case Number : Originating Claim No 231 of 2023 (Summons No 2078 of 2023)

Decision Date : 26 January 2024

Tribunal/Court : General Division of the High Court

Coram : Chua Lee Ming J

Counsel Name(s) : Blossom Hing Shan Shan, Joshua Chin Tian Hui and Claire Neoh Kai Xin (Drew & Napier LLC) for the claimant; Lionel Leo Zhen Wei, Daniel Liu Zhao Xiang, Kwong Kai Sheng and T Abirami (WongPartnership LLP) for the defendants.

Parties : Cheong Jun Yoong — Three Arrows Capital Ltd — Christopher Farmer (in his capacity as a duly appointed liquidator of Three Arrows Capital Ltd) — Russell Crumpler (in his capacity as a duly appointed liquidator of Three Arrows Capital Ltd)

Civil Procedure – Service

Conflict of Laws – Natural forum

26 January 2024

Chua Lee Ming J:

Introduction

1 This was an application by the defendants to set aside an order of court granting the claimant approval to serve this Originating Claim out of Singapore on the defendants, and, consequently, to set aside the service of the Originating Claim that was effected on the defendants pursuant to the order of court. One of the issues raised was where cryptoassets are situated.

2 The first defendant, Three Arrows Capital Ltd (the "Company") was incorporated on 3 May 2012 in the British Virgin Islands ("BVI") as an investment fund in the business of trading and dealing in cryptocurrency and other digital assets. On 27 June 2022, a BVI court placed the Company under liquidation (the "BVI Liquidation Proceedings") and appointed the second defendant, Mr Christopher Farmer, and the third defendant, Mr Russell Crumpler, as the liquidators (together, the "Liquidators").[note: 1]

3 At the material time, the claimant, Mr Cheong Jun Yoong , managed a portfolio of assets in the Company. In this action, the claimant claims that the portfolio of assets managed by him constituted a standalone fund carrying the brand "DeFiance Capital" (the "DC Fund") and that the assets in the DC Fund (the "DC Assets") were

held on trust by the Company for the benefit of the claimant and other investors in the DC Fund (the "DC Investors").

Background

The 3AC Group

4 The Company was set up by Mr Su Zhu ("SZ") and Mr Kyle Livingston Davies ("KD") and registered as a "Professional Fund" with the Financial Services Commission of the BVI (the "BVI FSC").[note: 2]

5 Until September 2021 the Company's investment manager was Three Arrows Capital Pte Ltd ("TACPL"), a company incorporated in Singapore; in September 2021, ThreeAC Ltd ("3ACL"), a company incorporated in the BVI, took over as the Company's investment manager.[note: 3]

6 The Company operated a master-feeder fund structure:[note: 4]

(a) The Company was the master fund. It had an offshore feeder fund and an onshore feeder fund. The *offshore* feeder fund was Three Arrows Fund Ltd ("TAF Ltd"), which was incorporated in BVI and also registered as a "Professional Fund" with the BVI FSC. The *onshore* feeder fund was Three Arrows Fund, LP ("TAF LP"), a Delaware limited partnership.

(b) Investors invested in the master fund via the feeder funds, *ie* by subscribing for (i) shares of various classes offered by TAF Ltd, or (ii) limited partner interests offered by TAF LP. Contractually, the investors' relationship was with the feeder funds.

(c) The feeder funds in turn invested substantially all their assets in the master fund (*ie* the Company) by subscribing for shares of the Company.

7 TAF Ltd was the more significant feeder fund. As of 31 December 2021, 99% of the equity in the Company was owned by TAF Ltd; the remaining 1% was held by TAF LP (the onshore feeder fund).[note: 5]

8 The Company, TAF Ltd, TAF LP, TACPL and 3ACL are referred to in these grounds as the "3AC Group".

9 As stated earlier, on 27 June 2022, the Company was placed under liquidation. On 27 January 2023, TAF Ltd was placed into voluntary liquidation in BVI by its sole member, TACPL.[note: 6]

How the DC Fund came about

10 The claimant began investing in cryptocurrency-related investments in 2017. By April 2018, the claimant was managing cryptocurrency-related investments for himself and on behalf of a group of friends and ex-colleagues. The investments were held in cryptocurrency wallets and/or accounts which belonged to the claimant.[note: 7] By November 2019, the claimant was managing about US$900,000 worth of investments and he wanted to formally set up a fund for the investments that he was managing.[note: 8]

11 Between November 2019 and early 2020, the claimant, SZ and KD discussed an arrangement pursuant to which the claimant would use the assets managed by him to launch an independent and standalone fund on the 3AC Group platform, which would be owned and controlled by the claimant (the "Independent Fund

Arrangement”).[note: 9]

12 According to the claimant, by early 2020, it was agreed that the salient features of the Independent Fund Arrangement would be as follows:[note: 10]

(a) SZ and KD would procure the entities within the 3AC Group to provide him and his fund access to the 3AC Group’s middle and back-office infrastructure/platform, including access to fund administrators and auditors. In consideration for the procurement of such services, he would pay SZ and KD 25% of the management and performance fees that his fund would collect.

(b) The claimant’s fund (eventually, the DC Fund) would be branded as “DeFiance Capital” and would be an independent fund. SZ and KD would procure the Company and other entities in the 3AC Group to keep the assets in the claimant’s fund (eventually, the DC Assets) segregated in designated accounts and/or cryptocurrency wallets under the claimant’s control.

(c) The claimant would have full control over the assets in his fund, including full control to move the assets out of the 3AC Group platform at any time. SZ and KD would procure that the Company and other entities within the 3AC Group would not deal with the assets without the claimant’s approval and/or instructions.

(d) The assets in the claimant’s fund would be siloed and the insolvency of either the fund or the 3AC Group would not affect each other.

(e) The claimant and the DC Investors would sign standard form fund documents to invest in the claimant’s fund.

13 The Company created sub-accounts for the claimant (the “DC Sub-Accounts”) within the Company’s main accounts on two cryptocurrency exchanges, Binance and FTX.[note: 11]

14 TAF Ltd created a class of shares called “Class Defiance Shares” and TAF LP created a class of interests called “Class Defiance Interests”.

15 The claimant and the DC Investors subscribed for Class Defiance Shares in TAF Ltd and Class Defiance Interests in TAF LP by entering into subscription agreements with TAF Ltd or TAF LP (the “Subscription Agreements”).[note: 12] The Subscription Agreements incorporated the terms set out in the offering memorandum and the memorandum and articles of association of the relevant feeder fund.[note: 13]

16 The claimant and the DC Investors paid for the Class Defiance Shares and Class Defiance Interests by transferring cryptocurrencies and fiat currencies to the DC Sub-Accounts. By May 2022, the claimant had transferred or procured the transfer of USDT 22.3m (cryptocurrency) and further amounts of cryptocurrencies and fiat currencies valued at US$93.8m to the DC Sub-Accounts.[note: 14]

17 The DC Assets thus comprised the cryptocurrencies and fiat currencies that were transferred to the DC Sub-Accounts and other assets that these cryptocurrencies and fiat currencies were used to acquire. These other assets included simple agreements for future equities (“SAFEs”) and simple agreements for future tokens (“SAFTs”). The SAFEs and SAFTs were entered into between the Company and various third-party portfolio companies.[note: 15] Under a SAFE, an investor pays an up-front investment and obtains the right to be issued a

certain number of shares in the company in future, which is typically triggered upon the occurrence of a specific event. A SAFT is similar except that under a SAFT the investor acquires a right to future tokens (cryptoassets) rather than shares.[note: 16]

Management and administration of the DC Fund

18 The claimant had sole discretion and control over the management of the DC Fund. Only the claimant and his employees knew the passwords that were required to access the DC Sub-Accounts.[note: 17] The claimant sourced a co-working space for himself and his employees.[note: 18]

19 As the DC Fund did not exist as a legal entity, the claimant managed the DC Fund initially as an employee of the Company's then investment manager, TACPL, and subsequently as an employee of TAC Research Pte Ltd ("TRPL"), another company set up by SZ and KD.[note: 19] Where necessary, the claimant instructed the Company's officers, employees or representatives to effect his investment decisions, *eg*, decisions to enter into SAFEs or SAFTs, which had to be entered in the Company's name.[note: 20]

20 The DC Assets were accounted for as forming a separate portfolio of assets associated with the Class Defiance Shares and Class Defiance Interests (at the feeder fund level) and with those shares in the Company that the feeder funds had subscribed to (at the master fund level). In short, the DC Assets were earmarked for the Class Defiance Shares and Class Defiance Interests. In this way, the benefit of any increase in the value of the DC Assets accrued solely to the holders of the Class Defiance Shares and Class Defiance Interests (*ie*, the claimant and the DC Investors).

21 The claimant also claimed that as a matter of fact, the DC Fund's operations were kept separate from the Company's operations.

22 In October 2021, the Company entered into a licence agreement with Fireblocks Ltd ("Fireblocks"), a proprietary digital assets custody solutions provider, pursuant to which the Company stored cryptocurrency tokens. The Company set up a workspace on the Fireblocks platform solely for the claimant's use to store the cryptocurrency tokens that were part of the DC Assets (the "DC FB Workspace"). Only the claimant and his representatives could access the DC FB Workspace.[note: 21] Apart from the DC Sub-Accounts and the DC FB Workspace, the claimant also stored the DC Assets in "cold wallets" which belonged to him.[note: 22] Cold wallets are wallets that are kept offline (usually on a physical device) for security.

Transfer of the DC Fund out of the 3AC Group

23 In February 2022, SZ and KD told the claimant that they intended to relocate the 3AC Group's operations to Dubai. The claimant decided to continue operating the DC Fund from Singapore. On 9 May 2022, he incorporated DeFiance Ventures Pte Ltd ("DVPL") and on 14 May 2022, he incorporated DeFiance Capital Pte Ltd ("DCPL").[note: 23]

24 On 14 June 2022, the Company transferred all its rights and interests in the DC FB Workspace, and all the DC Assets that were in the DC Sub-Accounts, to DCPL.[note: 24] These assets comprise cryptoassets in the form of tokens and non-fungible tokens ("NFTs") and are particularised in Schedule 3 to the statement of claim (the "Schedule 3 Assets").

25 Certain DC Assets were not transferred to the claimant and/or DCPL and remain in the Company's possession and/or control. These comprise:[note: 25]

(a) rights and interests in various SAFTs and SAFEs, particularised in Schedule 1 to the statement of claim ("Schedule 1 Assets"); and

(b) shares issued to the Company pursuant to certain SAFEs, particularised in Schedule 2 to the statement of claim ("Schedule 2 Assets").

26 On 20 June 2023, DCPL novated the DC FB Workspace to DVPL because DCPL had commenced operations as the investment manager of a separate new fund that the claimant had established.[note: 26]

The Company's application for recognition of the BVI Liquidation Proceedings

27 On 9 July 2022, the Liquidators filed HC/OA 317/2022 ("OA 317") in which they applied for the BVI Liquidation Proceedings to be recognised in Singapore as a "foreign main proceeding" within the meaning of Article 2(*f*) of the UNCITRAL Model Law on Cross Border Insolvency as adopted in Singapore by way of s 252 and the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).[note: 27]

28 On 22 August 2022, the High Court made orders (among other things) recognizing the BVI Liquidation Proceedings as a "foreign main proceeding" in Singapore and staying the commencement and continuation of individual proceedings concerning the property, rights, obligations or liabilities of the Company.[note: 28]

29 On 4 November 2022, the claimant filed an application in OA 317 seeking, among other things, permission to commence proceedings against the Company in connection with the DC Assets.[note: 29] On 25 January 2023, the High Court granted the claimant leave to commence action against the Company in connection with the DC Assets.[note: 30]

The Parallel BVI Proceedings

30 On 4 November 2022, the Liquidators filed an application in the BVI Liquidation Proceedings seeking orders that the DC Assets were assets of and beneficially owned by the Company (the "Parallel BVI Proceedings").[note: 31] The third defendant has stated that the claimant's application for leave to commence proceedings against the Company was *filed after* the Parallel BVI Proceedings had been filed.[note: 32] This was incorrect. The claimant's application was filed on 4 November 2022 at 8:55am (Singapore time).[note: 33] While the Parallel BVI Proceedings were stated to have been *submitted* on 3 November 2022 at 4:00pm, they were only *filed* on 4 November 2022 at 8:30am (BVI time),[note: 34] *ie* at 8:30pm (Singapore time) since Singapore is 12 hours ahead of BVI.

31 On 3 February 2023, the claimant filed an application to set aside the BVI court order granting the Liquidators permission to serve the Parallel BVI Proceedings on the claimant in Singapore.[note: 35] The application was heard on 18 and 19 July 2023; judgment was reserved.

The present action and the defendants' application to set aside ORC 2117

32 Pursuant to the leave granted by the High Court, on 18 April 2023, the claimant filed this Originating Claim, in which he claims as follows:

(a) Pursuant to the Independent Fund Arrangement, the Company became a trustee of the trust over the DC Assets.

(b) The Company

(i) holds the Schedules 1 and 2 Assets (see [25] above) as trustee, and

(ii) held the Schedule 3 Assets (see [24] above) as trustee prior to 14 June 2022 (*ie*, the date that these assets were transferred to DCPL),

under an express trust, resulting trust, *Quistclose* trust and/or common intention constructive trust for the DC Investors as the ultimate beneficial owners.

33 By way of HC/ORC 2117/2023 ("ORC 2117") filed on 10 May 2023, the court gave its approval for the claimant to effect service of the Originating Claim, the statement of claim, Form 10 (Notice of Intention to Contest or Not to Contest) and a sealed copy of the order (the "Court Papers") on the defendants in the BVI.

34 Service was effected on the defendants between 12 May 2023 to 16 May 2023,[note: 36] and on 11 July 2023, the defendants filed the present application to set aside ORC 2117 and the service of the Court Papers on the defendants.

The law on service out of jurisdiction

35 Order 8 r 1(1) of the Rules of Court 2021 ("ROC 2021") provides that an originating process may be served out of Singapore with the Court's approval if it can be shown that "the Court has the jurisdiction or is the appropriate court to hear the action". The claimant's application for approval to serve out of the jurisdiction was based on the Singapore Court being the appropriate court to hear the action.

36 The question of whether Singapore is the more appropriate forum for the action only arises for determination if the court is first satisfied that there is at least another available forum: *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party*) [2020] 1 SLR 226 ("*Oro Negro*") at [80(a)].

37 Paragraph 63(2) of the Supreme Court Practice Directions 2021 ("SCPD 2021") provides that for purposes of showing why the Singapore Court is the appropriate court to hear the action, the claimant must show that:

(a) there is a good arguable case that there is sufficient nexus to Singapore; sufficient nexus may be shown by reference to any of the non-exhaustive list of factors set out in para 63(3);

(b) Singapore is the *forum conveniens*; and

(c) there is a serious question to be tried on the merits of the claim.

38 Where a defendant applies to set aside an order for service out of jurisdiction, the burden remains on the plaintiff to demonstrate that the three requirements set out above are satisfied: *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [71], [72] and [75].

39 With respect to showing sufficient nexus to Singapore, the position under the ROC 2021 largely reflects that under the Rules of Court 2014 (Cap. 322, R 5, 2014 Rev Ed) ("ROC 2014"), for which, see *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 ("*MAN Diesel*") at [27], where the Court referred to

Zoom Communications at [26] and *Oro Negro* at [54]. One difference is that the list of factors set out in para 63(3) of the SCPD 2021 are non-exhaustive. In contrast, previous case law had treated the list of corresponding factors set out in O 11 r 1 of the ROC 2014 as exhaustive such that a claim "must come within the scope of one or more" of factors set out in O 11 r 1: see Ian Mah and Aaron Yoong , "Service out under the new Rules of Court" (2023) 35 SAcLJ 174 at para 23.

40 With respect to the requirement that Singapore is the *forum conveniens*:

(a) The claimant has to demonstrate that Singapore is, on balance, the more appropriate forum; Singapore would be the more appropriate forum if it has the most real and substantial connection with the disputes raised: *Oro Negro* at [80(b)] and [80(c)].

(b) It is not sufficient for the claimant to show that Singapore is one of the multiple forums which are comparatively equal; Singapore must be shown to be the more appropriate forum: *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [37]–[41].

(c) The court is primarily concerned with the quality, rather than the quantity, of the connecting factors: *MAN Diesel* at [128].

41 A claimant must provide full and frank disclosure of all material facts when applying for approval for service out; a failure to do so may be a sufficient basis to set aside the order granting such approval: *Oro Negro* at [54], citing *Zoom Communications* at [68]–[69].

Whether there was sufficient nexus to Singapore

42 The claimant relied on the following factors to establish sufficient nexus to Singapore:

(a) Relief was sought against the Company which was ordinarily resident or carrying on business in Singapore: SCPD para 63(3)(a).

(b) The claim was made to assert, declare or determine proprietary rights in or over movable property, or to obtain authority to dispose of movable property, situated in Singapore: SCPD para 63(3)(i).

(c) The claim was founded on a cause of action arising in Singapore: SCPD para 63(3)(p).

The claimant only had to show a good arguable case with respect to any one of the above factors.

Whether the Company was ordinarily resident or carrying on business in Singapore

43 The residency of a company is where the central management and command or control of the company is exercised: *Wishing Star Ltd v Jurong Town Corp* [2004] 1 SLR(R) 1 at [4]; *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [99].

44 It was not disputed that the Company had carried out its operations and conducted its trading activities from its Singapore premises.[note: 37] This ceased after the Company was placed under liquidation.

45 The defendants argued that:

(a) The Company was ordinarily resident in the BVI because various courts including the Singapore court have found that the BVI was the Company's centre of main interest, *ie*, where its central administration took place.

(b) The Company ceased to carry on business in Singapore since it was placed under liquidation.

46 The claimant noted that there was no reported decision on the relevant time at which to assess residency in the context of a company under liquidation. The claimant submitted that the residency of an insolvent company had to be assessed by reference to when it was alive and flourishing. The claimant argued that otherwise, a Singapore court would never be able to find jurisdiction in a claim against an insolvent foreign company even where, at all material times prior to its insolvency, the company was resident in Singapore.

47 I disagreed with the claimant. In my view, the question as to whether the Company was ordinarily resident or carrying on business in Singapore had to be determined at the time that the application for service out of jurisdiction was filed or heard. The court's jurisdiction is primarily territorial in nature. Jurisdiction over a defendant who is outside the territory is asserted by way of service of the originating process on him. Such service is possible only with the approval of the court. Where an application for approval for service out of jurisdiction is grounded on the defendant being ordinarily resident or carrying on business in Singapore, it seemed to me that in principle, the ground relied upon ought to be satisfied at the time when the application is filed or heard.

48 My conclusion finds support (at least, in part) in *Chellaram and another v Chellaram and others (No 2)* [2002] 3 All ER 17 ("*Chellaram*"). One of the issues in that case concerned the Civil Procedure Rules (UK) ("CPR") 6.20(11). Permission may be granted under CPR 6.20(11) to serve out of the jurisdiction if:

> a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where – (a) the trusts ought to be executed according to English law, and (b) the person on whom the claim form is to be served is a trustee of the trusts.

The English High Court decided (at [151]) that the condition that the "trusts ought to be executed according to English law" must be fulfilled when permission to serve out is sought. In *Halsbury's Laws of Singapore – Conflict of Laws Vol 6(2)* (LexisNexis, 2020 Reissue) at para 75.035, relying on *Chellaram*, the learned author also commented that the connection of ordinary residence or carrying on business in Singapore must be established "at the time leave is sought [to serve out of jurisdiction]".

49 By the time the claimant filed his application for approval to serve out of jurisdiction, the Company had been placed under liquidation. It was no longer carrying on business and the central management and control of the Company was no longer being exercised in Singapore. I concluded therefore that the ground based on the Company's residency or carrying on of its business was not satisfied.

Whether the claim involved property situated in Singapore

50 The Liquidators had repatriated all moneys held by the Company to the BVI. The Company's office premises in Singapore were repossessed by the landlord in October 2022. The Liquidators submitted that the Company did not have any property in Singapore.

51 The claimant submitted that he was asserting a proprietary claim with respect to the DC Assets that comprised cryptoassets stored in the DC FB Workspace under a licence owned by DVPL (see [22], [24] and [26] above). DVPL was a Singapore company in which the claimant was the sole shareholder. The DC Assets also

included shares and rights in the SAFEs and SAFTs but the cryptoassets constituted the majority in value of the assets.

52 The question was where are cryptoassets situated? The claimant informed me that there was no reported Singapore decision on the *situs* of cryptoassets.

53 The claimant submitted that there was a good arguable case for the principle that the presumptive owner of cryptoassets would be whoever controlled the wallet linked to the cryptoasset and that the *situs* of a cryptoasset would be where its owner was resident. The claimant submitted therefore that the DC Fund's cryptoassets were situated in Singapore since DVPL (and by extension, the claimant) controlled the private key to the assets. Both DVPL and the claimant are resident in Singapore.

54 The claimant relied on *Tulip Trading Ltd (a Seychelles company) v Van Der Laan and others* [2022] 2 All ER (Comm) 624 ("*Tulip Trading (HC)*"). In that case, the claimant claimed that it owned a substantial amount of digital currency assets and that its private keys were removed as a result of a computer hack. The defendants challenged the order granting permission to serve out of the jurisdiction. The English High Court set aside the order granting permission to serve out of the jurisdiction on the ground that the claimant had not established a serious issue to be tried on the merits (at [171]). However, the High Court also decided (in passing) that there was a good arguable case that the claimant was resident in the jurisdiction and that the digital assets were located in the jurisdiction (at [158]). I noted that the question of control over the digital assets did not arise in that case because the claimant's ownership was not disputed. While the English Court of Appeal overruled the decision of the High Court, there was no dispute in the appeal that there was a good arguable case that the claimant was resident in the jurisdiction and that the property was located in the jurisdiction: *Tulip Trading Ltd (a Seychelles company) v Bitcoin Association for BSV and others* [2023] 2 All ER (Comm) 479 (at [7]).

55 The defendants submitted that the DC Fund's cryptoassets should not be considered as being located in Singapore because there is significant uncertainty on how the location of digital assets is to be determined.[note: 38] The defendants referred to *Tulip Trading (HC)* and to the following cases:

(a) In *Lavinia Deborah Osbourne v Persons Unknown and another* [2022] EWHC 1021 (Comm) ("*Osbourne [2022]*"), the English High Court decided that cryptoassets are to be treated as located at the place where the owner is *domiciled* (at [15]–[16]).

(b) In *Lavinia Deborah Osbourne v Person Unknown Category A and others* [2023] EWHC 39 (KB), the claimant was domiciled in the jurisdiction. The English High Court referred to, among others, the decision in *Osbourne [2022]* and accepted that there was a good arguable case that two NFTs were located in the jurisdiction when they were in wallets linked to the claimant's account with a cryptoasset management platform (at [31]–[32]).

(c) In *Bybit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199 ("*Bybit*"), the High Court decided that USDT were choses in action (at [4]). The defendants in the present case submitted that on this basis, the USDT may be treated as being located in the country where the right to redeem it could be enforced. This was consistent with the general principle that choses in action are regarded as situated where they are properly recoverable or can be enforced: *Dicey, Morris & Collins on the Conflict of Laws* (Lord Lawrence Collins and Professor Jonathan Harris KC gen ed) (Sweet & Maxwell, 2022, 16th Ed) ("Dicey") at para 23-025.

56 The defendants further submitted that in the absence of a physical location, the location of the person who controls the private keys to the digital assets or the jurisdictional location of the digital assets should only be relevant when considering the enforceability of any orders made.

57 I agreed with the claimant that there was a good arguable case that the DC Funds cryptoassets were situated in Singapore because the cryptoassets were controlled by DVPL and/or the claimant and both are resident in Singapore.

58 It cannot be seriously disputed that cryptoassets constitute property, the proprietary rights to which may be enforced in court: *CLM v CLN and others* [2022] 5 SLR 273 ("*CLM*") at [46]; *Bybit* at [33] and [36].

59 A cryptoasset has no physical identity and is not associated with any physical object; it exists as a record in a network of computers associated with it: *ByBit* at [31]; *CLM* at [10]. Hence, its location cannot be determined by its physical presence.

60 I agreed with the claimant that the location of a cryptoasset is best determined by looking at where it is controlled. Given the fact that a cryptoasset has no physical presence and exists as a record in a network of computers, in my view, it best manifests itself through the exercise of control over it.

61 It was clear that control over a cryptoasset is with the person who controls the private key to the cryptoasset linked to that key. As explained in Kelvin FK Low and Ernie GS Teo, "Bitcoins and Other Cryptocurrencies as Property?" (2017) 9(2) Law, Innovation and Technology 235 (cited with approval in *CLM* at [10]):

> (a) A holder of bitcoin possesses a public address and a private cryptographic key. The public bitcoin address serves a similar function to an account number; all that is needed to receive bitcoins is the public bitcoin address.
>
> (b) The private cryptographic key is mathematically linked to the public address so that it is not possible to change the private key (unlike a conventional password).
>
> (c) To transfer a cryptoasset, one requires both the public address and the private key.

The public address is also known as the "wallet" or "crypto wallet".

62 The next question then was whether the location of the person who controls the private key should be determined according to his domicile or residence? I agreed with the claimant that the residence of the person who controls the private key should be treated as the *situs* of the cryptoasset linked to that private key.

63 In my view, residence is the more appropriate test. The *situs* of cryptoassets is being determined based on the exercise of control over such assets. The residence of the person is a better indicator of where the control is being exercised. In addition, where the person resides is normally where he can be sued. Further, it was also suggested in Dicey that for the *situs* of cryptoassets, the test of residence (or place of business) may be more appropriate "given the uncertainties around identification of domicile in difficult cases" (Dicey, at para 23–050).

64 As for *Bybit*, the question as to the *situs* of cryptoassets did not arise in that case. In any event, it seemed to me that treating cryptoassets as choses in action would lead the *situs* analysis to the person who controls the private key. As a chose in action, a cryptoasset would be properly recoverable or can be enforced where the person who controls the private key to the cryptoasset resides and can be sued.

65 As the defendants pointed out, there were other cases that decided that the location of cryptoassets should be the domicile, rather than the residence, of the owner. However, I saw no reason why the differing decisions (as to whether the test should be domicile or residence) had to lead to the conclusion (as the defendants submitted) that the DC Fund's cryptoassets should not be considered to be located in Singapore. Cryptoassets are a new type of property which have no physical presence. Courts have to adapt and evolve rules to ascribe a *situs* to them, not unlike how courts evolved rules ascribing a *situs* to choses in action which were once said to have no location (see Dicey, at para 23-025). It is no surprise that in the process in which the rules evolve, different judges have arrived at different conclusions.

Whether the claim was founded on a cause of action arising in Singapore

66 It was common ground that as the claim was a trust claim, the cause of action arose where in substance the trust in favour of the claimant arose: *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another* [2005] 2 SLR(R) 568 at [15].

67 The claimant submitted that in substance the trust over the DC Assets arose in Singapore because the trust over the DC Assets came to fruition in Singapore.

(a) At the material times, the Company had its headquarters in Singapore and the claimant was resident in Singapore.

(b) Discussions on the Independent Fund Arrangement between November 2019 and August 2020 did not only take place over messages exchanged on online messaging platforms but included physical meetings in Singapore.

(c) Meetings where the salient features and framework of the Independent Fund Arrangement were discussed took place in Singapore.

(d) The Company agreed to the Independent Fund Arrangement in Singapore.

68 The defendant submitted that the trust arose in the BVI because:

(a) More than 96% in value of the transfers of the Schedules 1, 2 and 3 Assets from the claimant and the DC Investors was made to TAF Ltd (the Company's offshore feeder fund).

(b) These transfers were made pursuant to the Subscription Agreements which the claimant and the DC Investors entered into with TAF Ltd. These Subscription Agreements were governed by BVI law.

(c) In consideration of the transfers, the DC Investors and the claimant received Class Defiance Shares in TAF Ltd.

(d) The Schedules 1, 2 and 3 Assets were then transferred by TAF Ltd to the Company (a company incorporated in the BVI) as the final leg in the 3AC Group's BVI-domiciled master/feeder fund structure.

69 In my view, the claimant had demonstrated a good arguable case that in substance the trusts arose in Singapore. In essence, the claimant's case was that the trusts arose pursuant to the Independent Fund Arrangement. The discussions on the Independent Fund Arrangement took place in Singapore. The agreement on

the Independent Fund Arrangement was reached in Singapore. The creation of the DC Sub-Accounts, the initial transfer of cryptocurrencies and fiat currencies to the DC Sub-Accounts, and the issuance of the Class Defiance Shares and Class Defiance Interests took place when the Company was headquartered and operating in Singapore. In addition, TACPL (the Company's investment manager then) is a Singapore company and both the Company and TACPL had common directors.[note: 39]

70 The master-feeder fund structure meant that formally, (a) the claimant and the DC Investors had to transfer their cryptocurrencies and fiat currencies to the feeder funds, in consideration for which the feeder funds issued Class Defiance Shares/Interests, and (b) the feeder funds in turn used the cryptocurrencies and fiat currencies to subscribe for shares in the master-fund, *ie*, the Company. In my view, the formalities of the fund structure did not change my conclusion that *in substance* there was a good arguable case that the trust arose in Singapore.

Whether Singapore was the more appropriate forum

71 The claimant submitted that Singapore was the more appropriate forum whilst the defendants submitted that it should be the BVI. Singapore would be the more appropriate forum if it is the forum with which the dispute has the most real and substantial connection. I agreed with the claimant that the relevant factors pointed to Singapore being the more appropriate forum.

Witnesses

72 Most of the relevant witnesses are in Singapore. I agreed with the claimant that, apart from convenience and cost, the compellability of these witnesses to give evidence in the BVI was a significant factor since the main disputes revolve around questions of fact (*eg*, how the Independent Fund Arrangement was set up): see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [19]. There was also no suggestion that the key relevant witnesses would be compellable to give evidence in the BVI.

73 The Independent Fund Arrangement is key to the claimant's case. The witnesses are the claimant, SZ and KD. All three are Singapore citizens. The claimant was and remains resident in Singapore. At the material times, SZ and KD were also resident in Singapore although it was not clear at the time I heard the defendants' application whether they were still present in Singapore or where they were, if not in Singapore.

74 Ningxin, a trader of the 3AC Group whom the claimant dealt with, could give evidence of instructions from SZ and KD regarding the segregation of the DC Assets and how the other assets of the 3AC Group were treated. Ningxin and her family were believed to be based in Singapore.[note: 40] The claimant dealt with another trader of the 3AC Group, Eric Mak, who was Ningxin's predecessor and could also give evidence concerning the segregation of the DC Assets. However, Eric Mak as a witness was a neutral factor as he was neither based in Singapore nor the BVI, but appeared to be based in Hong Kong.[note: 41]

75 Ascent Fund Services (Singapore) Pte Ltd ("Ascent"), the fund administrator for the DC Fund and the 3AC Group is incorporated in Singapore and its employees who handled the DC Fund and the 3AC Group were understood to be in Singapore. These witnesses could give evidence as to how the DF Fund was operated and on the instructions given by SZ and KD.

76 Oakfield & Associates ("Oakfield"), the auditors of the Company, is a public accounting firm registered in Singapore. Their representatives could give evidence on instructions by SZ and KD as to how the DC Fund was recognised at the Company (master-fund) level.

Documents

77 Relevant documents in the possession of Ascent and Oakfield would be in Singapore. There was no evidence that a BVI court would be able to compel the production of any such documents.

Governing law

78 The defendants relied on the fact that the transactions were implemented through a BVI investment structure pursuant to the Subscription Agreements, which were governed by BVI law. In my view, this was a neutral factor. The claimant did not challenge the fact that he and the DC Investors had been issued Class Defiance Shares and Class Defiance Interests pursuant to the Subscription Agreements. The substance of his case was that the trust was created pursuant to the Independent Fund Arrangement and that SZ and KD procured each entity in the 3AC Group (and their directors, officers, employees, representatives and/or agents) to act in a manner consistent with the Independent Fund Arrangement. In other words, there was a trust notwithstanding the fact that the master-feeder fund structure was used.

79 In any event, in my view, the applicability of BVI law was not sufficient to outweigh the factors in favour of Singapore being the more appropriate forum.

Administration of the Company's liquidation

80 The defendants submitted that the issues in the present case are more appropriately dealt with by the BVI court as they concern the Liquidators' administration of the Company's liquidation. The defendants argued that the Company's creditors' committee had approved the dispute with the claimant being resolved by the BVI court as part of the BVI Liquidation Proceedings.[note: 42] In my view, this was not a relevant consideration. This argument amounted to nothing more than that the Company and/or its creditors preferred the dispute between the Company and the claimant to be litigated in the BVI.

81 The defendants also submitted that if any of the Company's creditors wished to intervene and participate, they would look to participate via the BVI proceedings. I disagreed with this submission. It was not clear how the creditors would be able to intervene in the dispute over the ownership of the DC Assets. The dispute over the DC Assets was between the Company and the claimant. Further, the fact that the creditors might prefer to intervene in proceedings in the BVI was as irrelevant as the Company's preference to litigate in the BVI.

Parallel BVI Proceedings

82 In my view, the Parallel BVI Proceedings were not a significant factor given the early stage of those proceedings (see [31] above).

Whether there was a serious question to be tried

83 In my view, the evidence showed that there was a serious question to be tried as to the existence of the trust. In particular:

(a) SZ's messages on Telegram to the claimant supported the claimant's case. In these messages, SZ:

(i) suggested a "standalone fund" within the Company's fund structure, "separate" from what the Company did;[note: 43]

(ii) referred to a "siloed reputation/risk model" (a "siloed risk" model could arguably require that the Company's other assets not be at risk of the DC Fund's insolvency);[note: 44]

(iii) stated that the claimant would have "full control to move [his] fund elsewhere" [note: 45] (which was different from the procedures for redemption provided in the Amended and Restated Memorandum of Association of the Company's and TAF Ltd);[note: 46]

(b) The 3AC Group paid the claimant (or his nominees) 75% of the fees collected in connection with the DC Fund and paid the remaining 25% to SZ and KD.[note: 47] This was consistent with the Independent Fund Arrangement (see [12(a)] above). In my view, it was significant that none of these fees were paid to the feeder funds or the Company.

(c) The claimant had sole control over the management of the DC Fund. Although the claimant managed the DC Fund as an employee of TACPL/TRPL, his employment by TACPL/TRPL was necessary only because the DC Fund was not a legal entity. What was more important was that the claimant managed the DC Fund to the exclusion of other officers, representatives or employees of the 3AC Group. In contrast, the claimant separately managed a discrete pool of TAC Ltd's assets in a managed account (over which there was no trust) based on a mandate fixed by SZ and KD.

(d) In his email to the claimant, Eric Mak (a trader of the 3AC Group) confirmed the following:[note: 48]

> As far as [he could] recall, Defiance operated independently from 3AC in terms of management and employees. Exchange subaccounts were held for Defiance Capital and any token transactions between 3AC and Defiance [he] saw were documented as arms length counterparty transactions in terms of loans and trades.

(e) The Company set up the DC FB Workspace solely for the claimant's use to store the DC Assets; only the claimant and his representatives could access the DC FB Workspace (see [22] above).

(f) On 14 June 2022, the Company transferred all its rights and interests in the DC FB Workspace and all the DC Assets that were in the DC Sub-Accounts to DCPL. This was different from the provisions for redemption found in the Amended and Restated Memorandum of Association of the Company and TAF Ltd. Instead, it was consistent with the Independent Fund Arrangement.

84 The claimant's discussions with SZ and KD, the segregation of the DC Assets and the extent to which the claimant had control over these assets to the exclusion of the 3AC Group supported the claimant's trust claim.

85 The defendants' main argument was that the trust claim flew in the face of the BVI-based master-feeder investment structure and that it could not have arisen if the Subscription Agreements meant what they said on their face.[note: 49] In my view, this was not a strong argument. It is not uncommon that a trust is found to exist notwithstanding the fact that it contradicts what relevant legal documents say.

Whether there was failure to make full and frank disclosure

86 The defendants submitted that the claimant failed to make full and frank disclosure because:[note: 50]

(a) he "made significant attempts to brush aside the BVI master-feeder investment structure and the Fund Documents which [were] clearly adverse/fatal to his case"; and

(b) in particular, he had not "bothered to explain the BVI-centric master-feeder investment structure".

87 I disagreed with the defendants' submission. I did not think that there was any failure to make full and frank disclosure of material facts. The claimant had disclosed the Liquidators' position that they disagreed that the DC Assets were held on trust and reproduced (quite extensively) the Liquidators' reasons, which referred to the terms of investment into TAF Ltd and the master-feeder investment structure.[note: 51]

Conclusion

88 For the reasons set out above, I concluded that the claimant had demonstrated that:

(a) the claim had sufficient nexus to Singapore,

(b) Singapore was the more appropriate forum, and

(c) there was a serious question to be tried.

89 I also concluded that there had been no failure to make full and frank disclosure.

90 Accordingly, I dismissed the defendants' application. I ordered the defendants to pay costs to the claimant fixed at $15,000 plus disbursements to be fixed by me if not agreed.

[note: 1]1st affidavit of Russel Crumpler ("Crumpler's 1st affidavit"), at pp 102–108.

[note: 2]Statement of Claim ("SOC"), at para 4; Crumpler's 1st affidavit, at para 11.

[note: 3]Crumpler's 1st affidavit, at paras 21–22.

[note: 4]Crumpler's 1st affidavit, at paras 12–13 and 16–17.

[note: 5]Crumpler's 1st affidavit, at para 20, p 160.

[note: 6]Crumpler's 1st affidavit, at para 18, p 141.

[note: 7]SOC, at paras 8–10.

[note: 8]Claimant's 1st affidavit, at para 24.

[note: 9]SOC, at para 11.

[note: 10]SOC, at para 12; Claimant's 1st affidavit, at para 31.

[note: 11]SOC, at para 13; Claimant's 1st affidavit, at para 34.

[note: 12]Crumpler's 1st affidavit, at para 32.

[note: 13]Crumpler's 1st affidavit, at para 38.

[note: 14]Claimant's 1st affidavit, at paras 34 and 36.

[note: 15]Claimant's 1st affidavit, at paras 42–46.

[note: 16]Crumpler's 1st affidavit, at para 92.

[note: 17]SOC, at para 16(c).

[note: 18]Claimant's 1st affidavit, at para 38.

[note: 19]Claimant's 1st affidavit in OA 317, at para 111.

[note: 20]Claimant's 1st affidavit, at para 42.

[note: 21]Claimant's 1st affidavit, at para 40.

[note: 22]Claimant's 1st affidavit, at para 41.

[note: 23]Claimant's 1st affidavit, at paras 54–56.

[note: 24]SOC, at para 22.

[note: 25]SOC, at para 24.

[note: 26]Crumpler's 1st affidavit, at pp 1132–1138.

[note: 27]Crumpler's 1st affidavit, at pp 111–114.

[note: 28]Crumpler's 1st affidavit, at pp 115–117.

[note: 29]Crumpler's 1st affidavit, at pp 478–480.

[note: 30]Claimant's 1st affidavit, at p 237 (lines 7–10).

[note: 31]Crumpler's 1st affidavit, at pp 312–317.

[note: 32]Crumpler's 1st affidavit, at para 48.

[note: 33]Crumpler's 1st affidavit, at p 478.

[note: 34]Crumpler's 1st affidavit, at p 312.

[note: 35]Crumpler's 1st affidavit, at pp 319–325.

[note: 36]Memorandum of Service dated 20 June 2023.

[note: 37]Crumpler's 1st affidavit in OA 317, at para 32.

[note: 38]Liquidators' Written Submissions, at para 71.

[note: 39]Claimant's 2nd affidavit, at p 52.

[note: 40]Claimant's 1st affidavit in OA 317, at para 62(j).

[note: 41]Claimant's 3rd affidavit in OA 317, at p 686.

[note: 42]Liquidators' Written Submissions, at para 97.

[note: 43]Claimant's 1st affidavit, at para 30.

[note: 44]Claimant's 1st affidavit, at para 32(a).

[note: 45]Claimant's 1st affidavit, at para 32(b).

[note: 46]Crumpler's 1st affidavit, at pp 930 and 987.

[note: 47]Claimant's 1st affidavit, at para 51.

[note: 48]Claimant's 3rd affidavit in OA 317, at para 36(a), pp 686–688.

[note: 49]Liquidators' Written Submissions, at para 132.

[note: 50]Liquidators' Written Submissions, at para 149.

[note: 51]Claimant's 1st affidavit, at para 60.

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CLM
v
CLN and others

[2022] SGHC 46

General Division of the High Court — Suit No 470 of 2021 (Summonses Nos 2444 and 4880 of 2021)
Lee Seiu Kin J
8 June, 9 November 2021; 4 March 2022

***Civil Procedure** — Amendments — Orders — Application for leave to amend writ of summons — Whether leave should be granted — Order 20 r 5(1) Rules of Court (2014 Rev Ed)*

***Civil Procedure** — Injunctions — Interim proprietary injunction — Application for interim proprietary injunction for stolen cryptocurrency assets — Whether such assets could be subject to such injunction*

***Civil Procedure** — Interim orders — Jurisdiction — Unidentified persons alleged to have participated or assisted in theft — Whether court had jurisdiction to grant interim orders against such persons*

***Civil Procedure** — Mareva injunctions — Interim worldwide Mareva injunction — Application for interim worldwide Mareva injunction for total value of stolen cryptocurrency assets — Whether requirements satisfied*

***Civil Procedure** — Parties — Joinder — Application to join additional defendants — Whether requirements satisfied — Order 15 r 4(1) Rules of Court (2014 Rev Ed)*

***Civil Procedure** — Service — Substituted service out of jurisdiction — Application for leave to serve cause papers and relevant documents by e-mail out of jurisdiction — Whether leave should be granted — Order 11 r 1, O 11 r 3(1) and O 62 r 5 Rules of Court (2014 Rev Ed)*

Facts

The plaintiff had stored cryptocurrency, *viz*, 109.83 Bitcoin ("BTC") and 1497.54 Ethereum ("ETH"), in two separate digital wallets that were accessible through a free mobile application secured with a password. The wallets employed recovery seeds that could be used to recover the password if the mobile phone was lost or destroyed.

The plaintiff and seven acquaintances went on vacation at his apartment in Mexico. One night, the plaintiff and one acquaintance went out while the rest of the group remained at his apartment. As the plaintiff needed some money, he called one member of the group at his apartment and requested that member to retrieve some cash that he had kept in a safe. The plaintiff then read the safe combination over the phone. The plaintiff claimed that some other members of the group were in the same room while two other members were in a nearby bedroom, and they could hear the safe combination being said out loud. This safe contained the recovery seeds for his wallets. The next night, the plaintiff found that the BTC and ETH were withdrawn from his wallets without his knowledge or consent (collectively, the "Stolen Cryptocurrency Assets").

The plaintiff then commenced the action to trace and recover the Stolen Cryptocurrency Assets that were allegedly misappropriated from him by unidentified persons (*ie*, the first defendants), a portion of which had been traced to digital wallets that were controlled by cryptocurrency exchanges with operations in Singapore (*ie*, the second and third defendants).

In Summons No 2444 of 2021 ("SUM 2444"), the plaintiff sought: (a) a proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the Stolen Cryptocurrency Assets; (b) a worldwide freezing injunction prohibiting the first defendants from dealing with, disposing of, or diminishing their assets up to the value of US$7,089,894.68, being the value of the Stolen Cryptocurrency Assets; and (c) ancillary disclosure orders against the second and third defendants to assist in the tracing of the Stolen Cryptocurrency Assets and the identification of the first defendants.

Subsequently, as a result of further investigations and disclosure by the second and third defendants, the plaintiff managed to identify two persons, CPZ and CQA, within the first defendants. The plaintiff also discovered that further portions of the Stolen Cryptocurrency Assets had been dissipated to a cryptocurrency exchange, CQB, and a digital payment services company, CQC.

In Summons No 4880 of 2021 ("SUM 4880"), the plaintiff sought leave to join the four persons above as defendants to the action. The plaintiff also applied for leave to serve the cause papers and relevant documents on the additional defendants out of jurisdiction. Specifically, for CPZ and CQA, the plaintiff applied for leave to serve them by way of e-mail, *ie*, via substituted means.

Held, allowing the applications:

SUM 2444

Jurisdiction against persons unknown

(1) Because the first defendants' identities were unknown at the time of the application, there was a preliminary issue of whether the court had jurisdiction to grant interim orders against them: at [23].

(2) Such a jurisdiction was recognised in the UK and in Malaysia and the reasoning in those authorities was readily applicable to our local context. First, like those jurisdictions, there was nothing in our Rules of Court (2014 Rev Ed) ("ROC") that required a defendant to be specifically named. Second, like the UK Civil Procedure Rules 1998 (SI 1998 No 3132) r 3.10, O 2 r 1 of our ROC expressly provided that even if the commencement of proceedings against persons unknown contravened the ROC, such a contravention was treated as a mere irregularity and would not nullify proceedings. Third, like O 89 of the Malaysian Rules of Court 2012, O 81 r 3 of our ROC allowed for a reference to persons unknown in summary proceedings for possession of land; there was no reason in principle why such a reference could not be used for interim orders. The court therefore had the jurisdiction to grant interim orders against the first defendants: at [24] to [31].

(3) However, the description of the first defendants had to be sufficiently certain as to identify those who were included and those who were not. The present description satisfied this requirement: at [32] and [35].

Proprietary injunction

(4) The plaintiff had to prove: (a) a serious question to be tried; and (b) that the balance of convenience lay in favour of granting the proprietary injunction: at [38].

(5) The extant case law and especially the analysis in *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809 showed that cryptocurrencies satisfied the classic definition of a property right in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. The plaintiff was therefore able to prove a serious arguable case that the Stolen Cryptocurrency Assets were capable of giving rise to proprietary rights which could be protected via a proprietary injunction. This satisfied the requirement of a serious question to be tried: at [39] to [41], [45] and [46].

(6) If the proprietary injunction were not granted, there would be a real risk that the first defendants would dissipate the Stolen Cryptocurrency Assets, which would prevent the plaintiff from recovering those assets even if he successfully obtained a judgment in his favour. Conversely, the first defendants would only suffer losses arising from their inability to deal with the Stolen Cryptocurrency Assets, which could be compensated by way of damages. Hence, the balance clearly lay in favour of granting the proprietary injunction: at [48].

Mareva injunction

(7) The plaintiff had to prove that: (a) he had a good arguable case on the merits of his claim; and (b) there was a real risk that the defendants would dissipate his assets to frustrate the enforcement of an anticipated judgment of the court. Since a worldwide freezing injunction was sought, the court would require more exacting circumstances and would consider whether the defendants had sufficient assets within the jurisdiction to satisfy the prospective judgment: at [51] and [52].

(8) In respect of the first requirement, it was sufficient to consider the plaintiff's claim that the first defendants held the Stolen Cryptocurrency Assets on a constructive trust for the plaintiff. It was hornbook law that such a constructive trust arose where a person misappropriated another's property without consent: at [53].

(9) In respect of the second requirement, it was relevant that the first defendants had acted dishonestly in misappropriating the Stolen Cryptocurrency Assets. Moreover, the risk of dissipation was heightened as the Stolen Cryptocurrency Assets were susceptible to being transferred by the click of a button, through digital wallets that might be completely anonymous and untraceable to the owner, and could be easily dissipated and hidden in cyberspace: at [54].

(10) Additionally, the circumstances showed that the first defendants likely would not have sufficient assets in Singapore to satisfy an award for damages: at [55].

Disclosure orders

(11) The court's power to grant disclosure orders ancillary to a freezing injunction originates from s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed). As the second and third defendants *were* parties to the present dispute, there was no need to refer to the principles governing *Bankers Trust* orders, which were orders compelling *non-parties* to provide documents to assist with an applicant's tracing claim where there was a *prima facie* case of fraud: at [58] and [59].

(12) The disclosure orders sought were just and convenient. The plaintiff required the information sought to understand the details and whereabouts of the Stolen Cryptocurrency Assets and to facilitate the identification of the first defendants or any persons that may have assisted or acted in concert with them: at [60].

SUM 4880

Joinder and amendment of writ

(13) Order 15 r 4(1) of the ROC provided that any person could be joined to the action if: (a) there existed a common question of law or fact that would arise in the event that separate actions were commenced against the defendants; and (b) all the plaintiff's rights to relief against both defendants arose out of the same transaction or series of transactions: at [65].

(14) It was clear that common questions of law and fact would arise in separate claims against the first defendants and the additional defendants. The documentary evidence showed that the fourth and fifth defendants were involved in the transfers of assets traceable to the Stolen Cryptocurrency Assets in rather suspicious circumstances and were thus persons identified from the first defendants. The sixth and seventh defendants were similar to the second and third defendants in that they were entities whose accounts were involved in the transfer of assets traceable to the Stolen Cryptocurrency Assets: at [66].

(15) It was eminently clear that the plaintiff's rights to relief against all the defendants arose out of the same transaction since they related to the theft and dissipation of the Stolen Cryptocurrency Assets: at [67].

Service out of jurisdiction

(16) To obtain leave to serve out of jurisdiction, the plaintiff had to show that: (a) its claim came within one of the heads under O 11 r 1 of the ROC; (b) its claim had a sufficient degree of merit; and (c) Singapore was the proper forum for the trial of the action: at [70].

(17) The first requirement was satisfied. The sixth and seventh defendants had wholly-owned subsidiaries and therefore assets in Singapore. The fourth and fifth defendants fell within the meaning of a "proper party" under O 11 r 1(*c*) of the ROC: at [71].

(18) With regard to the second requirement, the plaintiff had to show that there was a serious question to be tried on the merits of the claim. The documents disclosed by the second and third defendants revealed that the accounts registered by the fourth and fifth defendants were likely created for the sole purposes of dissipating the stolen assets. For the sixth and seventh defendants, similar to the second and third defendants, the plaintiff would have

a meritorious claim in seeking disclosure of relevant information against them: at [72].

(19) As for the last requirement, the court would assess whether Singapore was the most appropriate forum to hear the substantive dispute and the plaintiff bore the burden of proof. This requirement was satisfied and the court placed much weight on: (a) the fact that the second and third defendants were based in Singapore and had complied with disclosure orders; and (b) the fact that the sixth and seventh defendants had wholly-owned subsidiaries in Singapore and were likely to comply with disclosure orders: at [73] and [74].

Substituted service out of jurisdiction

(20) Pursuant to O11 r 3(1) read with O 62 r 5 of the ROC, the court may grant leave for substituted service out of jurisdiction for an originating process where it appeared to the court that it was impracticable for any reason to serve that document personally. In the circumstances, the only practical means by which the plaintiff could effect service on the fourth and fifth defendants was by way of e-mail and that mode would bring the writ of summons to the notice of those defendants: at [77] and [82].

Case(s) referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (folld)
B2C2 Ltd v Quoine Pte Ltd [2019] 4 SLR 17 (refd)
Bankers Trust Co v Shapira [1980] 1 WLR 1274 (distd)
Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] 1 WLR 1633 (folld)
Bouvier, Yves Charles Edgar v Accent Delight International Ltd [2015] 5 SLR 558 (folld)
Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd [1999] 3 SLR(R) 1156; [2000] 1 SLR 673 (folld)
Cameron v Liverpool Victoria Insurance Co Ltd [2019] 1 WLR 1471 (refd)
CMOC v Persons Unknown [2017] EWHC 3599 (Comm) (folld)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25 (refd)
Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA [2003] 1 SLR(R) 157; [2003] 1 SLR 157 (folld)
J H Rayner (Mincing Lane) Ltd v Teck Hock and Co (Pte) Ltd [1989] 2 SLR(R) 683; [1989] SLR 1174 (folld)
National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (folld)
Petroval SA v Stainby Overseas Ltd [2008] 3 SLR(R) 856; [2008] 3 SLR 856 (folld)
Quoine Pte Ltd v B2C2 Ltd [2020] 2 SLR 20 (refd)
Ruscoe v Cryptopia Ltd [2020] 2 NZLR 809 (folld)
Siemens AG v Holdrich Investment Ltd [2010] 3 SLR 1007 (refd)
Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 (folld)
Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd [2016] 4 SLR 1392 (refd)
Sun Electric Pte Ltd v Menrva Solutions Pte Ltd [2020] 4 SLR 978 (folld)
Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd [2018] 2 SLR 21 (folld)

Zoom Communications Ltd v Broadcast Solutions Pte Ltd [2014] 4 SLR 500 (folld)

Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown [2021] 7 MLJ 178 (folld)

Legislation referred to

Civil Law Act (Cap 43, 1999 Rev Ed) s 4(10) (consd)

Rules of Court (2014 Rev Ed) O 11 r 1, O 11 r 3(1), O 15 r 4(1), O 62 r 5 (consd); O 1 r 7, O 2 r 1, O 11 r 1(*a*), O 11 r 1(*c*), O 15, O 20 r 5(1), O 62 r 5(1), O 81, O 81 r 3, Appendix A

Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18(2), First Schedule

Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 3.10 (consd)

Rules of Court 2012 (PU(A) 205/2012) (M'sia) O 89 (consd)

Ong Tun Wei Danny, Chow Chao Wu Jansen and Yap Zhe You Ryo (Rajah & Tann Singapore LLP) for the plaintiff;
Defendants absent and unrepresented.

4 March 2022

Lee Seiu Kin J:

Introduction

1 The present dispute raised two interesting and novel points of law. First, can stolen cryptocurrency assets be the subject of a proprietary injunction? Second, does the court have jurisdiction to grant interim orders against persons whose identities are presently unknown?

2 The plaintiff had commenced an action to trace and recover 109.83 Bitcoin ("BTC") and 1497.54 Ethereum ("ETH") (collectively, the "Stolen Cryptocurrency Assets") that were allegedly misappropriated from him by unidentified persons (*ie*, the first defendants), a portion of which has been traced to digital wallets that were controlled by cryptocurrency exchanges with operations in Singapore (*ie*, the second and third defendants).

3 In Summons No 2444 of 2021 ("SUM 2444"), which was heard on 8 June 2021, the plaintiff sought the following interlocutory relief via an *ex parte* application:

(a) A proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the Stolen Cryptocurrency Assets.

(b) A worldwide freezing injunction prohibiting the first defendants from dealing with, disposing of, or diminishing their assets up to the value of US$7,089,894.68, being the value of the Stolen Cryptocurrency Assets.

(c) Ancillary disclosure orders against the second and third defendants to assist in the tracing of the Stolen Cryptocurrency Assets and the identification of the first defendants.

4 In Summons No 4880 of 2021 ("SUM 4880"), the plaintiff sought, via an *ex parte* application, leave to join persons as defendants to the action because they were either (a) individuals believed to have participated in or assisted with the theft or (b) entities who had received the Stolen Cryptocurrency Assets.

5 I allowed the above applications and I set out the grounds of my decision below.

SUM 2444

The parties

6 The plaintiff is a national of the US and an entrepreneur, who claims to be the owner of the Stolen Cryptocurrency Assets.

7 The first defendants are persons unknown, which refer to any person or entity who carried out, participated in, or assisted in the theft of the Stolen Cryptocurrency Assets, save for entities involved in the provision of cryptocurrency hosting or trading facilities in the ordinary course of business. At the time of the hearing for SUM 2444, the plaintiff was unable to identify specifically who the first defendants may be.

8 The second and third defendants are entities that are incorporated in the Cayman Islands and Seychelles respectively, and who operate cryptocurrency exchanges with operations in Singapore. Portions of the Stolen Cryptocurrency Assets have been traced to digital wallets in the exchanges operated by the second and third defendants. Nonetheless, at the time of application, the plaintiff believed that the second and third defendants were innocent third parties and asserted no substantive claims against them apart from disclosure.

The nature of BTC and ETH

9 For context, I briefly set out the nature of the Stolen Cryptocurrency Assets.

10 BTC and ETH are commonly referred to as cryptocurrencies. While the word "currency" connotes a medium of exchange, a cryptocurrency is not associated with any physical object (unlike how a currency such as the US Dollar is). In essence, BTC and ETH are records in a network of computers associated with that cryptocurrency. These records are stored in publicly available ledgers that provide a digital record of every BTC or ETH transaction that has taken place. The records, in a form known as blockchain, provide an accurate, verifiable, and permanent audit trail with which one can track the transmission of cryptocurrencies. The following

explanation in Kelvin F K Low and Ernie G S Teo, "Bitcoins and Other Cryptocurrencies as Property?" (2017) 9(2) Law, Innovation and Technology 235 (available at https://ink.library.smu.edu.sg/sol_research/2806) is helpful:

> Bitcoin was conceived by the pseudonymous Satoshi Nakamoto in his seminal white paper first published in 1 November 2008. … Bitcoin was envisaged as 'an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.' As a result of the central role played by cryptography in the system, bitcoin and its derivatives are known as cryptocurrencies. Once properly validated, bitcoin transactions are irreversible, or in the parlance of the bitcoin community, immutable.
>
> Unlike most prior forms of 'electronic money', the system is neither derived from nor backed by any fiat currency. Instead, individual bitcoins are first created in the system through a process called mining. This process is intimately connected to the verification process by which transfers are tracked within the system. Instead of a centralised ledger (or register), the bitcoin system employs a decentralised system of ledgers known as the blockchain. The blockchain is essentially a register containing information tracking the creation and transfer of bitcoins much like a bank ledger tracks payments between bank accounts. Unlike bank accounts, however, the blockchain is not maintained by a central authority but instead resides in thousands of computers throughout the world. These computers are connected over the Internet to other computers running the same software, creating a network. When the holder of a bitcoin wishes to make a payment in bitcoin, an instruction is sent to this network and the computers on the network (nodes) validate the transaction before it is added to the blockchain files sitting on all the computers in the network. The process of validation involves the solution of a complex mathematical puzzle by nodes operated by users known as miners. Although the puzzles are described as complex, '[i]n fact there is nothing complex about this process, and you can do this by hand without a calculator; it just deliberately takes many computational steps without shortcuts.' In essence, this involves the miners' computers engaging in a guessing game and the odds of winning are dependent on how quickly a miner's computer can perform calculations as compared to those of other miners. Such users are described as miners because, in order to incentivise participants to engage in this process of validation, the system rewards the first to solve the puzzle with a preset quantity of new bitcoins. This did not require very much computational power in the beginning and anyone with a computer could mine bitcoin. However, as a result of the design of the bitcoin protocol, the level of difficulty increases with increased computational power participating in the network, and mining progressed from the use ordinary computers to dedicated ASIC (application-specific integrated circuit) chips that are designed to do nothing except mine for bitcoin. Although computationally difficult to solve, the solutions are easily verifiable by other nodes, who may or may not be miners, on the network. Once verified, the transaction is added to the blockchain. This verification

> process requires a consensus of a majority of nodes in the network so that the likelihood of fraud is dramatically reduced.
>
> A holder of bitcoins possesses a public bitcoin address and a private cryptographic key. The bitcoin address is often regarded as a serving a similar function to a bank account number. All that is needed to receive bitcoins is this public bitcoin address. Like a bank account, it is possible to have as many bitcoin addresses as one can be bothered to create. In order to transfer bitcoins out of the address, however, one requires both the address and the private cryptographic key. Whilst sometimes considered the equivalent of a password, the private cryptographic key is mathematically linked to the public address so that it is not possible to change the private key unlike a conventional password. One of the attractions of bitcoins is its relative anonymity compared with other payment systems. … However, bitcoin addresses are not completely anonymous but only pseudo-anonymous. While the identity of the address holder is not known, all transactions related to the address are in fact transparent and tracked in the blockchain. With the appropriate information, including publicly available information, it is possible to track some bitcoin transactions. …

11 BTC and ETH are sent between users electronically by sharing public "wallet" addresses on the blockchain. These wallets are represented by a string of numbers and letters, and loosely function like an account number. Unlike traditional bank accounts, however, all transactions to and from a given wallet can be viewed on the public blockchain.

12 For security, BTC and ETH wallets employ one or more "private keys" that should be known only to the wallet owner. The private key functions like a signature that confirms that any given transaction is authorised by the wallet owner. Private keys are represented by a string of 64 numbers and alphabets. Thus, anyone in possession of the private key can access the linked wallet and transfer BTC and ETH out. Likewise, losing the private key means that the funds held in the wallet cannot be accessed. As there are more than a billion permutations for what a private key may be, it is virtually impossible for one to guess the private key of a digital wallet.

13 Given the risks associated with the loss of the private key, most private keys are backed up by a "recovery seed" that can restore access to the private key in the event of loss.

Background to the theft

14 Prior to the theft, the Stolen Cryptocurrency Assets were accessible through two separate digital wallets, controlled by two software applications which were downloaded onto the plaintiff's mobile phone and marketed publicly as "Exodus" and "BRD".

15 BRD and Exodus wallets are decentralised "hot" wallets (*ie*, wallets that are connected to the Internet) that are accessible through a free mobile

application that is locked by either a password or a biometric key. BRD and Exodus provide users with a public wallet address and allow the private key to be stored directly on the user's phone. BRD and Exodus wallets do not themselves hold cryptocurrencies but rather manage the private key through which a user can access those cryptocurrencies (which are maintained on the BTC or ETH blockchain).

16 While the plaintiff had locked both his Exodus and BRD wallets with a password, both wallets employed recovery seeds that could be used to recover the passwords and could therefore allow him to gain access to the cryptocurrencies in the event that his mobile phone was lost or destroyed.

17 In January 2021, the plaintiff and seven acquaintances were on vacation at his apartment in Mexico. On the night of 7 January 2021, the plaintiff and one acquaintance went out while the rest of the group remained at his apartment. As he needed some money, the plaintiff called one member of the group at his apartment, [E], and requested that [E] retrieve some cash that the plaintiff had kept in the safe in the master bedroom of his apartment. The plaintiff read the safe combination to [E] and [E] repeated the combination to the plaintiff to confirm that he had gotten it right. According to the plaintiff, during the call, some members of the group were in the same room as [E], while two other members were in a nearby bedroom. The plaintiff therefore claimed that anyone in the apartment could have heard the safe combination being said out loud. [E] later brought to the plaintiff the requested cash, and the three of them returned to the apartment at around 2.00am on 8 January 2021.

18 At around 8.00pm on 8 January 2021, the plaintiff accessed his Exodus and BRD wallets and discovered that his BTC and ETH had been withdrawn without his knowledge or consent.

19 The transaction records of the BRD and Exodus applications showed that on 8 January 2021, the following transfers were made to three different wallet addresses that the plaintiff did not control or own:

(a) at 7.16pm, 59.38 BTC was transferred from the Exodus wallet to wallet address [address redacted];

(b) at 7.17pm, 50.45 BTC was transferred from the BRD wallet to wallet address [address redacted]; and

(c) at 7.19pm, 1497.54 ETH was transferred from the Exodus wallet to wallet address [address redacted].

20 The plaintiff claimed that, since his mobile phone was with him when the above transactions took place, the first defendants could not have effected the transfers using the BRD and Exodus applications on his mobile phone. Hence, the plaintiff believed that the first defendants obtained the plaintiff's recovery seeds by accessing his safe, sometime between the time he read the safe combination aloud to [E] the night before and the time at

which the transactions were made. The first defendants entered the plaintiff's recovery seeds into the BRD and Exodus applications via a separate mobile device to access the plaintiff's private keys, which they then used to transfer the Stolen Cryptocurrency Assets.

21 Subsequently, the plaintiff's investigations and tracing efforts determined that the first defendants had dissipated the stolen assets through a series of digital wallets. Ultimately, the relevant transfers are as follows:

(a) on or around 17 April 2021, 15.0 BTC traceable to the Stolen Cryptocurrency Assets was transferred to wallet address [address redacted], which is controlled by the second defendant (the "second defendant's account"); and

(b) on or around 25 April 2021, 0.3 BTC traceable to the Stolen Cryptocurrency Assets was transferred to wallet address [address redacted], which is controlled by the third defendant (the "third defendant's account").

22 Hence, the plaintiff sought a proprietary injunction and a worldwide freezing injunction against the first defendants, as well as ancillary disclosure orders against the second and third defendants for information and documents relating to the accounts that were credited with the 15.0 BTC and 0.3 BTC that are traceable to the Stolen Cryptocurrency Assets.

My decision

Jurisdiction against persons unknown

23 As stated above (at [7]), the identity of the first defendants were unknown at the time of the application in SUM 2444. There is therefore a preliminary issue of whether the court has jurisdiction to grant interim orders against the first defendants even though their identities were unknown at that time. The plaintiff submitted in the affirmative, with the following authorities in support.

24 In the UK, the jurisdiction to grant orders against persons unknown was recognised in *Bloomsbury Publishing Group Ltd and another v News Group Newspapers Ltd and others* [2003] 1 WLR 1633 ("*Bloomsbury*"). There, the court granted the plaintiff's application for an interlocutory injunction against unknown persons who had taken copies of an unpublished book, enjoining such persons to deliver up the copies of the book and restraining them from disclosing to any person any information derived from the book (at 1634). The court noted that the UK Civil Procedure Rules ("CPR") Practice Directions para 4.1(1) merely required that the title of the proceedings "*should* state … the full name of each party"

[emphasis added] and not that a defendant *must* be named (at [16] and [19]). Moreover, the court considered CPR r 3.10, which states as follows:

> **General power of the court to rectify matters where there has been an error of procedure**
>
> **3.10** Where there has been an error of procedure such as a failure to comply with a rule or practice direction —
>
> (a) The error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error.

The court noted that "[CPR] 3.10 confers on the court a general power of dispensation where there has been a procedural error and provides that such error does not invalidate any step taken in the proceedings unless the court so orders" (at [15]). From this premise, the court distinguished the pre-CPR case of *Friern Barnet Urban District Council v Adams and others* [1927] 2 Ch 25, where it was held, *inter alia*, that the prescribed form of writ required the defendant to be named. Because of the different regime introduced by the CPR, the court held (at [19]) that "[t]he proper application of [CPR] 3.10 is incompatible with a conclusion that the joinder of a defendant by description rather than by name is for that reason alone impermissible". Importantly, the court set out the appropriate test as follows (at [21]):

> … The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.

25 In *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) ("*CMOC*"), the plaintiffs claimed against unidentified defendants who misappropriated £6.3m by infiltrating the e-mail account of the plaintiff's senior management and issuing payment instructions without the plaintiff's authorisation (at [1]). The court recognised *Bloomsbury* as authority for the proposition that the courts have jurisdiction to grant interlocutory injunctions against persons unknown and held that there was "no reason in principle against, and indeed a good arguable case for, saying that this should extend to a freezing injunction" (at [4]). The court thereby granted the plaintiff's application for a worldwide freezing injunction against persons unknown, and ancillary disclosure orders against certain banks who had received the stolen proceeds (at [9]–[10]).

26 In *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2021] 7 MLJ 178 ("*Zschimmer*"), the plaintiff, a German company, was defrauded by unidentified persons to make payments to a bank account in Malaysia, which the plaintiff thought were

genuine commission payments to a South Korean business partner. In granting a proprietary injunction and a freezing injunction against persons unknown, the Malaysian High Court considered *CMOC*, and noted that it was affirmed by the UK Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 and applied in at least two other English decisions (at [44]–[48]). Importantly, the court reasoned as follows (at [40] and [49]):

> 40 It is not usually the case that a defendant is described as 'persons unknown'. Nevertheless, the court can grant interlocutory orders against the first defendant – being persons unknown. In cases like the present which involve cyber fraud and fake e-mail addresses, the fraudster or fraudsters are unknown. English case law have allowed for similar injunctive orders against 'persons unknown'. There is nothing in our Rules of Court 2012 that would prevent the writ of summons and applications from being filed against persons unknown.
>
> …
>
> 49 As stated above, *there is nothing in our Rules of Court 2012 prohibiting the making of an order against persons unknown*. In fact, *O 89 of the Rules of Court 2012 for summary proceedings for possession of land allows for a defendant reference to persons unknown* (see *Fauziah bt Ismail & Ors v Lazim bin Kanan & Ors (as person occupying GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan without the applicants' consent)* [2013] 5 MLJ 423; [2013] 7 CLJ 37 (CA) the commentary in *Foong's Malaysia Cyber, Electronic Evidence and Information Technology Law*, para [8.098] to [8.100]).
>
> [emphasis added]

27 In my view, the reasoning in the above authorities is instructive and readily applicable to our legal context.

28 To begin with, like in the case of the UK and Malaysia, there is nothing in our Rules of Court (2014 Rev Ed) ("ROC") that requires a defendant to be specifically named. While the prescribed form for commencing an action by writ (Form 2 under Appendix A of the ROC) contains fields for the plaintiff to state the name and address of the defendant, O 1 r 7 of the ROC clarifies that "the Forms in Appendix A to these Rules shall be used where applicable *with such variations as the circumstances of the particular case require*" [emphasis added].

29 Moreover, similar to CPR r 3.10 in the UK (as relied on by the court in *Bloomsbury*), O 2 r 1 of our ROC expressly provides that even if the commencement of proceedings against persons unknown contravenes the ROC, such a contravention is treated as a mere irregularity, and will not result in the nullification of proceedings unless the court exercises its discretion to order the same:

> **Non-compliance with Rules (O. 2, r. 1)**
>
> **1.**—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, *the failure shall be treated as an **irregularity** and **shall not nullify** the proceedings, any step taken in the proceedings, or any document, judgment or **order** therein.*
>
> (2) Subject to paragraph (3), the Court ***may***, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or ***order*** therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> …
>
> [emphasis added in italics and bold italics]

Plainly, the reference to "order" in the above provision covers interim orders such as injunctions.

30 Furthermore, just as how O 89 of the Malaysian Rules of Court 2012 allows for a reference to persons unknown in summary proceedings for possession of land (as noted in *Zschimmer*), so does O 81 of our ROC, which governs the same. Order 81 r 3 of the ROC provides as follows:

> **Form of originating summons (O. 81, r. 3)**
>
> 3. An originating summons filed under this Order shall include the following note at the end thereof:
>
>> '*Note:* Any person occupying the premises who is not named as a defendant by this originating summons may apply to the Court personally or by solicitor to be joined as a defendant. If a person occupying the premises does not attend personally or by solicitor at the time and place abovementioned, such order will be made as the Court may think just and expedient.'.

In *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*White Book*") at para 81/3/1, the learned author states:

> **Persons unknown**—The originating process under this rule must be in Form 4 and shall contain the note as set out in this rule. Where the identity of persons in occupation is unknown to the plaintiff they may be described as 'Persons Unknown': see *Bristol Corp. v. Persons Unknown* [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593.

Since persons whose identities are unknown can be described as "persons unknown" in such summary proceedings, I see no reason in principle why they cannot be so described for the purposes of interim orders.

31 Hence, in my opinion, this court has the jurisdiction to grant interim orders against the first defendants, who are persons unknown.

32 However, I do stress that, following *Bloomsbury*, the description of the first defendants must be sufficiently certain as to identify both those who are included and those who are not.

33 In *Zschimmer*, the persons unknown were described as follows (at [42]):

> …
>
> (a) any person or entity who carried out and/or assisted and/or participated in the fraud;
>
> (b) any person or entity who received any of the EUR123,014.65 misappropriated from the plaintiff (including any traceable proceeds thereof) other than in the course of a genuine business transaction with either another defendant or a third party; and
>
> (c) in either case of para 2(i) or (ii), other than by way of the provision of banking facilities.

34 In the present dispute, the following description was used:

> [A]ny person or entity who carried out, participated in or assisted in the theft of the Plaintiff's Cryptocurrency Assets on or around 8 January 2021, save for the provision of cryptocurrency hosting or trading facilities.

35 I was satisfied that the present description describes with sufficient certainty the persons who fall within and outside of the description.

Proprietary injunction

36 As stated above (at [3(a)]), the plaintiff sought a proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the Stolen Cryptocurrency Assets.

37 Pursuant to s 18(2) read with para 5(a) of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the General Division of the High Court has the power to grant interim proprietary injunctions.

38 As set out in *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") at [143]–[164], the applicant must prove the following to obtain a proprietary injunction:

> (a) there is a serious question to be tried; and
>
> (b) the balance of convenience lies in favour of granting the injunction.

This is because the usual principles in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 apply.

(1) Serious question to be tried

39 As stated by the Court of Appeal in *Bouvier* (at [151]), in respect of an application for an interlocutory proprietary injunction, the first requirement of showing that there is a serious question to be tried will be satisfied as long as "the plaintiffs have a seriously arguable case that they [have] a proprietary interest". In this regard, the court does not engage in complex questions of law or fact at the interlocutory stage.

40 The important issue which arose here was therefore whether the Stolen Cryptocurrency Assets, being cryptocurrency, were capable of giving rise to proprietary rights which could be protected via a proprietary injunction.

41 It is apposite to first refer to the classic definition of a property right in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 ("*Ainsworth*") at 1248: "it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

42 In *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17, the Singapore International Commercial Court held (at [138]–[146]) that it was possible for cryptocurrencies to be held on trust, and that the defendant in that case did hold BTC on trust for the plaintiff. In so holding, the court reasoned that cryptocurrencies meet the four requirements set out in *Ainsworth* and "have the fundamental characteristic of intangible property as being an identifiable thing of value" (at [142]). However, it should be noted that since this point was undisputed by the parties, the court was satisfied that cryptocurrencies could be created as property in a generic sense and left open the question of what the precise nature of this property right was.

43 On appeal however, the parties disputed the issue of whether cryptocurrencies were a species of property that was capable of being held on trust: see *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [137]. The Court of Appeal reasoned that it was unnecessary to consider this issue because even if it was answered affirmatively, there was no certainty of intention to create a trust on the facts (at [144]). Nevertheless, the court canvassed in detail the authorities in support of treating cryptocurrencies as property (at [139]–[143]):

> 139 There have been some other cases in the Commonwealth that have implicitly accepted that cryptocurrency may be regarded as property, although we are not aware of any court that has attempted to identify the precise nature of the property right if any. In *Elena Vorotyntseva v Money-4 Limited and others* [2018] EWHC 2596 (Ch), the English High Court issued a proprietary injunction preventing the removal of specific ETH and BTC holdings. In coming to his decision, Birss J observed that there had been no suggestion that cryptocurrencies could not be a form of property.

140 In *Copytrack Pte Ltd v Wall* [2018] BCSC 1709, the Supreme Court of British Columbia ordered that some C$400,000 worth of ETH be traced, which suggests that ETH was recognised as a species of property susceptible to tracing. The action was brought by Copytrack Pte Ltd ('Copytrack'), a company engaged in the business of digital content management and automated copyright enforcement. Copytrack created its own cryptocurrency, Copytrack tokens, and mistakenly transferred a more valuable cryptocurrency, ETH, to the defendant investor instead of Copytrack tokens. The ETH was then transferred by the defendant to third parties. Copytrack sought to trace and recover the ETH. The court characterised the issue of whether the property law doctrines of conversion and wrongful detention could apply to cryptocurrencies as a 'critical issue' and the 'real issue on this application'. While the court did not go so far as to rule on whether cryptocurrencies could, in fact, be subject to specific property law claims, the court held that it would be unreasonable and unjust in the circumstances to deny Copytrack a remedy, and so allowed Copytrack to trace and recover the wrongfully transferred ETH.

141 Academic commentators broadly agree that BTC may be regarded as a property right, although they disagree as to the precise nature of this right. In Jean Bacon *et al*, 'Blockchain Demystified: A Technical and Legal Introduction to Distributed and Centralised Ledgers' (2018) 25(1) Rich J L & Tech 1, the authors suggest (at para 182) that holders of digital tokens such as BTC should be regarded as having a property interest at common law, because they hold a bundle of rights that include the right to control the token. This interest is identifiable through entries on the blockchain, can be transferred by entries of the blockchain, and has a high degree of permanence and stability.

142 To similar effect is Kelvin F K Low and Ernie G S Teo, 'Bitcoins and other cryptocurrencies as property?' (2017) 9(2) *Law, Innovation and Technology* 235 (available at https://ink.library.smu.edu.sg/sol_research/2806), where the authors argue that the property right relating to BTC is the right to have one's public BTC address appear as the last entry in the blockchain in relation to a particular BTC. Such a right provides exclusive control to the holder in the form of universal exigibility and can be seen as involving a true property transfer when one transfers BTC from one's public BTC address to another's BTC address.

143 Most recently, the UK Jurisdiction Taskforce ('UKJT') chaired by Sir Geoffrey Vos released its 'Legal Statement on Cryptoassets and Smart Contracts' (November 2019), where it considered the question of whether English law would treat a particular cryptoasset as property. The UKJT defined cryptoassets as generally having the following characteristics (at para 31): (a) intangibility; (b) cryptographic authentication; (c) use of a distributed transaction ledger; (d) decentralisation; and (e) rule by consensus. The UKJT stated (at para 85) that cryptoassets have all the indicia of property, and that their novel or distinctive features as aforementioned do not disqualify them from being property. The UKJT also stated that cryptoassets are not disqualified from being property simply because they might not be classifiable either as things in possession or as things in action.

> The UKJT therefore concluded that cryptoassets could be treated, in principle, as property.

Ultimately, the court observed (at [144]) that "[t]here may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property".

44 The plaintiff referred me to the New Zealand case of *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809 ("*Ruscoe*"), where the High Court held, following a comprehensive discussion (at [102]–[120]), that (at [120]):

> [C]ryptocurrencies meet the standard criteria outlined by Lord Wilberforce [*ie*, the four requirements set out in *Ainsworth*] to be considered a species of 'property'. They are a type of intangible property as a result of the combination of three interdependent features. They obtain their definition as a result of the public key recording the unit of currency. The control and stability necessary to ownership and for creating a market in the coins are provided by the other two features – the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin.

45 In this regard, the court examined the four requirements in *Ainsworth* in turn:

(a) The first requirement is that the right must be "definable" – the asset must hence be capable of being isolated from other assets whether of the same type or of other types and thereby identified (*Ruscoe* at [104]). To this end, cryptocurrencies are computer-readable strings of characters which are recorded on networks of computers established for the purpose of recording those strings, and are sufficiently distinct to be capable of then being allocated to an account holder on that particular network (*Ruscoe* at [105]).

(b) The second requirement is that the right must be "identifiable by third parties", which requires that the asset must have an owner being capable of being recognised as such by third parties (*Ruscoe* at [109]). An important indicator is whether the owner has the power to exclude others from using or benefiting from the asset (*Ruscoe* at [110]). In this vein, excludability is achieved in respect of cryptocurrencies by the computer software allocating the owner with a private key, which is required to record a transfer of the cryptocurrency from one account to another (*Ruscoe* at [112]).

(c) The third requirement is that the right must be "capable of assumption by third parties", which in turn involves two aspects: that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable (*Ruscoe* at [114]). The fact that these two aspects are met by cryptocurrencies, is evidenced by the fact that many cryptocurrencies, certainly BTC and ETH, are the subject of active trading markets (*Ruscoe* at [116]).

(d) The fourth requirement is that the right and in turn, the asset, must have "some degree of permanence or stability", although this is a low threshold since a "ticket to a football match which can have a very short life yet unquestionably it is regarded as property" (*Ruscoe* at [117]). In this respect, the blockchain methodology which cryptocurrency systems deploy provides stability to cryptocurrencies, and a particular cryptocurrency token stays fully recognised, in existence and stable unless and until it is spent through the use of the private key, which may never happen (*Ruscoe* at [118]).

46 Having considered the extant case law and especially the analysis in *Ruscoe*, I was of the view that cryptocurrencies satisfied the definition of a property right in *Ainsworth*. The plaintiff was therefore able to prove a serious arguable case that the Stolen Cryptocurrency Assets were capable of giving rise to proprietary rights, which could be protected via a proprietary injunction. I reiterate that the court does not engage in complex questions of law or fact at the interlocutory stage (see [39] above). Hence, the first requirement of showing that there is a serious question to be tried was satisfied.

(2) Balance of convenience

47 The balance of convenience is assessed by considering the potential prejudice that the applicant may suffer if the injunction is not granted, against the prejudice to the respondent in the event that the injunction is granted and the applicant's hypothesis is refuted at the trial (*Bouvier* ([38] *supra*) at [161]).

48 In my view, the balance clearly lay in favour of granting the proprietary injunction. If it were not granted, there would be a real risk that the first defendants would dissipate the Stolen Cryptocurrency Assets, which would prevent the plaintiff from recovering those assets even if he successfully obtained a judgment in his favour. Conversely, even if the plaintiff's case were later refuted, the first defendants would only suffer losses arising from their inability to deal with the Stolen Cryptocurrency Assets, which could be compensated by way of damages.

(3) Conclusion

49 For the above reasons, I granted the proprietary injunction prohibiting the first defendants from dealing with, disposing of, or diminishing the value of the Stolen Cryptocurrency Assets.

Mareva injunction

50 In addition to the proprietary injunction, the plaintiff also sought a worldwide freezing injunction to restrain the first defendants from dealing with, disposing of, or diminishing the value of, their assets up to the value of

US$7,089,894.68, being the value of the Stolen Cryptocurrency Assets (see [3(b)] above).

51 To obtain a freezing injunction, the applicant has to prove two requirements (*Bouvier* at [36]):

(a) First, the applicant must have a good arguable case on the merits of its claim.

(b) Second, there must be a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the court.

52 The applicable test for a worldwide freezing injunction is the same as that for a domestic one. However, the circumstances that will have to be established in order to cross the threshold of necessity will likely be more exacting where a worldwide freezing injunction is concerned (*Bouvier* at [36]–[37]). There is also a further consideration of whether the defendant has sufficient assets within the jurisdiction to satisfy the prospective judgment: generally, the fewer the assets within the jurisdiction, the greater the necessity for taking protective measures in relation to those outside it (*Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [29]).

53 A good arguable case is one which is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success" (*Bouvier* at [36]). The plaintiff had two claims against the first defendants. First, that the first defendants held the Stolen Cryptocurrency Assets on a constructive trust for the plaintiff. Second, that the first defendants were enriched at the expense of the plaintiff in circumstances that were unjust, because the first defendants obtained the plaintiff's assets without his consent or authority. In respect of the first claim, it is hornbook law that where a person misappropriates the property of another without consent, a constructive trust arises by operation of law over the stolen assets, as it would be unconscionable for the misappropriating party to assert any beneficial interest in the property or their traceable proceeds (*Yuanta Asset Management International Ltd and another v Telemedia Pacific Group Ltd and another and another appeal* [2018] 2 SLR 21 at [113]). In my view, this alone was sufficient to show that the plaintiff had a good arguable case against the defendants.

54 As for proving a real risk of dissipation, there must be some "solid evidence" to demonstrate the risk, and not just bare assertions to that effect (*Bouvier* at [36]). Importantly, a well-substantiated allegation that a defendant has acted dishonestly can and often will be relevant to whether there is a real risk that the defendant may dissipate his assets (*Bouvier* at [94]). In this regard, the plaintiff rightly submitted that the first defendants had acted dishonestly in misappropriating the Stolen

Cryptocurrency Assets. Having examined the evidence, I found that the first defendants dissipated the stolen assets through a series of digital wallets that appear to have been created solely for the purpose of frustrating the plaintiff's tracing and recovery efforts, and which had either no or negligible transactions other than the deposit and withdrawal of the Stolen Cryptocurrency Assets. Moreover, the risk of dissipation in the present case is heightened by the nature of the cryptocurrency: the Stolen Cryptocurrency Assets are susceptible to being transferred by the click of a button, through digital wallets that may be completely anonymous and untraceable to the owner, and can be easily dissipated and hidden in cyberspace.

55 I also agreed with the plaintiff's submission that the first defendants likely would not have sufficient assets in Singapore to satisfy an award for damages. Primarily, this was because the value of the plaintiff's claim is in excess of US$7m, while less than US$1m worth of the Stolen Cryptocurrency Assets are known to have been transferred to digital wallets owned by the second and third defendants, which have operations in Singapore. Moreover, it was also unlikely that the first defendants would hold all of their remaining ill-gotten gains in Singapore.

56 Hence, I granted the worldwide freezing injunction sought by the plaintiff to restrain the first defendants from dealing with, disposing of, or diminishing the value of, their assets up to the value of US$7,089,894.68, being the value of the Stolen Cryptocurrency Assets.

Disclosure orders

57 The plaintiff sought the following ancillary disclosure orders requiring the second and third defendants to disclose to the plaintiff:

(a) the current balances of the second and third defendants' accounts that were credited with the 15.0 BTC and 0.3 BTC respectively, that are traceable to the Stolen Cryptocurrency Assets;

(b) information and documents collected by the second and third defendants in relation to the owners of the relevant accounts in the second and third defendants; and

(c) details of all transactions involving the relevant accounts in the second and third defendants from the dates on which the stolen assets were credited against the accounts.

58 As stated by the court in *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2020] 4 SLR 978 at [81], the source of the statutory power to grant interlocutory relief is s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed). Hence, the power to grant disclosure orders ancillary to a freezing injunction originates from the same provision.

59 The plaintiff made submissions on the basis that the ancillary disclosure orders sought were *Bankers Trust* orders (from the case of *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 ("*Bankers Trust*")), which were orders compelling *non-parties* to provide documents to assist with the applicant's tracing claim where there was a *prima facie* case of fraud: *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd and others and another appeal* [2016] 4 SLR 1392 at [26]. In my decision, it was unnecessary to consider such principles given that the second and third defendants *are* parties to the present dispute. The court was therefore empowered by s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) to grant interlocutory relief "either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made".

60 In the present case, I was of the view that the disclosure orders sought were just and convenient. The plaintiff required the information sought to understand what remained of the stolen assets that were transferred to the second and third defendants, the extent that they have been transferred to other persons or accounts, as well as the whereabouts of such assets. The information sought would also facilitate the identification of the first defendants, or any persons that may have assisted or acted in concert with them. I therefore granted the ancillary disclosure orders sought by the plaintiff.

SUM 4880

61 As a result of the plaintiff's subsequent investigations and disclosure by the second and third defendants, he managed to identify two persons, CPZ and CQA, within the first defendants. In SUM 4880, heard on 9 November 2021, he sought leave to join these two persons as the fourth and fifth defendants to the action. Accordingly, he also sought leave to amend the writ of summons (the "Writ") to, *inter alia*, include claims against these two defendants.

62 The plaintiff also discovered that further portions of the Stolen Cryptocurrency Assets had been dissipated to a cryptocurrency exchange and a digital payment services company:

> (a) First, the plaintiff traced 0.0996 BTC of the Stolen Cryptocurrency Assets that had been withdrawn from the third defendant's account. The plaintiff discovered that approximately 0.08432778 BTC traceable to the 0.0996 BTC withdrawn from the third defendant's account was ultimately transferred to digital wallets owned and controlled by CQB, via three transactions between 29 June 2021 and 10 July 2021. CQB is a US-incorporated entity that maintains a cryptocurrency exchange.

(b) Second, the plaintiff's tracing of the 0.0996 BTC also revealed that a further 0.00685635 BTC which are traceable to the 0.0996 BTC withdrawn from the third defendant's account was ultimately transferred to a digital wallet owned and controlled by CQC via one transaction on 13 July 2021. CQC is aUS-incorporated entity which provides financial and digital payment services.

(c) Third, the plaintiff also discovered that a further 0.64360035 BTC of the Stolen Cryptocurrency Assets had been transferred to digital wallets that are associated with the second defendant, via three transactions between 13 October 2021 and 14 October 2021.

63 The plaintiff therefore sought leave in SUM 4880 to join CQB and CQC as the sixth and seventh defendants to the action. Similar to the second and third defendants (see [8] above), the plaintiff believed that the sixth and seventh defendants are innocent third parties and asserted no substantive claims against them apart from disclosure.

64 The plaintiff also applied for leave to serve the cause papers and relevant documents on the fourth to seventh defendants (the "additional defendants") out of jurisdiction. Specifically, for the fourth and fifth defendants, the plaintiff applied for leave to serve them by way of e-mail, *ie*, via substituted means.

Joinder and amendment of writ

65 Under the ROC, O 15 r 4(1) provides that any person may be joined to the action if: (a) there exists a common question of law or fact that would arise in the event that separate actions are commenced against the defendants; and (b) all the plaintiff's rights to relief against both defendants arise out of the same transaction or series of transactions.

66 In my view, it was clear that common questions of law and fact will arise in separate claims against the first defendants and the additional defendants.

(a) First, the documentary evidence, which largely consisted of the registration details and transaction history of the relevant accounts disclosed by the second and third defendants and another cryptocurrency exchange, showed that the fourth and fifth defendants were involved in the transfers of assets traceable to the Stolen Cryptocurrency Assets in rather suspicious circumstances. Hence, they were persons identified from the group of unknown persons constituting the first defendants. The plaintiff's claims against the fourth and fifth defendants include a claim that they had unlawfully conspired with the first defendants to cause loss to the plaintiff by way of the theft, and/or had dishonestly assisted the first defendants with the theft. Hence, common questions of law and fact would arise as to whether the theft had occurred in the first place, and whether the defendants have any factual or legal basis to retain the stolen assets.

(b) Second, the sixth and seventh defendants were similar to the second and the third defendants in that they were entities whose accounts were involved in the transfer of assets traceable to the Stolen Cryptocurrency Assets. Also, the plaintiff's right of disclosure against the sixth and seventh defendants was predicated on, *inter alia*, the plaintiff's proprietary interest in the assets transferred to them, which was a crucial element in the plaintiff's proprietary claim against the first defendants for the Stolen Cryptocurrency Assets.

67 Moreover, it was eminently clear that the plaintiff's rights to relief against the additional defendants all arose out of the same transaction *vis-à-vis* the existing defendants, *ie*, the theft and dissipation of the Stolen Cryptocurrency Assets.

68 Hence, the requirements under O 15 r 4(1) were satisfied and I granted the plaintiff's joinder application. Accordingly, I also granted the plaintiff leave to amend the Writ to include claims against the fourth and fifth defendants, pursuant to O 20 r 5(1).

Service out of jurisdiction

69 The plaintiff applied for leave to serve the cause papers and relevant documents on the fourth to seventh defendants out of jurisdiction.

70 As stated by the Court of Appeal in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26], three requirements must be satisfied before leave to serve out of jurisdiction is granted:

(a) the plaintiff's claim must come within one of the heads under O 11 r 1 of the ROC;

(b) the plaintiff's claim must have a sufficient degree of merit; and

(c) Singapore must be the proper forum for the trial of the action.

71 With regard to the first requirement, the sixth and seventh defendants have wholly-owned subsidiaries in Singapore, and they therefore have assets in Singapore in the form of shares in the Singapore subsidiaries. Hence, the requirement under O 11 r 1(*a*) of the ROC that the person is domiciled, ordinarily resident, carrying on business or has property in Singapore is satisfied. As for the fourth and fifth defendants, O 11 r 1(*c*) provides that service out of jurisdiction is permissible where "the claim is brought against a person duly served in or out of Singapore and a person out of Singapore is a necessary or proper party thereto". In this regard, a person is a "proper party" if, had he been within the jurisdiction, he would have been properly joined as a defendant pursuant to O 15 of the ROC (*J H*

Rayner (Mincing Lane) Ltd v Teck Hock and Co (Pte) Ltd and others [1989] 2 SLR(R) 683 at [17]–[19]; *White Book* at para 11/1/19). This was the case here (see [65]–[68] above).

72 With regard to the second requirement, the plaintiff has to show that there is a serious question to be tried on the merits of the claim (*Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156 at [19]–[20]). In my view, this threshold was met. The documents disclosed by the second and third defendants reveal that the accounts registered by the fourth and fifth defendants were likely created for the sole purposes of dissipating the stolen assets, which suggests that the fourth and fifth defendants were likely to have been amongst the conspirators who had planned to and did indeed steal the Stolen Cryptocurrency Assets from the plaintiff. As for the sixth and seventh defendants, which are a cryptocurrency exchange and a digital payment services company respectively, the plaintiff would have a meritorious claim in seeking disclosure of relevant information against them, just as they did against the second and third defendants (see [57]–[60] above).

73 As for the last requirement, the plaintiff bears the burden of proving that Singapore is the proper forum (*Zoom Communications* at [71]–[75]). In this regard, as set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (affirmed in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens AG*") at [5]–[6]), the courts will assess whether Singapore is the most appropriate forum to hear the substantive dispute, by considering what factors there are which point in the direction of Singapore as the appropriate forum. The following statements by the Court of Appeal were instructive (*Siemens AG* at [4], [7] and [8]):

> 4 … The purpose of the *forum conveniens* analysis is to identify the most appropriate forum in which to try the substantive dispute. It is wrong to say that Singapore is *forum non conveniens* simply because the connecting factors which point to Singapore are outweighed by all the connecting factors which point away from Singapore. The connecting factors which point away from Singapore must point to a more appropriate forum than Singapore, and they might not do so if those connections are dispersed amongst several jurisdictions. Quite simply, Singapore is *forum non conveniens* only if there is a more appropriate forum than Singapore.
>
> …
>
> 7 However, in recognition of the primarily territorial nature of the court's jurisdiction, the court begins with the location of the defendant when it decides whether it has jurisdiction over a dispute – thus, jurisdiction over a defendant who is within the territory is as of right, while jurisdiction over a defendant who is outside the territory is discretionary. In this sense, there is a burden – *viz*, the burden of displacing the *prima facie* weight given to the location of the defendant. But, despite the use of the term, the burden is not strictly one of proof. Instead, the burden is one of demonstrating the normative weight to be given to each connecting factor in the light of all the

> circumstances of the case. The ease of discharging the burden would similarly depend on the facts of each case – again, as Lord Goff himself noted in *Spiliada* (at 481), the circumstances described in the English equivalent of our O 11 r 1 are 'of great variety, ranging from cases where … the discretion would normally be exercised in favour of granting leave … to cases where the grant of leave is far more problematical'. In the same vein, Lord Goff also remarked (at 481) that the importance to be attached to any particular ground invoked by the plaintiff in seeking leave for service out of jurisdiction might vary from case to case.
>
> 8 Separately, we do not think that it is necessary for a plaintiff who seeks leave for service out of jurisdiction to show that Singapore is 'clearly' the *forum conveniens* if, by this, it is meant that Singapore must be not only the most appropriate forum in the final analysis, but also the most appropriate forum by far. No doubt, there will be cases where the *forum conveniens* is clear beyond contest. But, in the case of an international dispute where the connecting factors are finely balanced, a requirement that there must be a forum which is clearly the most appropriate forum would necessarily condemn the dispute to jurisdictional limbo. Such a result does the doctrine of *forum non conveniens* no credit. In our view, therefore, *it is sufficient for a plaintiff seeking leave for service out of jurisdiction to show that Singapore is, on balance and in the final analysis, the most appropriate forum to try the dispute, and it matters not whether Singapore is the most appropriate forum by a hair or by a mile*.
>
> [emphasis in original omitted; emphasis added in italics]

74 In my decision, I placed much weight on: (a) the fact that the second and third defendants are based in Singapore and have complied with disclosure orders; and (b) the fact that the sixth and seventh defendants have wholly-owned subsidiaries in Singapore and were likely to comply with disclosure orders. They were sufficient to show that Singapore was the most appropriate forum even though the fourth and the fifth defendants are foreign nationals.

75 Hence, I granted the plaintiff's application for leave to serve the cause papers and relevant documents on the additional defendants out of jurisdiction.

Substituted service out of jurisdiction

76 The plaintiff applied to serve the cause papers and relevant documents on the fourth and fifth defendants by way of e-mail.

77 Pursuant to O 11 r 3(1) read with O 62 r 5 of the ROC, the court may grant leave for substituted service out of jurisdiction (*Petroval SA v Stainby Overseas Ltd and others* [2008] 3 SLR(R) 856 ("*Petroval*") at [26]). Under O 62 r 5(1), substituted service may be ordered where "it appears to the Court that it is *impracticable for any reason* to serve that document personally on that person" [emphasis added]. Order 11 r 3(1) then

provides, *inter alia*, that O 62 r 5 "shall apply in relation to the service of an originating process out of Singapore".

78 In *Petroval*, in allowing substituted service, the court had regard to the impracticality of effecting personal service on the defendants and the effectiveness of the chosen mode of substituted service in notifying the defendants of the Singapore action and the Singapore order (*Petroval* at [26]). Similarly, I found that these considerations were present on the facts.

79 First, it was impractical to serve the cause papers in the present action on the fourth and fifth defendants personally, as their physical whereabouts are presently unknown. Moreover, it was unlikely that they would agree to come forward to accept service willingly. The plaintiff had previously served the injunction and disclosure order on the first defendants via the fourth and fifth defendants (who were unnamed and part of the first defendants prior to this application). However, the fourth and fifth defendants did not respond to the e-mails effecting service. Also, both the fourth and fifth defendants had used Virtual Private Network services to obscure the locations from which they had accessed their accounts in the second and third defendants, seemingly to avoid being located physically in the event that their identities are uncovered.

80 Second, sending the cause papers and relevant documents to the fourth and fifth defendants' e-mail addresses would likely bring the present suit to their attention, as they had recently used these e-mail addresses less than five months ago to register their accounts. There was also evidence that the fourth defendant had used her e-mail address as recently as June 2021.

81 Third, and in my view this was the most important reason, the accounts in the second and third defendants were opened by the fourth and fifth defendants via e-mail. Although the identity documents provided showed their physical addresses, it does not seem that the onboarding process involved verification of the veracity of those physical addresses. The operative contact point was always their e-mail addresses as all communications between them were done by way of e-mail. It was clear that service by e-mail would most certainly bring the Writ to the attention of the account holders, *viz*, the fourth and fifth defendants.

82 In the circumstances of the present case, I was of the view that the only practical means by which the plaintiff could effect service on the fourth and fifth defendants was by way of e-mail and that that mode of service would bring the Writ to the notice of those defendants. Hence, I dispensed with the requirement of two prior reasonable attempts at personal service under para 33(2) of the Supreme Court Practice Directions and granted the plaintiff's application for leave to serve the fourth and fifth defendants via substituted means, *viz*, by way of e-mail.

Conclusion

83 For the above reasons, I granted the plaintiff's applications in SUM 2444 and SUM 4880, with minor corrections as to the phrasing of the prayers in SUM 4880.

84 As for costs, they are to be in the cause.

Reported by Chong Ren Jie.

Guan Chong Cocoa Manufacturer Sdn Bhd
v
Pratiwi Shipping SA

[2002] SGCA 45

Court of Appeal — Civil Appeal No 80 of 2002
Chao Hick Tin JA and Judith Prakash J
12 September; 25 October 2002

Civil Procedure — *Appeals — Appellate court's review of trial judge's discretion*

Civil Procedure — *Mareva injunctions — Requirements to be satisfied — Factors indicating real risk of dissipation of assets*

Facts

The appellants were the lawful holders of two bills of lading relating to the carriage of a cargo of cocoa beans on board the vessel *Pratiwi*. The respondents were the owners of that vessel. A fire had broken out on board the vessel and the cargo was damaged. The appellants claimed for the loss suffered.

The respondents owned another vessel, the *Langsa*. Unknown to the appellants, the respondents sold that vessel. The appellants had problems tracing the subsequent owner of the *Langsa*. Furthermore, the respondents did not reply when questioned by the appellants as to the sale of the *Langsa* or to the state of their business.

The appellants then sought a worldwide Mareva injunction against the assets of the respondents. This was refused at first instance. On appeal, the appellants confined their application to only the vessel *Langsa* or its proceeds.

Held, allowing the appeal:

(1) An appellate court's function in relation to the judge's exercise of discretion in granting or refusing to grant an interlocutory relief was only one of review and not to exercise an independent discretion of its own: at [16].

(2) There were two main requirements which a plaintiff had to satisfy before a court would grant a Mareva injunction. The first was that the plaintiff must have a good arguable case. The second was that the refusal of the Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied: at [17].

(3) The test of whether there was a real risk that the judgment would remain unsatisfied was an objective one and the court was not concerned with motive or purpose as opposed to effect. There was no need to show an intention to dissipate assets: at [17].

(4) A mere assertion that there was a risk of dissipation was not good enough. There had to be some solid evidence to substantiate the alleged risk. The evidence had to reasonably have a bearing on the risk factor: at [18] and [19].

(5) The respondents had sold the only vessel they owned and they had ceased business. The proceeds of sale could be easily dissipated or removed out of Singapore. There was thus solid evidence indicating a real risk of dissipation: at [21] to [23].

(6) The cross-undertaking in damages furnished by the appellants provided an adequate safeguard against the possibility that the injunction might be wrongly granted: at [28].

(7) This injunction granted was not of a worldwide nature. However, even if the injunction could be considered to be of a worldwide nature, the injunction should still be granted as it did not appear that the respondents had other assets within the jurisdiction: at [29].

Case(s) referred to

Derby & Co Ltd v Weldon (Nos 3 & 4) [1990] 1 Ch 65 (refd)

Felixstowe Dock & Railway Co v United States Lines Inc [1989] QB 360 (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191; [1982] 2 WLR 322 (folld)

Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen) [1983] 1 WLR 1412; [1984] 1 All ER 398 (refd)

Lawrence Lee Mun Kong and Lisa Theng Siew Lian (Chui Sim Goh & Lim) for the appellants;
Joseph Tan Wee Kong (Kenneth Tan Partnership) for the respondents.

[Editorial note: This was an appeal from the decision of the High Court in [2002] SGHC 202.]

25 October 2002

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against a decision of the High Court which had refused the appellants' application for a Mareva injunction. The action related to a claim for the loss suffered by the appellants on account of damage to cargo due to a fire on board a vessel of the respondents. We heard the appeal on 12 September 2002 and allowed it. We granted a Mareva injunction in respect of the proceeds from the sale of a specific asset. We now give our reasons.

The facts

2 The appellants were the lawful holders of two bills of lading, No 01/PRT/PL/VII/01 and No 02/PRT/PL/VII/01, both dated 13 July 2001. The bills related to the carriage of a cargo of cocoa beans of a total weight of 609 metric tonnes on board the vessel *Pratiwi* from Palu, Indonesia to Pasir Gudang, Johor. The appellants were the buyers of the cargo. The respondents were the owners of the vessel *Pratiwi*.

3 Foong Sun Shipping (Pte) Ltd ("Foong Sun") were the respondents' agents and managers of the vessel. The bills of lading for this cargo were in Foong Sun's standard form. The appellants had business dealings with Foong Sun from early 2001.

4 On July 2001, a fire occurred on board the vessel. It started at the engine room. After the fire was put out, the vessel was towed to Banjarmasin, Indonesia. The fire so badly damaged the vessel that eventually it was declared a constructive total loss and had to be sold for scrapping for only $50,000. No insurance had been taken out in respect of its hull and machinery though there was a policy with China Insurance for third party liability for up to $500,000.

5 The cargo of cocoa beans was then transferred to another vessel *Sun Ray* which carried it to Pasir Gudang. Unfortunately, the cargo was found, on arrival, to have also been damaged by the fire. It was eventually disposed of in a salvage sale, causing the appellants a loss that was subsequently quantified at $904,164.22. In October 2001, the appellants made a claim against the respondents for the loss, without stating a specific sum. On 31 October 2001, the respondents denied liability.

6 The appellants had insured the cargo with Malaysian Assurance Alliance Bhd ("MAA"). The appellants notified Foong Sun that they would be submitting their claim for the loss to MAA. But on 10 April 2002, MAA informed the appellants that MAA would be repudiating liability because there was a breach of the policy. The appellants informed Foong Sun of this development and thereafter, the appellants' Finance and Trading Manager, Mr Hia Cheng, discussed the situation with the Manager of Foong Sun, Ms Elaine Quek. Both expressed a wish to resolve the matter amicably.

7 On 16 May 2002, the appellants' solicitors made a claim of RM1,948,253 against China Insurance under their third party policy issued to the respondents. This communication was copied to Foong Sun.

8 On 18 June 2002, China Insurance denied liability through its solicitors, M/s Kenneth Tan Partnership ("KTP"), on the ground that the fire started without the fault of the owners. On the same day, the appellants' solicitors directed the claim of the appellants to the respondents. The appellants also asked Foong Sun's solicitors, KTP, for details of the owners of the *Pratiwi*, including the owners' country of incorporation, registered address and assets. The details were not furnished.

9 The appellants instituted this action on 12 July 2002. Their claim was based on breach of contract and, in the alternative, on negligence. At the time, the searches carried out by the appellants indicated that the *Pratiwi* was owned by the respondents who had the same address as Foong Sun and that the vessel's previous name was *Takitori*. Neither the respondents nor

Foong Sun informed the appellants that the respondents also owned another vessel, the *Langsa*.

10 In the meantime, on 22 June 2002, unbeknown to the appellants, the respondents sold the *Langsa*. On 17 July 2002, the appellants learned, from discreet enquiries with the staff of Foong Sun, that the *Langsa* had changed her name to *Sri Bahari*. However, subsequent searches on the *Sri Bahari* carried out by Lloyd's Marine Intelligence Unit in England, Harper Wira Insurance Surveyors & Adjusters in Malaysia and Seabird Consultants of Singapore, on behalf of the appellants, did not bring forth consistent results. Harper Wira reported that the vessel's owner was Foong Sun, whereas Seabird Consultants learned that it was PT Pelayaran Fajar Sribahari SAK. Furthermore, both Seabird Consultants and Lloyd's Marine Intelligence Unit could not confirm whether the *Langsa* had changed its name to *Sri Bahari*.

11 On 26 July 2002, the appellants' solicitors wrote to the respondents' solicitors, KTP, seeking confirmation that the respondents were still trading. There was no response.

12 On 29 July 2002, the appellants sought a worldwide Mareva injunction against the assets of the respondents, including the *Langsa* and the sale proceeds of the *Pratiwi*. The application came before the judge in chambers on 2 August 2002 who refused it. Thereafter, the appellants asked for further arguments and confined their application to only the vessel *Langsa* or its proceeds. On 8 August 2002, the judge certified that she would not require further arguments.

13 In the court below, the respondents raised only one ground to resist the application, *ie* that the appellants had not shown that there was any real risk of dissipation of assets. The judge held that there was no "solid evidence" of any risk of dissipation to satisfy the court that a Mareva injunction should be granted over assets in Singapore, much less to pounce on the respondents' assets worldwide. The fact that the respondents were a Panamanian company and only owned the vessel *Langsa* and no others, did not necessarily mean that an injunction should be granted. Before us, the main issue was again whether the real risk of dissipation test had been satisfied.

Real risk of dissipation

14 There was a suggestion that as the appellants had shipped cargoes on board the *Langsa* previously, they would have known that it belonged to the respondents. We were unable to follow the logic of this contention. The appellants did not deal with the respondents but with Foong Sun who managed the *Langsa* and issued its own form of bill of lading. A ship's manager-cum-agent could be handling the vessels of many owners. The appellants said that they did not know who the owners of the *Langsa* were.

There was no evidence that the shippers of goods would normally check on the ownership of a vessel. It was only after the fire had occurred on the *Pratiwi* and when further searches on the *Lloyd's Register of Ships, Supplement & New Entries*, July/August 2001 and May/June 2002 were made, that it was discovered that the respondents also owned the *Langsa*. Upon this discovery, the writ issued earlier was, on 16 July 2002, amended to include the *Langsa*.

15 The appellants relied in the main upon the following facts and circumstances to contend that there was a real risk of dissipation:

(a) The timing of the sale of the *Langsa*. In assessing the significance of this timing, the following two dates must be kept in mind. In April 2002 the appellants informed the respondents that the insurers of the cargo had repudiated liability. Then on 18 June 2002, China Insurance informed the appellants that they denied liability for the claim. Thus, the matter could not be resolved amicably. Four days later, on 22 June 2002, the respondents executed the bill of sale of their only asset, the *Langsa*, through their agents, Foong Sun. No reason was offered as to why the respondents had to dispose of that asset.

(b) The bill of sale stated that the price had been paid. Admittedly, in Elaine Quek's affidavit she stated that the payment had not yet been received. But the question was, why did the bill of sale state something which was not true? Was there anything behind that? These were queries which any fair-minded individual, viewing the situation, would naturally have raised. Answers should have been provided. Yet none was forthcoming.

(c) The respondents were no longer carrying on business, having sold their only asset, the *Langsa*.

(d) The respondents were evasive about their country of incorporation, registered office address, assets and other matters.

(e) The proceeds of sale of the *Langsa*, being cash, could easily be disposed of or dissipated.

(f) The respondents were incorporated in Panama, a country with whom Singapore had no arrangement for the reciprocal enforcement of judgments.

The law

16 It is settled law that an appellate court's function in relation to the judge's exercise of discretion in granting or refusing to grant an interlocutory relief is only one of review and not to exercise an independent discretion of its own. In the words of Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1982] 2 WLR 322 at 325:

> [The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal …

17 There are two main requirements which a plaintiff must satisfy before a court will grant a Mareva injunction. The first is that the plaintiff must have a "good arguable case". The respondents did not raise any argument in relation to this requirement. Their arguments centred wholly on the second requirement, which is that there is a real risk of dissipation of assets or, in the words of the Court of Appeal in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen)* [1984] 1 All ER 398 at 419, the test is whether "the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied" and this is an objective test. The court is not concerned with motive or purpose as opposed to effect: see *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] QB 360. There is no need to show an intention to dissipate assets: see *The Niedersachsen*.

18 Clearly, mere assertion that there is a risk of dissipation is not good enough. There must be some "solid evidence" to substantiate the alleged risk. In the words of Mustill J in *The Niedersachsen*, whose judgment was upheld on appeal, (at 406):

> It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.

19 As is apparent from what Mustill J said, the hard question in each case is to determine whether the evidence adduced is sufficient to establish that there is a real risk of dissipation. It is practically impossible to lay down any general guidelines on how the evidential burden could be held to have been fulfilled. But the evidence must reasonably have a bearing on the risk factor.

In our opinion, a good piece of evidence would be where the defendant, for no sufficient reason, starts to put his property up for sale or where a company just ceases business.

20 Steven Gee's *Mareva Injunctions and Anton Piller Relief* (4th Ed, 1998) at pp 195–197 set out the factors which are relevant to the consideration of the question of risk. Below are some of the factors which the author has identified and which are germane to the present appeal:

> (1) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated. The plaintiff may find it easier to establish the risk of dissipation of a bank account, or of moveable chattels, than the risk that the defendant will dispose of real estate, *eg*, his house or office …
>
> (2) The nature and financial standing of the defendant's business …
>
> (3) The length of time the defendant has been in business …
>
> (4) The domicile or residence of the defendant …
>
> (5) If the defendant is a foreign company, partnership, or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country …
>
> (6) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the plaintiff's favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the plaintiff commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent …
>
> (9) The defendant's behaviour in response to the plaintiff's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the plaintiff.

Our decision

21 It appeared to us clear that the following factors were not given sufficient consideration by the court below in refusing the grant of a Mareva injunction:

(a) The sale on 22 June 2002 of the only vessel, *Langsa*, owned by the respondents.

(b) The respondents had ceased business.

(c) The false statement in the bill of sale that the proceeds had been paid.

(d) The respondents are a company incorporated in Panama, a country with whom Singapore has no arrangement on reciprocal enforcement of judgments.

(e) The proceeds of sale of the *Langsa* when eventually received could be easily dissipated or removed out of Singapore.

22 In our judgment, these facts constituted "solid evidence" indicating that there was a real risk of dissipation. We recognised that each of these factors, on its own, would not necessarily indicate a real risk. An example would be where a defendant was a foreign company. That fact, *per se*, could not be a ground to allege that there would be a real risk of dissipation. A plaintiff who entered into a commercial arrangement with a foreign entity would have realised that he would encounter certain inconvenience in enforcing the contract or a judgment. That would be the normal order of things. But when one were to take this factor, together with the other factors enumerated above into account, the picture could well be different as in this case.

23 Of the five factors listed in [21] above, the two most critical were: (i) the fact that the respondents had sold the *Langsa*, and (ii) the respondents had ceased to carry on business. It was significant that no reason was offered to explain why the respondents had to dispose of their only asset, the *Langsa*. This could not be a transaction in the ordinary course of business. Unless an explanation was offered it would, *prima facie*, be an act of dissipation. This factor alone would have sufficed for the court to grant a Mareva injunction.

24 Similarly, with regard to the factor of the respondents ceasing business, here again there was no explanation. There was no indication of any future plans. This factor alone would also have sufficed for the issue of a Mareva injunction. With respect to the judge below, we thought she indulged in speculation when she held that there was no evidence that the stoppage of trading by the respondents would be permanent. But the fact of the matter was that no explanation was given by the respondents at all. What was real was that the business of the respondents had stopped. There was no evidence to contradict or qualify that. If the stoppage was intended to be temporary, why did the respondents not say so?

25 The bill of sale stated that the proceeds of sale had been paid when it was not. Why was a falsehood stated in the bill? No explanation was offered by either Elaine Quek or the respondents. The argument was made that if there was any intention to deceive, Elaine Quek would not have disclosed that the purchaser had not yet made payment. Be that as it may, it was a matter exclusively within the knowledge of the respondents and/or Elaine Quek. Perhaps, faced with an application for a Mareva injunction, Elaine Quek felt compelled to set out the true position. The silence certainly did

not help. Moreover, the proceeds of the *Langsa*, when paid to the respondents, would be in cash and could be easily disposed of or dissipated.

26 It seemed to us that a very significant feature of the case was the deafening silence on the part of the respondents and their managers, Foong Sun. Foong Sun, in the person of Elaine Quek, purported to speak for the respondents but gave no explanation of the various actions taken by the respondents including the fact that the respondents had agreed to a deferred payment of the price of the *Langsa*. The court was also not told what the actual payment terms were. Points which required answers were just left unanswered. We would also add that many documents were disclosed in the proceedings, but we were never shown a single document emanating from the respondents.

27 Finally, there was one other circumstance to which we ought to allude. It was noted that China Insurance had issued a policy to cover the respondents for third party liabilities up to $500,000. But that was still way below the quantified claim of the appellants at $904,164. Moreover, China Insurance had yet to reply to the appellants' letter seeking confirmation that China Insurance would pay if the appellants should establish their claim against the respondents.

28 The cross-undertaking in damages furnished by the appellants provided an adequate safeguard against the possibility that the injunction might be wrongly granted. It could not be argued that the injunction might destroy the respondents' business, or that a third party's confidence in them might be undermined, as the respondents had already ceased business.

29 The injunction which the appellants sought before us, and which we granted, was very specific, namely, only in respect of the proceeds of sale of the *Langsa*, irrespective of whether the moneys would be received in Singapore or elsewhere. Here again, we would observe that the respondents did not indicate whether the payment would be received in Singapore or elsewhere. We did not think this injunction was really of a worldwide nature. But even if this injunction could be considered to be of that nature, it should still be granted as it did not appear that the respondents had other assets within the jurisdiction. In *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] 1 Ch 65, Lord Donaldson of Lymington MR said (at 79):

> … I can see neither rhyme nor reason in regarding the existence of some asset within the jurisdiction of however little value as a pre-condition for granting a Mareva injunction in respect of assets outside the jurisdiction. The existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it.

30 In the result, we allowed the appeal and granted a Mareva injunction over the proceeds of sale of the *Langsa*.

Reported by Vincent Leow.

Janesh s/o Rajkumar
v
Unknown Person ("CHEFPIERRE")

[2022] SGHC 264

General Division of the High Court — Originating Claim No 41 of 2022 (Summons No 1800 of 2022)
Lee Seiu Kin J
13 May 2022; 21 October 2022

***Civil Procedure** — Injunctions — Claimant seeking proprietary injunction over non-fungible token ("NFT") — Whether NFTs were capable of giving rise to proprietary rights which could be protected via proprietary injunction — Whether proprietary injunction should be granted over claimant's NFT*

***Civil Procedure** — Parties — Naming of parties to suit — Claimant unable to name defendant as defendant was only known by his pseudonym — Whether claimant should be barred from seeking interim relief or bringing claim if he was unable to name defendant — Rules of Court 2021*

***Civil Procedure** — Service — Claimant seeking leave for substituted service on defendant by way of defendant's Twitter account, Discord account and messaging function of cryptocurrency wallet address — Whether substituted service out of jurisdiction permissible — Order 62 r 5 Rules of Court (2014 Rev Ed) — Order 8 r 2(1) Rules of Court 2021*

Facts

The claimant ("Claimant") was the owner of a non-fungible token ("NFT") known as the Bored Ape Yacht Club ("BAYC") ID #2162 (the "Bored Ape NFT"). He was a regular user on "NFTfi", which was a community platform functioning as an NFT-collateralised cryptocurrency lending marketplace. He would often enter into loan transactions with other users to borrow cryptocurrencies with NFTs as collateral. One NFT he would use as collateral was a Bored Ape NFT; its rarity and high value allowed him to obtain larger sums of cryptocurrency loans.

Because the Bored Ape NFT was extremely precious to the Claimant, he would take special care when using it as collateral. For instance, he would generally only deal with reputable lenders which were highly ranked by NFTfi's ranking system. Further, for every loan transaction in which he used the Bored Ape NFT as collateral, he was careful to state specific terms as part of the loan agreement. These terms ensured that while the Claimant was entitled to use the Bored Ape NFT as collateral, lenders whom he transacted with would not be able to take control or claim ownership over the NFT. In that regard, the Claimant refused to enter into any loan agreement with lenders who were unwilling to agree on these terms.

The present dispute arose out of a loan transaction which the Claimant had entered into with the defendant ("Defendant"), who went by the pseudonym "chefpierre.eth". The Claimant asked for a short extension of time to repay the loan – the Defendant agreed. Two days later, the Defendant agreed to the Claimant's proposal to enter into a refinancing loan – the outstanding amount owed under the current loan would be deducted from fresh funds provided to the Claimant. The Defendant, however, changed his mind and refused to enter into the refinancing loan, insisting that the current loan be repaid in full. The Claimant was caught flat-footed, and the Defendant transferred the Bored Ape NFT which was held in NFTfi's escrow account into his cryptocurrency wallet. The Bored Ape NFT was later listed for sale on "OpenSea" (an online NFT marketplace). The Claimant sued the Defendant, and also took out the present application for a proprietary injunction over the Bored Ape NFT.

Held, allowing the application:

(1) The court had the jurisdiction to hear the present application. While the decentralised nature of blockchains might pose difficulties when it came to establishing jurisdiction, there had to be a court which had the jurisdiction to hear the dispute. In the present case, based on the available facts, that court was the Singapore court. The primary connecting factor to Singapore was the fact that the Claimant was located in Singapore, and carried on his business here: at [30].

(2) While the Rules of Court 2021 stipulated the manner in which a defendant to an action should be named, a claimant should not be barred from seeking interim relief, or bringing a claim, if he was unable to name the defendant and has only his pseudonym. It was sufficient, to ensure compliance with the formality requirements set out in the Rules of Court 2021 ("ROC 2021"), that the description of the defendant was certain enough to identify both those who were included and those who were not: at [38] and [39].

(3) The description of the Defendant in this case was sufficiently certain. The Defendant was identified as: (a) the user behind the account "chefpierre.eth" on Twitter and Discord as of the date of filing of this application; (b) the person to whom the Bored Ape NFT had been transferred; and (c) the person who had transferred the Bored Ape NFT from the escrow account to his own cryptocurrency wallet: at [40].

(4) The Claimant had to show that he had a seriously arguable case that he had a proprietary interest in the Bored Ape NFT. This rested on the assumption that the Bored Ape NFT, or NFTs in general, were capable of giving rise to proprietary rights which could be protected via a proprietary injunction. In the present case, NFTs could be considered property, and were thus capable of giving rise to proprietary rights as they fulfilled the definition of property as set out in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175: at [46] and [69] to [72].

(5) The balance of convenience lay in favour of granting the proprietary injunction over the NFT. It was the string of code that represented the Bored Ape NFT on the blockchain that was truly unique, and irreplaceable. If that code was transferred to third parties, the Claimant might never be able to recover it, and so any proprietary remedy ordered by the court in relation to the Bored Ape NFT would be writ in water: at [80].

(6) Order 8 r 2(1) of the ROC 2021 did not appear to prescribe a closed list as to how service of the originating process or other court documents could be effected out of Singapore. It was clear that the ROC 2021 was not intended to drastically change the regime relating to jurisdiction in general, and the service of originating processes or other court documents out of Singapore. Rather, the intention was to simplify things, for example, by obviating the need for a claimant to scrutinise a list of cases in which service out of Singapore would be permissible. The court's power to allow substituted service out of jurisdiction was one of considerable vintage – if the drafters of ROC 2021 had intended to curtail the court's power in such a radical fashion, there would have been express and specific language to that effect: at [88] to [90].

(7) Leave was granted for substituted service out of jurisdiction – to find otherwise would be to deprive the Claimant of the only practical manner of effecting service on the Defendant: at [91].

[Observation: The decision here, as well as that in *CLM v CLN* [2022] 5 SLR 273, concerned interlocutory applications and so should be read in the proper context. The question of whether cryptocurrency could be considered property was not decided in either *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 or *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20. In the present case, it appeared that there were other grounds on which the Claimant could have sought an injunction: at [69], [75] and [76].]

Case(s) referred to

AA v Persons Unknown who demanded bitcoin on 10th and 11th October 2019 [2019] EWHC 3556 (Comm) (refd)

Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property [1931] 1 KB 672 (refd)

Amir Soleymani v Nifty Gateway LLC [2022] EWHC 773 (refd)

B2C2 Ltd v Quoine Pte Ltd [2019] 4 SLR 17 (refd)

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] 1 WLR 1633 (refd)

Boardman v Phipps [1966] 3 WLR 1009 (refd)

Bouvier, Yves Charles Edgar v Accent Delight International Ltd [2015] 5 SLR 558 (folld)

CLM v CLN [2022] 5 SLR 273 (refd)

Colonial Bank v Whinney [1885] 30 Ch D 261 (refd)

Consistel Pte Ltd v Farooq Nasir [2009] 3 SLR(R) 665; [2009] 3 SLR 665 (refd)

Elena Vorotyntseva v Money-4 Ltd [2018] EWHC 2596 (Ch) (refd)

Kwok Chi Leung Karl v Commissioner of Estate Duty [1988] 1 WLR 1035 (refd)

Lim Lye Hiang v OA [2012] 1 SLR 228 (refd)

Hermès International and Hermès of Paris, Inc v Mason Rothschild 603 F Supp 3d 98 (SDNY, 2022) (refd)

National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (folld)

Quoine Pte Ltd v B2C2 Ltd [2020] 2 SLR 20 (refd)

Petroval SA v Stainby Overseas Ltd [2008] 3 SLR(R) 856; [2008] 3 SLR 856 (refd)

Porter v Freudenberg [1915] 1 KB 857 (refd)

Ruscoe v Cryptopia Ltd [2020] 2 NZLR 809 (refd)
Storey, David Ian Andrew v Planet Arkadia Pte Ltd [2016] SGHCR 7 (refd)
Tulip Trading v Bitcoin Association for BSV [2022] EWHC 667 (refd)
Tullett Prebon (Singapore) Ltd v Chua Leong Chuan Simon [2005] 4 SLR(R) 344; [2005] 4 SLR 344 (refd)
VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 (refd)
Your Response Ltd v Datateam Business Media Ltd [2015] QB 41 (refd)

Legislation referred to

Rules of Court (2014 Rev Ed) O 2 r 1, O 62 r 5
Rules of Court 2021 O 3 r 1, O 3 r 2(4), O 3 r 2(5), O 3 r 6, O 6 r 1(3), O 6 r 5(1), O 6 r 11(1), O 7, O 7 r 7, O 8, O 8 r 1, O 8 r 2, O 8 r 2(1), O 8 r 2(1)(*e*), O 8 r 2(1)(*f*)
Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18(2), First Schedule para 5(*a*)
Bankruptcy Act 1883 (c 52) (UK)

Shaun Leong, Rachel Koh and Theodore Ang (Withers KhattarWong LLP) for the claimant;
Defendant absent and unrepresented.

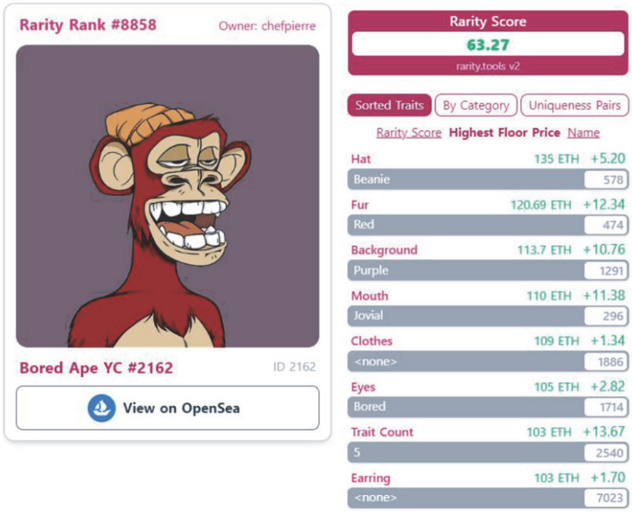
21 October 2022

Lee Seiu Kin J:

Introduction

1 Cars, books, wine and luxury watches – these are but to name a few examples of highly sought-after items for collectors. For digital nomads, however, especially those steeped in the world of blockchain and cryptocurrencies, non-fungible tokens (“NFTs”) have, in recent times, emerged as a highly sought-after collectors’ item. They are, to draw an analogy, the equivalent of a Rolex Daytona, or a F P Journe, to a horology enthusiast. Such is the hype around such NFTs that it is not uncommon to read about them being sold for sums of money that are puzzling to the unconverted. For fans of such NFTs, however, it seems that it is well worth the cost.

2 In the present case, the claimant was the proud owner of an NFT known as the Bored Ape Yacht Club (“BAYC”) ID #2162 (the “Bored Ape NFT”):



3 The Bored Ape NFT was precious to the claimant. That was apparent from his affidavit. The claimant, however, had lost "possession" of the Bored Ape NFT – he therefore brought the present application for an injunction to restrain the defendant from dealing with it.

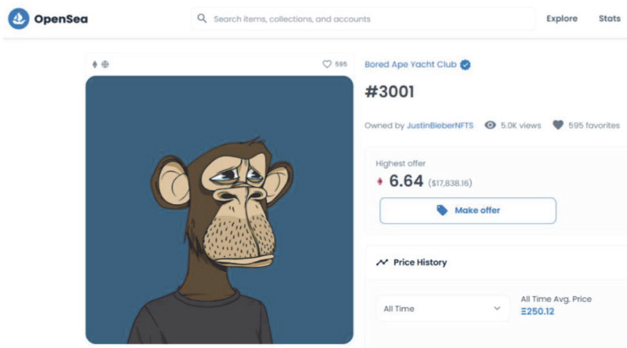
4 In the earlier case of *CLM v CLN* [2022] 5 SLR 273 ("*CLM*"), I had dealt with the question of whether stolen cryptocurrency assets, specifically Bitcoin and Ethereum, could be the subject of a proprietary injunction. Having considered the cases and the analysis in *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809 ("*Ruscoe*"), I was of the view (at [46]) that the claimant in that case was able to prove a serious arguable case that the stolen cryptocurrency assets were capable of giving rise to proprietary rights, which could be protected via a proprietary injunction.

5 The present application that was before me raised similar issues. This was unsurprising – given the rapid pace at which modern technology develops, disputes arising out of the application and deployment of such new technologies will become more common. The one pressing concern which most lawyers will encounter is whether the fabric of the common law can be extended, in a principled fashion, to cover disputes involving these technologies: see, *eg*, *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 ("*B2C2 (CA)*") at [144]; Vincent Ooi, "Contracts Formed by Software: An Approach from the Law of Mistake" (2022) Journal of Business Law 97 at 112–113; *AI, Data and Private Law: Translating Theory into Practice* (Gary Chan Kok Yew & Yip Man eds) (Hart Publishing, 2021).

Background

6 The claimant averred that the Bored Ape NFT was a unique and irreplaceable artwork. The Bored Ape NFT was part of a collection of

10,000 other pieces of artwork depicting apes with different unique attributes. The NFTs within the BAYC collection were hugely popular, and owned by a number of celebrities, including Justin Bieber who owned this particular NFT (reproduced below):



7 This, according to the claimant, spoke volumes as to the monetary value placed on NFTs within the BAYC collection, and the fact that such NFTs were also status symbols.

8 In relation to the technical aspects of such NFTs, each NFT within the BAYC collection was minted on the Ethereum blockchain with an individual, and unique hash number recorded on the blockchain together with a unique token ID which served as publicly verifiable proof of its provenance. The Bored Ape NFT had the following hash number recorded on the blockchain: 11c6ce8133ae11a9008557dd1c0bdd4b81d88b9d1609ab4dac2716a4b3f14465.

9 In relation to the visual characteristics of the Bored Ape NFT, the claimant described it as being the only one of its kind in existence. The Bored Ape NFT had, according to "OpenSea" – a marketplace for trading NFTs – the following special characteristics:

(a) a "jovial mouth" – a trait which only 3% of BAYC NFTs had;

(b) "Red fur" – a trait which only 5% of BAYC NFTs had;

(c) a "beanie hat" – a trait which only 6% of BAYC NFTs had;

(d) "Bored Eyes" – a trait which only 17% of the BAYC NFTs had;

(e) a "Purple Background" – which only 13% of the BAYC NFTs had; and

(f) It was a "virgin ape". What this meant, in the claimant's words, was that it was an ape that had not been "fed with any mutant serum" previously, and so the Bored Ape NFT retained its potential of producing another, unique piece of art. This "mutant serum", when applied to a NFT within the BAYC collection, produced a mutated version of the original ape – this was known as a "Mutant Ape Yacht Club NFT" ("MAYC NFT"). This meant that each owner of an NFT in the BAYC collection could also own a MAYC NFT which was a unique asset, separate from the original ape. The claimant also stated that it was "very possible for BAYC to initiate more projects in the future to allow BAYC NFT owners to create more unique artwork, for example, those based on artificial intelligence and robots".

10 The claimant acquired the Bored Ape NFT on 6 August 2021 when he purchased it for 15.99 ETH from a user operating under the pseudonym "victorjia_eth" on OpenSea. The claimant was a regular user on "NFTfi", which is a community platform functioning as an NFT-collateralised cryptocurrency lending marketplace. He would often enter into loan transactions with other users to borrow cryptocurrencies with NFTs as collateral. One NFT he would use as collateral was the Bored Ape NFT; its rarity and high value allowed him to obtain larger sums of cryptocurrency loans.

11 Because the Bored Ape NFT was extremely precious to the claimant, he would take special care when using it as collateral. For instance, he would generally only deal with reputable lenders which were highly ranked by NFTfi's ranking system. Further, for every loan transaction in which he used the Bored Ape NFT as collateral, he was careful to specify the following terms as part of the loan agreement:

(a) The Bored Ape NFT would be transferred to NFTfi's escrow account to be held until full repayment of the loan was effected.

(b) In the event that the claimant was unable to make full repayment of the loan on time, he would inform the lender who should provide reasonable extensions of time for repayment.

(c) At no point should the lender utilise the "foreclose" option of NFTfi's "Smart Program" on the Bored Ape NFT without first granting the claimant reasonable opportunities to make full repayment of the loan and retrieve the Bored Ape NFT from the escrow account.

(d) At no point would the lender obtain ownership, nor any right to sell or dispose of the Bored Ape NFT. The lender could only, at best, hold on to the Bored Ape NFT, pending repayment of the loan.

The claimant would not, because the Bored Ape NFT was precious to him, enter into any loan agreement with lenders who were unwilling to agree on the aforementioned terms.

12 The claimant explained that the reason why he had to specify these terms was because NFTfi facilitated such loan agreements through smart contracts, which are computer programs that automatically carry out a

given set of instructions upon the fulfilment of pre-set conditions ("NFTfi's Smart Program"). The NFTfi's Smart Program allowed for the repayment of the loans as well as the unilateral "foreclosure" on the NFTs by the lender if the specified payment was not made by the stipulated date.

13 The claimant, on the basis of these terms (set out above at [9]), had successfully borrowed and paid back numerous cryptocurrency loans using the Bored Ape NFT as collateral. The lenders complied with his terms, and at no point did they exercise, or purport to exercise the "foreclose" option on the NFTfi's Smart Program, or attempt to remove the Bored Ape NFT from his possession.

14 Things, it seemed, were going swimmingly for the claimant – that is, until he began dealing with the defendant, whom he only knew by the pseudonym "chefpierre.eth". Given the urgency in which the claimant took out the present application, exactly who was behind the pseudonym "chefpierre.eth" was unknown. However, it appeared that "chefpierre.eth" would post regularly on Twitter. And according to the claimant, it would be possible, given time, to obtain the identity of "chefpierre.eth".

15 Sometime in or around early January 2022, the claimant reached out to "chefpierre.eth" to discuss the possibility of obtaining a loan. The claimant informed "chefpierre.eth" about his terms regarding the Bored Ape NFT (see [11] above), and made it abundantly clear that the Bored Ape NFT was extremely precious to him and that he did not wish to relinquish "possession" of it.

16 On 6 January 2022, having secured assurance from "chefpierre.eth" that the Bored Ape NFT would not be "foreclosed", the claimant entered into a loan agreement with "chefpierre.eth" for 45 ETH. The loan was for a period of 90 days, with interest payable at 33% per annum. The claimant subsequently repaid this loan.

17 On 18 March 2022, "chefpierre.eth" offered the claimant another loan. Given their prior dealings, the claimant felt comfortable transacting with "chefpierre.eth". Both parties entered into another loan agreement on 19 March 2022 (the "19th March Loan"), subject to the claimant's usual terms (see [11] above) for 150,000 DAI. "DAI" is another cryptocurrency and 150,000 DAI was equivalent to USD$150,000. The loan period was 30 days, with interest payable at 45% per annum.

18 On 17 April 2022, the claimant told "chefpierre.eth" that he would require a short extension of time to repay the 19th March Loan. In response, "chefpierre.eth" agreed to the extension, and reassured the claimant that the Bored Ape NFT would be returned to him once the loan was repaid in full.

19 Two days later, on 19 April 2022, the claimant informed "chefpierre.eth" that he had reached out to another user under the

pseudonym "homer", for a loan to repay the outstanding amount owed under the 19th March Loan. After some discussion, "chefpierre.eth" agreed to enter into a refinancing loan with the claimant. Under this new agreement, the claimant would take out a new loan with "chefpierre.eth", with the Bored Ape NFT as collateral. "chefpierre.eth" would then deduct the outstanding amount owed in the 19th March Loan from the fresh funds provided to the claimant.

20 "[C]hefpierre.eth", however, later changed his mind and issued an ultimatum, stating that he would not extend any refinancing loan and that he would exercise the "foreclose" option of the NFTfi's Smart Program if the 19th March Loan was not fully repaid by 21 April 2022, 5.00am Singapore time.

21 Caught flat footed, the claimant was unable to find sufficient funds to repay the 19th March Loan. "[C]hefpierre.eth" exercised the "foreclose" option of the NFTfi's Smart Program and the Bored Ape NFT was transferred from NFTfi's escrow account into his cryptocurrency wallet.

22 The claimant said that he was devastated by this. But he still clung to the hope that "chefpierre.eth" would return the Bored Ape NFT once full payment was made. He therefore made part payment of the 19th March Loan and reminded "chefpierre.eth" of the terms of their agreement. "[C]hefpierre.eth", however, refused to discuss the matter further and informed the claimant that he would be keeping the Bored Ape NFT for himself. Thereafter, "chefpierre.eth" returned the part payment which the claimant had made and prevented the claimant from making any further payments.

23 Since then, the claimant discovered that "chefpierre.eth" had listed the Bored Ape NFT for sale on OpenSea (an online NFT marketplace). There were, according to the claimant, a number of offers made for the Bored Ape NFT.

24 The claimant therefore filed a suit against the defendant, "chefpierre.eth", and claimed that:

(a) He had an "equitable proprietary claim" over the Bored Ape NFT.

(b) The defendant was liable to him in the tort of conversion, breach of contract, and unjust enrichment.

25 Given the real risk of dissipation and disposal of the Bored Ape NFT, the claimant made an urgent application to court in summons No 1800 of 2022 ("SUM 1800") for the following orders:

(a) A proprietary injunction prohibiting the defendant from in any way dealing with the Bored Ape NFT, until after the trial of Originating Claim No 41 of 2022 ("OC 41"). OC 41 was filed in the

General Division of the High Court by the claimant against the defendant on the same date as SUM 1800. The injunction would apply to any appeals arising therefrom, such dealings including but not limited to selling or disposing of the Bored Ape NFT and using the Bored Ape NFT as collateral in transaction with any third party.

(b) Leave be granted for the claimant to serve: (i) a copy of the originating claim and statement of claim; and (ii) a copy of the summons for injunction and any order(s) made therein (collectively, the "Court Documents") on the defendant, by the following means:

(i) on the defendant's Twitter account;

(ii) on the defendant's Discord account; and

(iii) on the messaging function of the Defendant's cryptocurrency wallet address 0x0e616785638663C88A493a82972E2F9CaDAab4bc.

(c) The time for entry of an appearance in this action by the defendant be 21 days after service of the court documents on him, inclusive of the day of service.

(d) Liberty to apply.

(e) The costs of and occasioned by this application be in the cause.

(f) Such further or other relief as the court deems fit.

26 I heard counsel for the claimant on 13 May 2022 and allowed the application. These are the reasons for my decision.

Whether the court had the jurisdiction to hear the application

27 The claimant argued that, notwithstanding the fact that the domicile, residence and present location of the defendant was unknown, the Singapore court was the appropriate court to hear the application for the injunction on the basis that:

(a) There was sufficient nexus to Singapore. The claimant is a Singapore citizen who carried on business from Singapore and owned property in Singapore. Further, he entered the transactions concerning the Bored Ape NFT in Singapore.

(b) There was a serious question to be tried on the merits of the claim.

(c) Singapore was the *forum conveniens*. If the Singapore courts did not hear the case, there was no other appropriate forum. This was because the Bored Ape NFT existed as code stored on the Ethereum blockchain, which is essentially a decentralised network of ledgers maintained in computers around the world.

28 The claimant also referred me to the case of *Tulip Trading v Bitcoin Association for BSV & Ors* [2022] EWHC 667 ("*Tulip Trading*"). The claimant in that case, Tulip Trading Ltd ("TTL"), was the subject of a hack which rendered it unable to control, or use, a very substantial amount of Bitcoin which it claimed to own. TTL's case was that the defendants, none of whom were within the jurisdiction, were the core developers and/or otherwise controlled the software in respect of the relevant digital asset networks. TTL filed a claim, alleging that the defendants owed it a fiduciary and/or tortious duties, and applied for service out of jurisdiction. Permission to serve out of jurisdiction was granted on 7 May 2021. However, several of the defendants challenged the court's jurisdiction. This meant that the court had to reconsider whether, effectively by rehearing, permission to serve out should be given: *Tulip Trading* at [47]. The question then, which Justice Falk had to decide, was whether the requirements to obtain leave for service out of jurisdiction as summarised in *VTB Capital plc v Nutritek International Corp & Ors* [2012] EWCA Civ 808 at [99]–[101] were satisfied, namely:

(a) Was there a serious issue to be tried on the merits of the claim?

(b) Was there a good arguable case that the claim fell within one or more of the classes for which leave may be given set out in para 3.1 of "Practice Direction 6B" (which supplements Pt 6 of the Civil Procedure Rules on the service of documents, and sets out guidelines on service out of jurisdiction).

(c) That in all the circumstances, England was clearly or distinctly the appropriate forum for the trial of the dispute, and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

29 Justice Falk set aside the order granting permission for service out of jurisdiction on the basis that TTL had not established a serious issue to be tried on the merits of the claim. But if there had been a serious issue to be tried (*Tulip Trading* at [167]), Justice Falk took the view that England was the appropriate forum for the trial of the dispute, and that the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. In her view, the primary connecting factors were TTL's presence in the jurisdiction, including that of its agent and primary witness, Dr Wright, who had lived in the jurisdiction since 2015 and intended to apply for citizenship. TTL also had the better of the arguments that the digital assets were located in the jurisdiction and that damage has been or will be sustained here.

30 In the present case, I was satisfied that the court had the jurisdiction to hear the present application. While the decentralised nature of blockchains may pose difficulties when it comes to establishing jurisdiction, to my mind, there had to be a court which had the jurisdiction to hear the

dispute. In the present case, based on the available facts before me, that court was the Singapore court. The primary connecting factor was the fact that the claimant was located in Singapore, and carried on his business here.

Jurisdiction against an unknown person

31 The identity of the person behind the pseudonym "chefpierre.eth" was unknown. In their skeletal submissions, the claimant relied on the case of *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 for the proposition that an injunction could be granted against unknown persons provided the description of these unknown persons was sufficiently certain to identify the persons falling within and outside of that description. The claimant also relied on my decision in *CLM* ([4] *supra*) where I had concluded (at [31]) that the court had the jurisdiction to grant interim orders against the first defendants in that case, who were also persons unknown.

32 The application in *CLM*, however, was brought under the old Rules of Court (2014 Rev Ed) ("ROC 2014"). I had found that the ROC 2014 did not require the defendant to be specifically named (*CLM* at [28]). The application before me, however, being brought after 1 April 2022, was therefore subject to the new Rules of Court 2021 ("ROC 2021"). Here, the claimant submitted that nothing in the ROC 2021 required a defendant to be specifically named.

33 Under the ROC 2021, a writ of summons is now called an originating claim. The originating claim must be in Form 8: O 6 r 5(1) ROC 2021. Similarly, what was formerly referred to as an originating summons is now referred to, under the ROC 2021, as an originating application, which must be in either Form 15 (where the originating application must be served) or Form 16 (where service may be dispensed with): O 6 r 11(1). A glance at both Forms 8 and 15 reveals that the claimant's name and identification number, as well as that of the defendant, must be stated. Order 3 r 6, however, states that the practice directions, which contains the relevant forms, "must be used with such variations as the circumstances require".

34 As I noted in *CLM* (at [29]), in relation to O 2 r 1 of the ROC 2014:

> … Even if the commencement of proceedings against persons unknown contravenes the ROC, such a contravention is treated as a mere irregularity, and will not result in the nullification of proceedings unless the court exercises its discretion to order the same:
>
> > **Non-compliance with Rules (O. 2, r. 1)**
> >
> > **1.**—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, *the failure*

> *shall be treated as an* ***irregularity*** *and* ***shall not nullify*** *the proceedings, any step taken in the proceedings, or any document, judgment or* ***order*** *therein.*
>
> (2) Subject to paragraph (3), the Court ***may***, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or ***order*** therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> …

Plainly, the reference to 'order' in the above provision covers interim orders such as injunctions.

[High Court (General Division)'s emphasis in *CLM*]

35 However, under the ROC 2021, O 3 r 2(4)–O 3 r 2(5) state:

> **General powers of Court (O. 3, r. 2)**
>
> **2.**—(1) …
>
> (4) Where there is non-compliance with these Rules, any other written law, the Court's orders or directions or any practice directions, the Court may exercise all or any of the following powers:
>
> (*a*) subject to paragraph (5), waive the non-compliance of the Rule, written law, the Court's order or direction or practice direction;
>
> (*b*) disallow or reject the filing or use of any document;
>
> (*c*) refuse to hear any matter or dismiss it without a hearing;
>
> (*d*) dismiss, stay or set aside any proceedings and give the appropriate judgment or order even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way;
>
> (*e*) impose a late filing fee of $50 for each day that a document remains unfiled after the expiry of the period within which the document is required to be filed, excluding non-court days;
>
> (*f*) make costs orders or any other orders that are appropriate.
>
> (5) Where the non-compliance is in respect of any written law other than these Rules, the Court may waive the non-compliance only if the written law allows such waiver.

36 It is apparent from the ROC 2021 that where there has been non-compliance with the Rules, the court has the power, the scope of which is set out under O 3 r 2(4), to deal with such non-compliance. In contrast, under O 2 r 1 of the ROC 2014, non-compliance with the requirements under the Rules was treated as an irregularity which would not nullify the proceedings or any order therein.

37 The question, therefore, was whether the failure to name the defendant, in the precise manner as stipulated in the relevant forms, meant that there was non-compliance with the Rules. In my view, this did not amount to non-compliance. Here, O 3 r 1 states:

> **Ideals (O. 3, r. 1)**
>
> **1.**—(1) These Rules are to be given a purposive interpretation.
>
> (2) These Rules seek to achieve the following Ideals in civil procedure:
>
> (*a*) **fair access to justice**;
>
> (*b*) expeditious proceedings;
>
> (*c*) cost-effective work proportionate to —
>
> (i) the nature and importance of the action;
>
> (ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and
>
> (iii) the amount or value of the claim;
>
> (*d*) efficient use of court resources;
>
> (*e*) fair and practical results suited to the needs of the parties.
>
> (3) **The Court must seek to achieve the Ideals in all its orders or directions**.
>
> (4) All parties have the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals.
>
> [emphasis added in bold]

38 As is made clear by O 3 r 1, the ROC 2021 is to be interpreted purposively, and the court must seek to achieve the "Ideals" in all its orders and directions. To my mind, requiring strict compliance with the formality requirements of an originating application or claim may well restrict access to justice. As the present case has demonstrated, it is perfectly possible to have concluded a contract with someone else online, where both parties have concealed their true identities using pseudonyms. Should a claimant be barred from seeking interim relief, or bringing a claim, unless he is able to name the defendant, instead of using his pseudonym? I think not.

39 That said, this does not mean that the formality requirements may be dispensed of in their entirety. That would make a mockery of the Rules. Here, I would reiterate what I had earlier said in *CLM* (at [32]): the description of the defendant must be sufficiently certain so as to identify both those who are included and those who are not. In *CLM* (at [34]), I was satisfied that the following description which had been used sufficed:

> [A]ny person or entity who carried out, participated in or assisted in the theft of the Plaintiff's Cryptocurrency Assets on or around 8 January 2021, save for the provision of cryptocurrency hosting or trading facilities.

40 In the present case, the defendant was described as follows:

(a) The defendant was identified as the user behind the account "chefpierre.eth" on Twitter and Discord as of the date of filing of this application.

(b) The defendant was identified as the person to whom the Bored Ape NFT had been transferred to.

41 I was satisfied that the present description had, with sufficient certainty, described persons falling within and outside that description. In the alternative, even if the Rules required the defendant to be named, and that the failure to do so meant that there was non-compliance with the form requirements set out under O 6 r 5(1) and O 6 r 11(1) of the ROC 2021, I was prepared to waive this instance of non-compliance.

42 The court therefore had, in my view, the jurisdiction to grant the interim orders sought against the defendant, who is an unknown person in this case, notwithstanding the introduction of the ROC 2021.

Whether an injunction restraining the defendant from dealing with the Bored Ape NFT should be granted

43 The General Division of the High Court has the power, pursuant to s 18(2) read with para 5(*a*) of the First Schedule of the Supreme Court of Judicature Act 1969 (2020 Rev Ed), to grant interim proprietary injunctions. To obtain such an injunction, however, the applicant must establish the following requirements (*Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") at [143]–[164]):

(a) there is a serious question to be tried; and

(b) the balance of convenience lies in favour of granting the injunction.

44 The claimant argued that the requirements in *Bouvier* were satisfied. There was a serious question to be tried as the facts "deposed to by the Claimant [were] well-supported by contemporaneous written conversation[s] between the Claimant and the Defendant as well as actions taken by both parties in relation to [Bored Ape NFT] and the utilisation of NFTfi's Smart Programs". Further, because the assets in this case were blockchain-based, there was a public and irrefutable record of the transactions and actions undertaken with regard to the Bored Ape NFT and the exchange of cryptocurrency. The claimant also argued that the balance of convenience lay in favour of granting the injunction: without it, the defendant would be able to dispose of the Bored Ape NFT. If that happened, the loss suffered by the claimant could not be compensated by an award of damages as the Bored Ape NFT was a unique and irreplaceable artwork.

Whether there was a serious question to be tried

45 I turn now to deal with the first requirement set out in *Bouvier*. As I noted in *CLM* (at [39]):

> 39 As stated by the Court of Appeal in *Bouvier* (at [151]), in respect of an application for an interlocutory proprietary injunction, the first requirement of showing that there is a serious question to be tried will be satisfied as long as '**the plaintiffs have a seriously arguable case that they [have] a proprietary interest**'. In this regard, the court does not engage in complex questions of law or fact at the interlocutory stage.
>
> [emphasis added in bold]

46 The claimant therefore had to show that he had a seriously arguable case that he had a proprietary interest in the Bored Ape NFT. Naturally, this rested on the assumption that the Bored Ape NFT, or NFTs in general, were capable of giving rise to proprietary rights which could be protected *via* a proprietary injunction.

47 The following issues therefore arose for consideration:

(a) Was the Bored Ape NFT, or NFTs in general, capable of giving rise to proprietary rights which could be protected by an injunction?

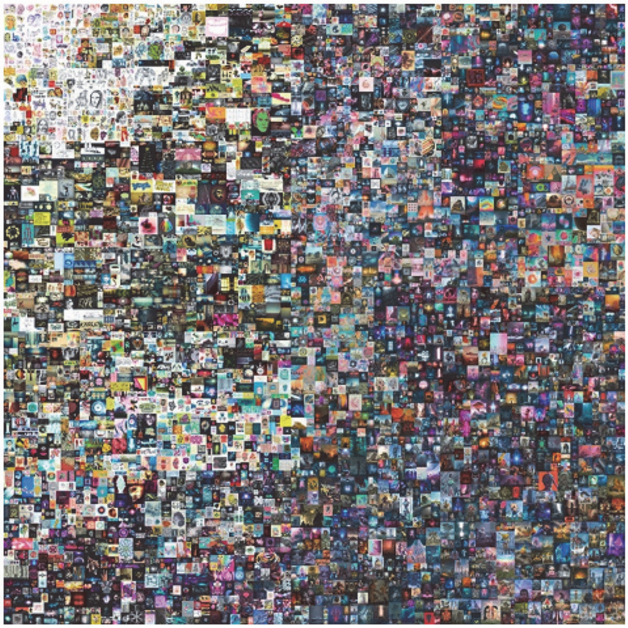
(b) Was it seriously arguable that the claimant had a proprietary interest in the Bored Ape NFT (bearing in mind that the court does not consider complex questions of fact or law at the interlocutory stage)?

48 I turn now to consider each issue, *seriatim*.

Whether the Bored Ape NFT, or NFTs in general, were capable of giving rise to proprietary rights which could be protected by an injunction

49 It is perhaps apposite, at this juncture, to delve a little into the technology behind NFTs. It should be noted that NFTs are associated not only with digital artwork, music and writing, but also contractual assets such as tickets to event as well as physical assets such as cars and yachts. Since the property in question is a digital artwork, I shall limit the discourse to such NFTs and use the very first NFT, of an artwork created by an artist going by the pseudonym "Beeple", as an example.

50 Beeple created an artwork called "Everydays: The First 5000 Days" ("Beeple's Artwork") (a thumbnail of which is reproduced below):



51 It is important to bear in mind that the above image is the result of a string of code (the "image file") which instructs the computer to generate the image that appears on the screen. Image files can be in various formats such as JPG, PNG, GIF, MP4, etc. The image file associated with a particular NFT may be stored on the blockchain itself (an "on-chain NFT") but the cost of this could be high if the image size is large. It is more common to store only the metadata of the image on the blockchain (an "off-chain NFT"). The metadata contains information about the image file such as the author, file creation date and file size. Once this metadata file is produced, it is then "hashed".

52 Beeple's Artwork had a file size of some 300 megabytes. It was stored on a decentralised file sharing system called the InterPlanetary File System ("IPFS") at the following link: https://ipfsgateway.makersplace.com/ipfs/QmXkxpwAHCtDXbbZHUwqtFucG1RMS6T87vi1CdvadfL7qA. In the case of Beeple's Artwork, the link to the image file residing in the IPFS was contained within the metadata file.

53 Beeple's metadata was then "hashed" – using an algorithm, a popular example of which would be "SHA2-256", to produce an output of a fixed length (*ie*, the "hash"). What this means is that an exactly identical file will always produce the same output. The hash serves to identify the original data in the image – any changes to the original image will result in a different hash value. In this case, the hash value of Beeple's Artwork was: QmXkxpwAHCtDXbbZHUwqtFucG1RMS6T87vi1CdvadfL7qA.

54 At this point, one might wonder where the NFT is in all of this. Beeple created the token using a code (or what those in the crypto space would call a "smart contract") called the "MakersTokenV2" – this was a derivation of the popular "ERC721" which powers most NFTs on the Ethereum blockchain. What this piece of code did was to create a new token in the crypto wallet address of Beeple who, as the controller of the wallet, would be able to transfer this token to another crypto wallet (*eg*, to a buyer who pays him for it). This ability to transfer a token to another wallet means, in effect, that Beeple is the "owner" of the NFT.

55 NFTs have been characterised as certificates of ownership "powered by smart contracts and protected by blockchain technology": Pinar Caglayan Aksoy & Zehra Ozkan Under, "NFTs and Copyright: Challenges and Opportunities" (2021) 16(10) Journal of Intellectual Property Law & Practice 1115 at 1115. However, from our rough description of what an NFT is above, it would be clear that, in most cases and certainly in the present case, all an NFT contains is a link to the server where the *actual* image itself can be found. Even if one is dealing with an "on-chain" NFT, it is, essentially, a string of code which includes the code for the image.

56 From this, it could be argued that all that is acquired when one "buys" an NFT is merely information. If, however, NFTs are characterised as information, one may expect to find serious objections towards granting it property status. As Prof Lee Pey Woan notes (Lee Pey Woan, "Personal Data as a Proprietary Resource" in *AI, Data and Private Law: Translating Theory into Practice* (Gary Chan Kok Yew and Yip Man eds) (Hart Publishing, 2021) ("*Personal Data as a Proprietary Resource*") at p 101):

> To sum up, the real objections to treating information as property are twofold. First, the free flow of information is of paramount importance, so informational access should not be curtailed as a general rule. **Second, information has a poor fit with conventional concepts of ownership, title and transfer because of its fluidity and variability in function and conception. These are serious hurdles, but they are by no means absolute impediments.** As alluded to above, the individual's interests in privacy and self-determinacy are significant counterweights that may justify some curtailment of access to information. While it is true that information should not, in general, be privatised, personal data may warrant special treatment as a means of augmenting the data subject's legal rights and control. Of course, information being intangible and non-rivalrous is not, in its natural state, an excludable resource. Such exclusivity, if desired, can only be artificially constructed by legal means. [emphasis added in bold]

57 However, where crypto assets (*ie*, cryptocurrencies, tokens and NFTs) are concerned, it may not be entirely appropriate to characterise them as information. As Gendall J noted in *Ruscoe* ([4] *supra*) (at [127]):

> [I]t is wrong in any event to regard cryptocurrencies as mere information because:

(a) The whole purpose behind cryptocurrencies is to create an item of tradeable value not simply to record or to impart in confidence knowledge or information. Although cryptocoins are not backed by the promise of a bank, the combination of data that records their existence and affords them exclusivity is otherwise comparable to the electronic records of a bank. The use of the private key also provides a method of transferring that value. This might be seen as similar in operation to, for example, a PIN on an electronic bank account.

(b) And, generally, as I see it, cryptocoins are no more mere information than the words of a contract are. What allows a contract to be capable of being an item of property is not the words nor even the binding promise which is only a personal obligation, but the fact that equity recognises there is a unique relationship between the parties created by the words and then supplies a system for transferring the contractual rights. Similarly, a unique relationship and system of transfer exists with respect to the relevant data on the blockchain that makes up a cryptocoin.

(c) In *Boardman v Phipps* Lord Upjohn stated: 'In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear.' This statement appears to confirm as a principle for not regarding information as property the fact that it can be infinitely duplicated. Again, this is not true of cryptocoins where every public key recording the data constituting the coin is unique on the system where it is recorded. It is also protected by the associated private key from being transferred without consent.

…

58 I agree with Gendall J's observations in *Ruscoe*. NFTs, when distilled to the base technology, are not just mere information, but rather, data encoded in a certain manner and securely stored on the blockchain ledger: see *Amir Soleymani v Nifty Gateway LLC* [2022] EWHC 773 at [9]; *Hermès International and Hermès of Paris, Inc v Mason Rothschild* 603 F Supp 3d 98 (SDNY, 2022) at [1]. To characterise NFTs as mere information would ignore the unique relationship between the encoded data and the blockchain system which enables the transfer of this encoded data from one user to another in a secure and verifiable fashion. The real objection to treating information as property depends on the functions it is used for, rather than on the plain fact that it is information: David Fox & Sarah Green, *Cryptocurrencies in Public and Private Law* (Oxford University Press, 2019) at para 6.44. When Lord Upjohn used the term "information" in *Boardman v Phipps* [1966] 3 WLR 1009, he was using it in the context of the knowledge that such information *informs* the reader. In the context of NFTs, the information concerned is a string of computer code (at its essence, zeros and ones) that does not provide any knowledge to those who have read it. It provides instructions to the computer under a system whereby the "owner" of the NFT has exclusive control over its transfer from his wallet to any other wallet.

59 In the same vein, there has been growing judicial support for "deploying property concepts to protect digital assets": *Personal Data as a Proprietary Resource* at p 96. For example, in *Elena Vorotyntseva v Money-4 Ltd t/a Nebeus.com and ors* [2018] EWHC 2596 (Ch) ("*Money-4 Ltd*"), the applicant brought an urgent *ex parte* application for a freezing order against the first respondent, Money-4 Ltd trading as Nebeus.com, and its directors. The applicant had given to Nebeus.com some 293 Bitcoins and 400 Ethereum with a combined total value of £1.5m. The applicant's lawyers had asked for confirmation from Nebeus.com that the cryptocurrency was still in their possession and that it had not been dissipated. When such confirmation was not forthcoming, the application for the freezing order was sought. While Birss J, who heard the case, was satisfied that the court could make such an order if it was appropriate to do so, there was no suggestion before him that cryptocurrency could not be a form of property, or that a party "amenable to the court's jurisdiction cannot be enjoined from dealing in or disposing of it" (*Money-4 Ltd* at [13]).

60 The point on whether cryptocurrency could be a form of property was more fully developed in *AA v Persons Unknown who demanded bitcoin on 10th and 11th October 2019 and ors* [2019] EWHC 3556 (Comm) ("*AA*"). In that case, the plaintiff was the insurer for a Canadian insurance company which had been hacked by the first defendant. The first defendant had bypassed the company's firewalls and installed malware called "Bitpaymer", which encrypted its computer systems. A ransom demand was made – the first defendant demanded payment of Bitcoins in exchange for the decryption tool. The insured company paid the ransom of some US$950,000-worth of Bitcoins on 10 October 2019. Subsequent investigations traced the Bitcoins paid to the second defendant whose wallet address was held by a cryptocurrency exchange ("Bitfinex") operated by the third and fourth defendants. An application was taken out for a proprietary injunction in respect of the Bitcoins held at the account of the fourth defendant. Bryan J, who heard the case, had to deal with the preliminary, and fundamental, question of whether the Bitcoins were property at all: *AA* at [55]. Here, Bryan J noted that the immediate difficulty was that "English law traditionally views property as being of only two kinds, choses in possession and choses in action" (*AA* at [55], citing *Colonial Bank v Whinney* [1885] 30 Ch D 261 ("*Colonial Bank*")). Bitcoins, and other cryptocurrencies, did not fall neatly into either category, and thus could not be classified as a form of property: *AA* at [56] and [58].

61 Bryan J, however, considered that it was "fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action" (*AA* at [58]). In doing so, he cited extensively from the legal statement on cryptoassets and smart contracts published by the UK Jurisdiction Task Force (the "Legal

Statement"). There, the UK Jurisdiction Task Force (the "Task Force") took the view that the issue in *Colonial Bank* was not about the scope of property generally as there was no dispute that the shares were property – the relevant question in that case was whether they were things in action within the meaning of the Bankruptcy Act 1883 (c 52) (UK): Legal Statement at para 71. In relation to Fry J's statement in that case, that "personal things [were] either in possession or in action, and that there [was] no third category", while it could carry the logical implication that an intangible thing is not property if it is not a thing in action, it was unclear whether Fry J intended that corollary and it should not in any case be regarded as part of the reasoning leading to his decision: Legal Statement at para 74. The Task Force thus took the view that *Colonial Bank* was not to be treated as limiting the scope of what kinds of things could be property in law – rather, it showed the ability of the common law to stretch "traditional definitions and concepts to adapt to new business practices": Legal Statement at para 77. After canvassing cases such as *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672 and *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41, as well as various statutory provisions defining property in terms that assumed that intangible property was not limited to things in action, the Task Force concluded that "the fact that a cryptoasset might not be a thing in action on the narrower definition of that term does not in itself mean that it cannot be treated as property": Legal Statement at paras 78–84.

62 The Legal Statement therefore formed the basis for Bryan J's conclusion that while a crypto asset might not be a thing in action based on a narrow definition of that term, it could still be considered property: *AA* at [59]. He therefore made a finding that crypto assets such as Bitcoin were property, given that they met the four criteria set out in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 ("*Ainsworth*") at 1248 – namely, that it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

63 However, as Prof Kelvin Low ("Prof Low") notes in his commentary, "Bitcoins as Property: Welcome Clarity?" (2020) 136 Law Quarterly Review 345 ("*Bitcoins as Property*") at 347–348:

> The nature of choses in action in the common law was the subject of heated debate in the late 19th century within the pages of this *Review*: see Elphinstone (1893) 9 L.Q.R. 311; Sweet (1894) 10 L.Q.R. 303; Broadhurst (1895) 11 L.Q.R. 64; Williams (1895) 11 L.Q.R. 223; Sweet (1895) 11 L.Q.R. 238. **At the time, one of the most significant concerns was whether rules applicable to traditional contractual choses in action, such as that applicable to assignments, would apply to new forms of intangible property such as shares and intellectual property**: Holdsworth (1920) 33 Harv. L. Rev. 997 at 1029. It is the best explanation for the mysterious statutory rule in s.30(1) Patents Act 1977 declaring that patents are intangible property but

not choses in action: see *Bridge et al*, *The Law of Personal Property*, 2nd edn (2017), at pp.175–176. In hindsight, this fear has been proven to be unfounded (see *Crosstown Music Company 1, LLC v Rive Droite Music Ltd* [2010] EWCA Civ 1222; [2012] Ch. 68 at [35] and [92]–[93] for copyright, not so statutorily classified) but a different, more conceptual, concern appears to have firmly taken root. **Traces of the same reasoning, which entail a narrow view of enforcement rights, can also be found, arguably even more clearly articulated**, in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch. 156 at [48], criticised by Low and Lin (2015) 27 J.E.L. 377. **This entails the view that only Hohfeldian (cf. Hohfeld (1913) 23 Yale L.J. 16) claim rights would fall within the category of a chose in action.** The irony of courts allowing legal actions in respect of intangible property that are not choses in action because they do not entail rights enforceable by action appears to have eluded proponents of this view. But as this author observed elsewhere, in *Bridge et al*, *The Law of Personal Property* (2017), at p.175:

> [S]uch a view of things in action both overemphasises the necessity of a right of action and underestimates the panoply of remedies available to a modern court. As to the former, the right of action serves the purpose of securing performance and in the vast majority of cases, things in action, even in the limited sense, are enjoyed in their performance rather than by way of action … As to the latter, the availability of declaratory and quia timet injunctive relief also severely blunts the force of criticisms that no rights of action exist prior to infringement.

The fatal flaw in the reasoning process is also underscored by a curious sentence in the UK Jurisdiction Taskforce's legal statement, (at [76], quoted by Bryan J. at [58] [of *AA*]):

> Thus, to the extent that the House of Lords [in *Colonial Bank*] agreed with Fry LJ on the classification issue, that seems to have been on the basis that the class of things in action could be extended to all intangible property (i.e. it was a residual class of all things not in possession) rather than on the basis that the class of intangible property should be restricted to rights that could be claimed or enforced by action.

The only way in which this sentence makes any sense is by dissociating the category of things in action in its first half from the narrow view of enforceability of rights in the sense of Hohfeldian claim rights in its second. Otherwise, the statement would be an oxymoron.

[emphasis added in bold]

64 Given Bryan J's reliance on the Legal Statement in the finding that crypto assets could still constitute property even if they did not fall within the category of choses in action, it would be apposite to unpack what Prof Low meant in his critique of the Legal Statement, specifically, the "curious sentence". Originally, the term "chose in action" encompassed all rights which were enforceable by action; this included, among other things, rights to a debt or rights of action on a contract (see Michael Bridge,

Personal Property Law (Oxford University Press, 4th Ed, 2015) at p 229). This was, however, later extended to cover "documents such as bonds, which evidenced or proved the existence of such rights of action": W S Holdsworth, "The History of the Treatment of 'Choses' in Action by the Common Law" (1920) 33(8) Harvard Law Review 997 ("*History of Choses*"). This subsequently led to the inclusion of other instruments such as bills of lading, and policies of insurance – these policies, however, were documents of title to what was essentially an incorporeal right of property. From this, there was no difficulty in including other things which were "even more obviously property of an incorporeal type" such as patents and copyrights: *History of Choses* at p 998.

65 With this brief history in mind, it is easier to see Prof Low's issue with the reasoning adopted in the Legal Statement which took the following form: the House of Lords in *Colonial Bank* agreed with Fry LJ on the classification issue, seemingly on the basis that "**A**", and not "**B**", where:

(a) **A** = Class of chose in action could be extended to all intangible property.

(b) **B** = Class of intangible property should be restricted to rights that could be claimed or enforced by action.

66 If a "chose in action" in **A** was referred to in the traditional sense (*ie*, rights or claims enforceable by action), then **A** = **B**, and the sentence would make no sense. *Per* Prof Low, the sentence would only make sense if the "chose in action" referred to in **A** did not mean rights that could be claimed or enforced by action. Therefore, the meaning of "chose in action" in **A** must go beyond mere "rights enforceable by action", which appears to be the case if one looks at the historical treatment of choses in action (see [64] above).

67 It would be rather apparent by now, that the meaning of terms such as "choses in action" and "intangible property" as they are used may not be entirely clear (see also: Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) at paras 01.004 and 01.011). If they are co-extensive, as Prof Low appears to suggest that they should be, then it may be possible to apply Fry LJ's *tertium quid* in answering the question as to whether crypto assets such as Bitcoin or NFTs constitute property. Support for adopting a broader meaning of "chose in action" can be found in Gendall J's remarks in *Ruscoe* ([4] *supra*) (see also *Lim Lye Hiang v Official Assignee* [2012] 1 SLR 228 at [28] citing *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035 at 1040E–1040G). He noted that the common objection to finding that crypto assets are property is that they are neither tangibles nor choses in action, which are the only two classes of property recognised by the common law (*Ruscoe* at [122]). But this objection was, in his view, a red herring – the most that could be said was that cryptocurrencies would have to be classified as choses in action (see also

Alvin W-L See & Yip Man, "Restitution of Mistakenly Transferred Bitcoins" (2022) Lloyd's Maritime and Commercial Law Quarterly 46 at 48). It was "ironic that something that might be said to have more proprietary features than a simple debt is deemed not to be property at all when a simple debt qualifies" (*Ruscoe* at [124]).

68 That being said, arguments as to whether crypto assets such as NFTs could be considered choses in action, and the potential applicability of Fry LJ's *tertium quid* were not advanced before me in the present case (*cf* Jeremiah Lau, "That New Chestnut – The Proprietary Status of Bitcoins" (2020) Lloyds Maritime and Commercial Law Quarterly 378 at 381–382). The trend of the case law has been to apply the *Ainsworth* criteria in deciding whether crypto assets are property, and this was something I had considered in *CLM* ([4] *supra*) itself (see *CLM* at [46]). In *AA*, Bryan J, having reasoned his way around Fry LJ's *tertium quid*, turned to the *Ainsworth* test to hold that cryptocurrencies were property (*AA* at [59]). In *Ruscoe*, it appears that Gendall J applied the *Ainsworth* criteria because counsel did not push the point that the common law only recognised two classes of personal property, and cryptocurrencies did not fall into either class (*Ruscoe* at [123]).

69 The *Ainsworth* test, however, as some may point out, is to some degree circular: Gray & Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at p 97. Prof Low also argued that the problem with using the test is that it "mixes up the various meanings which common lawyers give to the word 'property'" notwithstanding the fact that what "may be the subject matter of a trust and what may be the subject matter of a proprietary injunction, is wider than that envisaged by Lord Wilberforce in *Ainsworth*": *Bitcoins as Property* at p 349. Here, I would emphasise that the present case was an urgent *ex parte* hearing – I therefore did not have the benefit of submissions from the defendant. The cases which were cited to me showed that other courts had, in dealing with similar issues involving the proprietary nature of crypto assets, applied the *Ainsworth* criteria. Further, having examined the analysis of Gendall J in *Ruscoe*, I was of the view that the *Ainsworth* criteria could be usefully applied to determine if crypto assets were property. That said, it bears noting that my decisions, both in *CLM* and in the present case, concerned interlocutory applications, and so should be read in the proper context. A different conclusion may well be reached with the benefit of fuller submissions. With that in mind, let us now turn to examine the application of the *Ainsworth* criteria in the present case. In *CLM*, I had (at [46]), taken the view that cryptocurrencies satisfied the definition of a property right as set out in *Ainsworth*. Similarly, in the present case, I was of the view that such NFTs did satisfy the *Ainsworth* criteria. The first *Ainsworth* criteria is that the right must be "definable" – essentially, the asset "must hence be capable of being isolated from other assets whether of the same type or of other types and thereby

identified" (*CLM* at [45(a)], citing *Ruscoe* at [104]). This requirement is easily fulfilled – as explained (at [49]–[56] above), metadata is central to an NFT. It is this metadata which distinguishes one NFT from another.

70 The second requirement is that the "asset must have an owner being capable of being recognised as such by third parties" (*CLM* at [45(b)], citing *Ruscoe* at [109]). Where NFTs are concerned, the presumptive owner would be whoever controls the wallet which is linked to the NFT. Similar to cryptocurrencies, excludability is achieved because one cannot deal with the NFT without the owner's private key.

71 The third requirement is that "the right must be capable of assumption by third parties, which in turn involves two aspects: that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable" (*CLM* at [45(c)], citing *Ruscoe* at [114]). In the present case, I was of the view these requirements would be met. Firstly, the nature of the blockchain technology gives the owner the exclusive ability to transfer the NFT to another party, which underscores the "right" of the owner. Secondly, such NFTs are clearly the subject of active trading in the markets.

72 The fourth, and final, requirement is that the "right and in turn, the asset", must have "some degree of permanence or stability", although this is a low threshold since a "ticket to a football match which can have a very short life yet unquestionably it is regarded as property" (*CLM* at [45(d)], citing *Ruscoe* at [117]). The NFT concerned has as much permanence and stability as money in bank accounts which, nowadays, exist mainly in the form of ledger entries and not cold hard cash.

73 While this suffices to dispose of the point, I would make two observations. First, the claimant had, in written submissions, referred me to the decision of the Singapore International Commercial Court in *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 ("*B2C2*") for the proposition that "cryptocurrency, a form of digital assets, [was] a property in a generic sense for the purposes of being held on trust".

74 However, as I noted in *CLM* (at [42]):

> [T]he Singapore International Commercial Court held (at [138]–[146]) that it was possible for cryptocurrencies to be held on trust, and that the defendant in that case did hold BTC on trust for the plaintiff. In so holding, the court reasoned that cryptocurrencies meet the four requirements set out in *Ainsworth* and 'have the fundamental characteristic of intangible property as being an identifiable thing of value' (at [142]). **However, it should be noted that since this point was undisputed by the parties, the court was satisfied that cryptocurrencies could be created as property in a generic sense and left open the question of what the precise nature of this property right was.** [emphasis added in bold]

75 While the Court of Appeal in *B2C2 (CA)* ([5] *supra*) observed (at [144]) that there "may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property", it was unnecessary to consider this issue because even if it was answered in the affirmative, there was no certainty of intention to create a trust on the facts. It is clear then that the question of whether cryptocurrency could be considered as property was not decided in either *B2C2* or *B2C2 (CA)*.

76 The second observation relates to the grounds on which such an injunction is sought. Here, the basis of the injunction was proprietary (see [25(a)] above). As was noted in *Bouvier* ([43] *supra*) (at [144]), an interlocutory proprietary injunction is granted in support of a claim for proprietary relief. Such an injunction is one which fastens on the specific asset in which the plaintiff asserts a proprietary interest, and prevents the defendant, pending the resolution of the dispute, from dealing with that asset and its traceable proceeds. Here, the claimant did plead, in his statement of claim, that he had a proprietary interest in the Bored Ape NFT (see [24] above). Therefore, any injunction sought would fasten onto the Bored Ape NFT and prevent the defendant from dealing with it, or its traceable proceeds.

77 But as is evident from our discussion above, this necessarily involves the examination of the nature of NFTs, and whether it could be considered property. Given that the claimant had also pleaded that the defendant was liable for, amongst other things, breach of contract and the tort of conversion, it seemed that there were other strings to his legal bow when it came to applying for an injunction. To cite an example, in *Tullett Prebon (Singapore) Ltd and anor v Chua Leong Chuan Simon and others and another suit* [2005] 4 SLR(R) 344 ("*Tullet*"), the case involved the enforcement of a "straightforward term as to when the employee in question should be permitted to tender his resignation" (at [9]). While the balance of convenience, including the difficulties of assessing damages, did not clearly weigh in either party's favour, in granting the injunction, Choo Han Teck J took the view that the defendants should not be permitted to disregard the contract they had signed (*Tullet* at [7]).

78 Given that such points were not advanced before me, I express no conclusive view as to the merits of such an argument.

Whether the balance of convenience lay in favour of granting the injunction

79 Here, the claimant urged me to find that the balance of convenience lay in favour of granting the injunction. The counsel argued that the claimant would not be adequately compensated by an award of damages for the loss suffered if the defendant was allowed to transfer the Bored Ape

NFT to other parties. This was because the Bored Ape NFT was a very unique artwork, and the only one in existence.

80 While I agreed that the balance of convenience lay in favour of granting the injunction, I would point out that, based on our brief explanation of what an NFT is (see [49]–[56] above), it is not quite accurate to describe the Bored Ape NFT as a very unique artwork, and the only one in existence. The picture of the Bored Ape NFT exists as an image file which can be copied many times over. What is truly unique and irreplaceable here is the string of code that represents the Bored Ape NFT on the blockchain. If that is transferred to third parties, the claimant might never be able to recover it, and so any proprietary remedy ordered by the court in relation to the Bored Ape NFT would be writ in water.

81 For the above reasons, I granted the proprietary injunction sought by the claimant.

Whether the application for substituted service out of jurisdiction should be granted

82 Having found that the Singapore court was the appropriate court to hear this action, I would have granted leave for service out of jurisdiction under O 8 r 1. The claimant, however, applied for substituted service out of jurisdiction owing to the unique circumstances of the case.

83 Under the ROC 2014, substituted service was provided for in O 62 r 5, which stated:

> **Substituted service (O. 62, r. 5)**
>
> **5.**—(1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 136 for substituted service of that document.
>
> (2) An application for an order for substituted service must be made by summons supported by an affidavit in Form 137 stating the facts on which the application is founded.
>
> (3) Substituted service of a document, in relation to which an order is made under this Rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.
>
> (4) For the purposes of paragraph (3), the steps which the Court may direct to be taken for substituted service of a document to be effected include the use of such electronic means (including electronic mail or Internet transmission) as the Court may specify.

84 Under the ROC 2021, O 8 r 2 provides for the various methods of service out of Singapore. It states:

Methods of service out of Singapore (O. 8, r. 2)

2.—(1) Where the Court's approval has been obtained under Rule 1(2), service of the originating process or other court documents may be effected out of Singapore in the following manner:

(*a*) according to the manner contractually agreed between the parties;

(*b*) where there is a Civil Procedure Convention governing service in the foreign country, according to the manner provided in that convention;

(*c*) through the government of the foreign country if that government is willing to effect service;

(*d*) through the judicial authority of the foreign country if that authority is willing to effect service;

(*e*) through a Singapore consular authority in that foreign country;

(*f*) according to the manner provided by the law of that foreign country.

(2) Unless any Civil Procedure Convention, treaty, government or judicial authority of a foreign country requires that the originating process or other court documents be sent from the Government or judicial authority of Singapore, they may be sent to the entities in paragraph (1)(*c*), (*d*) and (*e*) by the serving party who must engage a solicitor for this purpose.

(3) Where the originating process or other court documents have to be sent from the Government of Singapore, the solicitor for the serving party must send them to the Registrar with a letter requesting the Registrar to forward them to the Ministry of Foreign Affairs stating the method of service in the foreign country.

(4) Every originating process or court document which is to be served outside Singapore must be accompanied by a translation in the official language of the foreign country, and if there is more than one official language, in any of those languages which is appropriate for the party to be served, except where the official language or one of the official languages is English.

(5) The translation must be certified by a person qualified to do so and the certificate must contain the translator's full name, his or her address and his or her qualifications.

(6) Nothing is to be done under this Rule that is contrary to the laws of the foreign country.

85 It is clear, from a brief glance at O 8 r 2, that there does not appear to be a provision allowing for substituted service out of Singapore. Where service in Singapore is concerned, however, O 7 r 7 states:

Substituted service (O. 7, r. 7)

7.—(1) If a document is required to be served personally and it is impractical to serve it personally, a party may apply to serve it by substituted service.

> (2) The Court may order any method of substituted service that is effective in bringing the document to the notice of the person to be served, including the use of electronic means.
>
> (3) Substituted service is to be effected within 14 days after the order of the Court.

86 The fact that O 7, which deals with service within Singapore, provided for substituted service, and O 8, which deals with service out of Singapore, had no comparable provision, suggested at first blush, that I did not have the power, under the ROC 2021, to allow for substituted service out of Singapore. I therefore directed the claimant to further address me on this point.

87 The claimant argued that the court did retain the discretion to allow substituted service out of Singapore under the ROC 2021. Here, O 8 r 2(1) prescribed a "non-exhaustive list of ways in which originating processes and court documents [could] be served out of Singapore". This was because O 8 r 2(1) omits the use of imperative language, and merely states that "service of the originating process or other court documents ***may*** be effected out of Singapore in the following manner" [emphasis added in bold italics]. Further, O 8 r 2 did not prescribe a closed list given that between O 8 r 2(1)(*e*) and O 8 r 2(1)(*f*), the word "or" between these two sub-provisions was not used. In contrast, other provisions in the ROC 2021 appeared to prescribe a closed list, for example, O 6 r 1(3), which states:

> **Mode of commencing proceedings (O. 6, r. 1)**
>
> **6.**—(1) …
>
> (3) A claimant must commence proceedings by an originating application where —
>
> > (*a*) these Rules or any written law require it;
> >
> > (*b*) the proceedings concern an application made to the Court under any written law; **or**
> >
> > (*c*) the proceedings concern solely or primarily the construction of any written law, instrument or document or some question of law and the material facts are not in dispute.
>
> [emphasis added in bold]

88 I agreed with this analysis. In my view, O 8 r 2(1) did not appear to prescribe a closed list as to how service of the originating process or other court documents could be effected out of Singapore. This conclusion is bolstered by the observations made by the drafters of the ROC 2021 in the Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at Chapter 6: Service out of Singapore (Chairman: Tay Yong Kwang), which stated:

> *Scope*
>
> 1 This Chapter sets out the provisions governing service of originating processes and other court documents out of Singapore. It largely retains the existing Order 11 with a simplification and rearrangement of its provisions.
>
> *Service out of Singapore with Court's approval*
>
> 2 Instead of enumerating all the permissible cases for service of an originating process out of Singapore, Rule 1(1) prescribes the criteria for **obtaining the Court's approval for service out of Singapore, namely showing** that the Court has the jurisdiction or is the appropriate court to hear the case. This makes it unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.
>
> [emphasis added in bold]

89 What is clear is that the ROC 2021 was not intended to drastically change the regime relating to jurisdiction in general, and the service of originating processes or other court documents out of Singapore. Rather, the intention was to simplify things, for example, by obviating the need for a claimant to scrutinise a list of cases in which service out of Singapore is permissible.

90 As a final point, the power of the court to allow substituted service out of jurisdiction is one of considerable vintage (see, *eg*, *Porter v Freudenberg* [1915] 1 KB 857 at 889), having been expressed in O 62 r 5 of the ROC 2014 (see, *eg*, *Petroval SA v Stainby Overseas Ltd and others* [2008] 3 SLR(R) 856; *Consistel Pte Ltd and another v Farooq Nasir and another* [2009] 3 SLR(R) 665; *Storey, David Ian Andrew v Planet Arkadia Pte Ltd and others* [2016] SGHCR 7). If the drafters of ROC 2021 had intended to curtail the court's power in such a radical fashion, there would have been express and specific language to that effect.

91 In the present case, bearing in mind the Ideals set out in the ROC 2021, I was satisfied that leave should be given for substituted service out of jurisdiction. To find otherwise would be to deprive the claimant of the only practical manner of effecting service on the defendant.

Conclusion

92 In the circumstances, I allowed the application, and granted an order in terms of the prayers sought (see [25] above). I also granted leave to share the injunction papers with certain entities for the purposes of enforcing it.

Reported by Soh Kian Peng.

Success Elegant Trading Ltd
v
La Dolce Vita Fine Dining Co Ltd and others and another appeal

[2016] SGHC 159

High Court — Originating Summons No 305 of 2015 (Registrar's Appeals Nos 73 and 88 of 2016); Originating Summons No 307 of 2015 (Registrar's Appeals Nos 72 and 89 of 2016)
Andrew Ang SJ
16 March; 5 July; 15 August 2016

***Banking** — Secrecy — Banking Act (Cap 19, 2008 Rev Ed) — Whether order for pre-action disclosure under Rules of Court (Cap 322, R 5, 2014 Rev Ed) against bank permitted under s 175 Evidence Act (Cap 97, 1997 Rev Ed) without separate legal proceeding apart from originating process for pre-action discovery — Banking Act (Cap 19, 2008 Rev Ed) — Rules of Court (Cap 322, R 5, 2014 Rev Ed) — Section 175 Evidence Act (Cap 97, 1997 Rev Ed)*

***Civil Procedure** — Disclosure of documents — Requirements for pre-action disclosure under O 24 r 6(5) Rules of Court (Cap 322, R 5, 2014 Rev Ed) to aid in tracing claim — Whether good arguable case for showing money in bank account was applicant's money — Order 24 r 6(5) Rules of Court (Cap 322, R 5, 2014 Rev Ed)*

Facts

Through a series of transactions from late December 2013 to January 2014, the plaintiffs acquired shares in a food and beverage business beneficially owned by one Mdm Zhang. The bulk of the purchase price was eventually paid into Mdm Zhang's bank account ("the HK Account") with Bank J Safra Sarasin, Hong Kong Branch ("Bank Sarasin").

According to the plaintiffs, Mdm Zhang made fraudulent misrepresentations that induced them to make the acquisition. The plaintiffs alleged that after the acquisition was completed, they discovered manipulation of accounting and financial records. Pursuant to disclosure orders obtained in Hong Kong by the plaintiffs against Bank Sarasin, the plaintiffs discovered that between March 2014 and 21 Jul 2014, more than US$110m and the equivalent of US$24,727,409.74 in securities were transferred from the HK Account to Success Elegant Trading Limited's ("SETL") bank account with Credit Suisse AG ("CS").

The plaintiffs took out the present originating summonses against CS and Deutsche Bank Aktiengesellschaft ("DB"), with whom SETL also has an account, for discovery of bank documents pertaining to the bank accounts of SETL. SETL successfully sought leave to intervene in the proceedings as a defendant.

The assistant registrar ("the AR") heard the matter and ordered disclosure of certain bank documents within the possession, custody or power of CS and DB. SETL appealed against the decision of the AR.

Held, dismissing the appeals:

(1) To succeed in their applications, the plaintiffs had to show (a) DB and CS had facilitated wrongdoing; (b) there was wrongdoing on the part of Mdm Zhang; and (c) disclosure was necessary, just and convenient. These requirements were drawn from the Court of Appeal's decision in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*"). As the plaintiffs were seeking to obtain information to trace funds, the court proceeded on the basis that they had to show a *prima facie* case of fraud and good ground for thinking that the money in the CS Account and DB Account was the plaintiffs' money: at [53], [54] and [57].

(2) There was strong and cogent evidence of a *prima facie* case of fraudulent manipulation by Mdm Zhang in the lead up to the acquisition: at [65].

(3) All the plaintiffs had to show was that there was an arguable case that the money in the DB Account and CS Account was their own money. The court was not required to rule definitively that the Plaintiffs had an equitable interest in moneys in the DB Account and the CS Account. In *Shalson v Russo* [2005] Ch 281, Rimer J held that that property revested in the representee upon the implied rescission of the contract. The plaintiffs were not blowing hot and cold and were evincing an unequivocal intention to rescind the acquisition agreements. The plaintiffs did not in any way affirm the acquisition agreements after discovery of the alleged fraud: at [66], [69] and [72].

(4) Even though some assets of the business might have been disposed of, as long as the fundamental nature of the business had not changed, rescission would not be barred. There was no evidence that the fundamental nature of the business had changed. Even if the business had failed, it was arguable that this was a result of the alleged fraudulent misrepresentation and falsification of accounts before the sale of the business. If the fraud was in any way causative of the first plaintiff now being in receivership, Mdm Zhang could not rely on that fact to resist rescission. If she could, it would be akin to allowing a fraudster to profit from his or her own fraud: at [75].

(5) There was circumstantial evidence to constitute a good arguable case that moneys may have been transferred from the CS Account to the DB Account. Even if SETL was not owned by Mdm Zhang, the plaintiffs would be entitled to trace the moneys into the accounts unless SETL was a *bona fide* purchaser for value. There was no evidence that SETL provided any consideration for the transfers. There was also *prima facie* evidence that Mdm Zhang regarded SETL as her company even after she apparently divested her interest in SETL. The plaintiffs had shown good grounds for thinking that moneys in both the CS Account and the DB Account belonged to the Plaintiffs and that both CS and DB had innocently been involved in wrongdoing: at [78] to [80].

(6) It was just and necessary for the disclosure orders to be made. Mdm Zhang had made it clear that she wished to set up a structure to put the moneys out of the plaintiffs' reach: at [82].

(7) Given that both the DB Account and the CS Account were in Singapore, there was a real possibility of proceedings being commenced in Singapore, especially if there were moneys remaining in the CS Account and DB Account or there were moneys which had been transferred from these accounts to other

accounts located in Singapore. There was thus a likely prospect of subsequent proceedings being commenced in Singapore: at [85].

(8) If a party could demonstrate a substantive right to the documents, without relying on s 175 of the Evidence Act (Cap 97, 1997 Rev Ed), an order could be made under s 175 for disclosure. The "legal proceeding" in s 175 would refer to the very application for disclosure, in which the applicant demonstrates a right to discovery independent of s 175. In fact, any reliance on s 175 alone for disclosure would be misconceived since that section did not provide an independent right to inspection of bankers' books where none existed. Section 175 should be interpreted purposively such the originating summonses each constituted "legal proceeding" within the meaning of s 175. There was no additional requirement of a *separate* legal proceeding. Further, the phrase "for any of the purposes of such proceedings" as it appeared in s 175 would include the purpose of tracing and following moneys which was the very *raison d'etre* of the applications: at [92] and [93].

[Observation: The only criterion made express in O 24 r 6(5) was that it was "just" for such a discovery order to be made. Order 24 r 6 was subject to O 24 r 7, which imported a requirement of necessity. As the Court of Appeal explained in *Dorsey James*, the prescribed test then becomes one of "justness underpinned by 'necessity'". The Court of Appeal in *Dorsey James* also explained that O 26A r 1(5) was meant to be a codification of the court's *Norwich Pharmacal* (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) jurisdiction. The extent (if any) to which recourse may be had to the inherent jurisdiction of the court for an order for pre-action disclosure (see *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 95) and how this interacts with the provisions in the Rules of Court on pre-action disclosure and para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) would have to be considered at an appropriate time: at [56].]

Case(s) referred to

Bankers Trust Co v Shapira [1980] 1 WLR 1274 (refd)

Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525 (refd)

Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd [1996] 5 MLJ 133 (refd)

Dorsey James Michael v World Sport Group Pte Ltd [2014] 2 SLR 208 (refd)

El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 (refd)

Goldcorp Exchange Ltd, Re [1995] 1 AC 74 (refd)

La Dolce Vita Fine Dining Co Ltd v Deutsche Bank AG [2016] SGHCR 3 (refd)

Lonrho plc v Fayed (No 2) [1992] 1 WLR 1 (refd)

Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (refd)

Directors of the Reese River Silver Mining Co Ltd, The v Joseph Mackrill Smith (1869) LR 4 HL 64 (refd)

Shalson v Russo [2005] Ch 281 (refd)

UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd [2006] 4 SLR(R) 95; [2006] 4 SLR 95 (refd)

Wee Soon Kim Anthony v UBS AG [2003] 2 SLR(R) 91; [2003] 2 SLR 91 (refd)

Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 (refd)

Legislation referred to

Banking Act (Cap 19, 2008 Rev Ed) s 47, Third Schedule

Evidence Act (Cap 97, 1997 Rev Ed) s 175 (consd); s 175(1), Pt IV

International Arbitration Act (Cap 143A, 2002 Rev Ed)

Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 r 6(5) (consd); O 24 r 6, O 24 r 7, O 26A r 1(5)

Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) First Schedule para 12

Bankers' Books (Evidence) Act (Brunei) s 7

Rules of the High Court 1990 (Brunei)

Edmund Kronenburg, Grace Loke and Jeslyn Tan (Braddell Brothers LLP) for the appellant;
Harpreet Singh SC, Paul Sandosham, Tan Mingfen, Jerald Foo and Elsa Goh (Cavenagh Law LLP) for the first and second respondents;
Tan Xeauwei and Benjamin Koh Zhen-Xi (Allen & Gledhill LLP) for the third respondent in Registrar's Appeals Nos 73 and 88 of 2016;
Chua Sui Tong and Daniel Chan (WongPartnership LLP) for the third respondent in Registrar's Appeals Nos 72 and 89 of 2016.

15 August 2016

Andrew Ang SJ:

Introduction

1 These were appeals by Success Elegant Trading Limited ("SETL") against the decision of an assistant registrar ("the AR") ordering pre-action discovery against two banks under O 24 r 6(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In Originating Summonses Nos 305 of 2015 ("OS 305") and 307 of 2015 ("OS 307"), the plaintiffs applied for discovery of bank documents pertaining to the bank accounts of SETL ("the second defendant") with Deutsche Bank Aktiengesellschaft ("DB") and Credit Suisse AG ("CS"), respectively. DB and CS were the first defendants in OS 305 and OS 307, respectively.

2 After hearing the parties, the AR ordered disclosure of the following documents within CS's and DB's possession, custody or power relating to any account held in the name of or beneficially owned by Zhang Lan ("Mdm Zhang") and/or SETL and/or any alias known to CS and DB:

(a) the account opening forms and other related documents submitted for the purpose of opening the aforesaid accounts;

(b) bank statements in respect of those accounts setting out all transfers into and/or from the accounts from and including 13 December 2013 to the date of the order; and

(c) remittance slips, payment instructions and SWIFT instructions relating to any transfers above.

3 In addition, the AR ordered that the documents disclosed to the plaintiffs by DB and CS were to be used solely for the purpose of following and tracing the money, and not for any other purpose.

4 At the conclusion of the hearing before me, I dismissed the appeals and affirmed the above order. I now provide detailed grounds of decision.

Background facts

The parties

5 The first and second plaintiffs ("the Plaintiffs") were limited liability companies incorporated in the Cayman Islands. They were majority owned by a private equity group, the CVC Group ("CVC"), which consisted of CVC Capital Partners SICAV-FIS S A and its subsidiaries. The second plaintiff owned 82.7% of La Dolce Vita Fine Dining Holdings Limited ("EquityCo"). EquityCo, which was itself a Cayman Islands special purpose vehicle, wholly owned the first plaintiff.

6 Mdm Zhang was an individual who, although not a party to these proceedings, featured prominently. She was registered as a citizen and resident of St Kitts and Nevis but habitually resided in the People's Republic of China ("PRC"). At the material time, Mdm Zhang wholly owned two British Virgin Island companies, Grand Lan Holdings Group (BVI) Limited ("Founder Holdco") and South Beauty Development Limited ("Management Holdco"). I will refer to Mdm Zhang and these companies collectively as "the Sellers".

7 SETL was a British Virgin Islands company incorporated on 2 January 2014. The parties were in disagreement over the beneficial ownership of SETL. The Plaintiffs took the position that Mdm Zhang owned and continued, up to the time of the hearing, to own SETL beneficially. SETL, on the other hand, took the position that Mdm Zhang no longer had an interest in SETL after 4 June 2014, which was when she transferred the sole share in SETL to Asiatrust Limited ("Asiatrust") (judgment of AR ([2016] SGHCR 3) at [4]).

8 DB and CS were foreign companies registered in Singapore as carrying on activities as the domestic banking units of wholesale banks in Singapore. It was not disputed that SETL had accounts with both DB and CS.

The acquisition

9 Through a series of transactions from late December 2013 to January 2014, the Plaintiffs acquired shares in a food and beverage business beneficially owned by Mdm Zhang. Certain private equity funds advised by CVC purchased for a sum of US$286,850,887 the equivalent of 82.7% of the issued shares in South Beauty Investment Company Limited ("the Company") from the Sellers. The Company, incorporated in the Cayman Islands, was a holding company of a group of subsidiary companies that owned a well-known chain of restaurants operating in the PRC ("South Beauty Business").

10 The acquisition was carried out in two stages. In the first stage, the first plaintiff purchased all the shares of the Company from Founder Holdco and Management Holdco for a consideration of US$235,066,678. EquityCo thus owned, through the first plaintiff, 100% of the Company. In the second stage, the second plaintiff (who held 69.2% of EquityCo prior to the acquisition) purchased 13.5% of EquityCo from Mdm Zhang (who prior to the acquisition held the remaining shares in EquityCo through nominees) for a consideration of US$51,784,209. The second plaintiff thus held 82.7% of EquityCo, indirectly holding 82.7% of the Company. The first and second stages of the acquisition were governed by a share purchasing agreement dated 9 December 2013 and a share sale and purchase agreement dated 13 December 2013, respectively.

11 Simplified for our present purposes, the valuation formula for the Company was based on a multiple of 13 times the Company's estimated 2013 consolidated net profit after tax, which in turn was based on the projected growth rate of the South Beauty Business in 2013. The bulk of the purchase price was eventually paid into Mdm Zhang's bank account ("the HK Account") with Bank J Safra Sarasin, Hong Kong Branch ("Bank Sarasin").

Allegations by the Plaintiffs of manipulation

12 According to the Plaintiffs, Mdm Zhang had represented to CVC at a number of face to face meetings prior to the acquisition that, *inter alia*, the South Beauty Business "was a thriving and successful brand, and that it was resistant to the economic and consumption slow-down that was occurring in the PRC during 2013 and beyond". This was in addition to the express indemnities and warranties in the acquisition agreements. The Plaintiffs also averred that the oral representations complemented the information that CVC received from the Company on behalf of Mdm Zhang and that this induced them into recommending the acquisition.

13 The Plaintiffs alleged that after the acquisition was completed, they discovered manipulation of the Company's accounting and financial records for the year 2013. This manipulation led to a higher (and false)

valuation that induced the Plaintiffs to think that the Company was more profitable than it actually was and to buy into the Company at a price that was grossly and artificially inflated. The Plaintiffs claimed that Mdm Zhang had, amongst others, (a) artificially inflated customer traffic, sales and revenue figures by fictitious booking of diners for expensive meals; and (b) artificially inflated sales and revenue figures by the purchase of a large number of diners' prepaid cards and gifting products.

Commencement of arbitration

14 The acquisition agreements were governed by the laws of Hong Kong and contained an arbitration agreement by which parties agreed to resolve claims arising out of or in connection with the agreements by arbitration in the China International Economic and Trade Arbitration Commission ("CIETAC").

15 Each of the Plaintiffs had commenced arbitration proceedings against the Sellers on 5 March 2015 ("the CIETAC arbitration"). In brief, the claims in the respective requests for arbitration pertained to what the Plaintiffs claimed was fraudulent manipulation of the accounting information of the Company, which information was relied on by the Plaintiffs when deciding whether or not to proceed with the acquisition. The Plaintiffs also asserted that the Sellers had breached various warranties in the agreements and made fraudulent misrepresentations in connection with those agreements. The Plaintiffs sought rescission of the acquisition agreements as well as recovery of the moneys paid pursuant to those agreements. In the alternative, they prayed for damages caused by Mdm Zhang's fraudulent misrepresentation.

The freezing orders in Hong Kong and Singapore

16 Following an *ex-parte* hearing on 26 February 2015, the High Court of the Hong Kong Special Administrative Region Court of First Instance ("the HK High Court") granted the Plaintiffs the following orders against Mdm Zhang and Founder Holdco:

> (a) Injunctions restraining them from disposing of their assets worldwide up to the sums of US$51,784,209 and US$235,066,678. These injunctions were granted in support of arbitration proceedings to be commenced in CIETAC. As mentioned above, the arbitration proceedings were commenced shortly after, on 5 March 2015.
>
> (b) Disclosure of information requiring them to disclose all assets, worldwide, in excess of an individual value of HK$500,000.
>
> (c) Disclosure of information against Bank Sarasin in respect of the HK Account.
>
> (d) Evidence preservation orders.

17 On 2 March 2015, three days before the commencement of the CIETAC arbitration, the Plaintiffs obtained orders in Singapore prohibiting Mdm Zhang from disposing of or dealing with or diminishing the value of her assets in Singapore whether in her own name or not and whether solely or jointly owned, up to the sums of US$235,066,678 and US$51,784,209 ("the Singapore Injunctions"). Like the freezing orders obtained in Hong Kong, these orders were granted on an *ex parte* basis. The Singapore Injunctions continued to remain in place as Mdm Zhang had not applied for these orders to be set aside.

18 Various banks in Singapore were then notified of the Singapore Injunctions. The Plaintiffs, believing that SETL was owned by Mdm Zhang and that SETL had an account with CS ("the CS Account"), sought confirmation of the same from CS on 9 March 2015. On 12 March 2015, solicitors for CS confirmed that steps had been taken to comply with the Singapore Injunctions. On 14 March 2015, the Plaintiffs' solicitors were notified by solicitors for DB that SETL had an account with DB ("the DB Account") and that DB believed that the account was subject to the Singapore Injunctions. Additionally, DB informed the Plaintiffs that measures had been taken to ensure compliance with the Singapore Injunctions.

Documents provided by Bank Sarasin

19 Pursuant to the disclosure orders made by the HK High Court (see [16(c)] above), Bank Sarasin provided various documents to the Plaintiffs on 3 March 2015. Those documents revealed that remittances were made out of Mdm Zhang's HK Account to various third parties, including SETL. The documents showed that over US$285m was transferred out of the HK Account, leaving a balance of approximately US$1.2m.

20 Between 10 March 2014 and 21 July 2014, more than US$110m and the equivalent of US$24,727,409.74 in securities were transferred from Mdm Zhang's HK Account to SETL's CS Account. The breakdown of the transfers was as follows:

Date	Amount (Local Currency)	Amount (approx US$)
10 March 2014	US$50,000,000	50,000,000
14 March 2014	US$2,085,489.46	2,085,489.46
14 March 2014	HK$25,005,896.93	3,224,694.95
17 March 2014	US$24,727,409.74 (in securities)	-
24 March 2014	US$60,000,000	60,000,000
21 July 2014	US$2,000,000	2,000,000

The present applications for discovery

21 As the Plaintiffs believed that Mdm Zhang had transferred funds out of her HK Account in order to put those funds out of their reach, they filed OS 305 and OS 307, under O 24 r 6(5) of the Rules of Court, for the following purposes:

(a) to identify third parties for the potential commencement of proceedings against them;

(b) to ascertain the full nature of the wrongdoing perpetrated by Mdm Zhang and to enable the Plaintiffs to plead their case properly; and

(c) to trace assets in support of the Plaintiffs' proprietary claim against Mdm Zhang and third parties who have received the moneys from her.

The decision of the AR

22 The decision of the AR may be found in *La Dolce Vita Fine Dining Co Ltd v Deutsche Bank AG* [2016] SGHCR 3 ("the Judgment"). In the Judgment, the AR identified the following issues:

(a) whether the requirements for obtaining an order for pre-action discovery pursuant to O 24 r 6(5) of the Rules of Court and/or inherent jurisdiction of the court had been satisfied;

(b) whether the Plaintiffs had shown that there was a likely prospect of subsequent proceedings being held in Singapore pursuant to O 24 r 6(5) of the Rules of Court read with para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"); and

(c) whether the requirements under the Banking Act (Cap 19, 2008 Rev Ed) ("the BA") read with s 175 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") for discovery of documents from the respective banks had been satisfied.

23 The AR began by discussing the general principles in relation to pre-action discovery against a non-party, observing that O 24 r 6(5) gave statutory effect to the *Norwich Pharmacal* (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) order, an order traditionally sought to obtain information for the purpose of identifying a potential defendant so that proceedings may be commenced against that person. She also noted that the court retained its inherent jurisdiction to order disclosure from a non-party, citing the High Court decision of *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 95 ("*Tokio Marine*").

24 In the AR's judgment, for the Plaintiffs to succeed they had to show: (a) a facilitation of wrongdoing by the person in possession of information; (b) a "real interest" in ascertaining a "source" by showing an arguable or *prima facie* case of wrongdoing against the person of whom information was sought; and (c) that it was necessary, just and convenient in all the circumstances for such an order to be made.

25 On the first requirement, the AR found that CS had innocently become involved in the wrongdoing because part of the purchase moneys had been transferred into the CS Account. While there was no direct evidence of a transfer into the DB Account, the AR noted that there was evidence from the documents disclosed by Bank Sarasin that Mdm Zhang intended to transfer her assets to other jurisdictions in order to put them out of the Plaintiffs' reach. This coupled with the fact that moneys were actually transferred into the CS Account made it highly probable that DB too had become involved in the wrongdoing.

26 On the second requirement, the AR discussed that the traditional *Norwich Pharmacal* order had been extended under the equitable jurisdiction of the court to include orders compelling non-parties to provide documents to assist with the applicant's tracing claim where there was a *prima facie* case of fraud. These orders were known as *Bankers Trust* orders, having been granted in the eponymous case of *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 ("the *Bankers Trust* case"). Dealing with the submission by counsel for SETL that the Plaintiffs had merely sought rescission in the CEITAC arbitration as opposed to actually having rescinded the agreements and thus did not have a proprietary claim, the AR held that all the Plaintiffs had to do was to show an arguable case that the agreements may be rescinded due to Mdm Zhang's fraudulent misrepresentation. The AR found that there was *prima facie* evidence of manipulation of the Company's financial records. The Plaintiffs had adduced a report from FTI Consulting that had analysed the Company's 2014 records and documents ("the first FTI report"). This report concluded that there was "pervasive manipulation of South Beauty's transaction sales data between January and April 2014" and that FTI Consulting considered "it highly likely that similar manipulation took place in 2013". Therefore, the AR was satisfied that there was a *prima facie* case of fraud that might entitle the Plaintiffs to rescind the various acquisition agreements.

27 The AR rejected SETL's submission that Mdm Zhang no longer had an interest in it after she transferred her sole share to Asiatrust. The AR agreed with the Plaintiffs that there was sufficient evidence to show that Mdm Zhang still owned SETL beneficially.

28 On the third requirement, the AR pithily observed that disclosure was necessary, just and convenient because the Plaintiffs needed the assistance of the court to obtain information as to the whereabouts of the moneys. The documents sought were thus necessary for a tracing claim.

29 In relation to SETL's argument that, in the light of the Court of Appeal decision in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*"), pre-action discovery orders could not be granted in aid of foreign proceedings, the AR held that there was a sufficient nexus to Singapore in this case for the orders to be made. Both the CS Account and DB Account were in Singapore, which meant that there was a likely prospect that subsequent proceedings may be commenced in Singapore if there were moneys in those accounts or if the moneys had been transferred to other accounts in Singapore. In any event, even if the court did not have such power under O 24 r 6(5), the AR opined that discovery could still be ordered in aid of foreign proceedings under the court's inherent jurisdiction.

30 In relation to the duty of bank secrecy under s 47 of the BA, the AR noted that an order for disclosure could only be made if the requirements of s 175 of the EA were satisfied. Section 175(1) of the EA read as follows:

> On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

31 The AR observed that s 175 did not, by itself, confer a party with an independent and substantive right to discovery. Further, referring to the Bruneian High Court case of *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd* [1996] 5 MLJ 133 ("*Chan Swee Leng*"), the AR held that the Plaintiffs had to show that they were parties to a *separate* legal proceeding, other than OS 305 and OS 307.

32 The AR found that the Plaintiffs satisfied s 175 as they were parties to the CIETAC arbitration. Discovery of documents would be for the purposes of the CIETAC arbitration since these documents would assist the Plaintiffs in tracing the funds. This would, in turn, assist in the recovery of any award made in favour of the Plaintiffs in the CIETAC arbitration. The AR disagreed with the submission from counsel for SETL that under the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Art 5 of the Model Law, the court had no power to grant discovery orders to assist international arbitrations whether seated in Singapore or abroad.

33 Having been satisfied that discovery was warranted on the facts, the AR confined her orders (see [2] above) to what was strictly necessary for the Plaintiffs to trace the funds.

Arguments on appeal

SETL's submissions

34 On appeal, counsel for SETL, Mr Edmund Kronenburg ("Mr Kronenburg") raised a variety of arguments as to why the AR had erred.

35 He contended that the requirements for a *Norwich Pharmacal* order had not been satisfied. First, there was no evidence of any "facilitation of wrongdoing" by DB. Unlike the CS Account, the Plaintiffs failed to adduce any evidence of funds being transferred into the DB Account. Secondly, there was no cogent and compelling evidence of wrongdoing or fraud by Mdm Zhang. Thirdly, there was no reason for thinking that the moneys in the DB Account or CS Account were the Plaintiffs'. As there was no evidence of fraud, the Plaintiffs had no right to rescind the agreements. Even if rescission was open to the Plaintiffs, they had not rescinded the agreements since they were seeking rescission in the CIETAC arbitration, as opposed to a declaration that they were correct in rescinding the agreements. Furthermore, there existed bars to rescission because *restitutio in integrum* was impossible. More than a year had passed since the acquisition took place and fundamental changes to the business had been made. The first plaintiff and its assets, including South Beauty, were in receivership. The Plaintiffs had not confirmed that South Beauty remained in a state to be restored to Mdm Zhang or that no assets had been disposed of pursuant to the receivership.

36 As there was no strong and cogent evidence of fraud, the Plaintiffs had failed to demonstrate a real interest in ascertaining a source.

37 Moreover, discovery was not necessary, just and convenient. As there was no basis to trace, given that rescission had not yet occurred, there was at present no necessity for the discovery orders to be made. The Plaintiffs had to await the outcome of the CIETAC arbitration before any potential proprietary claim against third parties could be asserted. No tracing could possibly be done unless the Plaintiffs were successful in the CIETAC arbitration, rescission was granted as a remedy, a declaration was made that Mdm Zhang held the moneys on trust for the Plaintiffs and the CIETAC tribunal made a tracing order. Given that there were still so many steps required, tracing could hardly be said to be necessary in all the circumstances.

38 Next, Mr Kronenburg argued that the Plaintiffs had failed to show a likely prospect of subsequent proceedings being brought in Singapore. *Dorsey James* ([29] *supra*) had clearly established that there had to be a Singapore nexus before discovery would be ordered under O 24 r 6(5).

39 Finally, Mr Kronenburg submitted that s 175 of the EA had not been satisfied. The AR was wrong to hold that orders assisting the Plaintiffs to trace the moneys would be *for the purpose* of the CIETAC arbitration. Tracing was only relevant to the enforcement of an arbitral award. As an arbitral award is rendered at the conclusion of arbitration proceedings, tracing only becomes relevant after the arbitration has concluded. Therefore, the orders cannot be said to be *for the purpose* of the CIETAC arbitration.

The Plaintiffs' submissions

40 Mr Harpreet Singh SC ("Mr Singh") argued on behalf of the Plaintiffs. He submitted that there was sufficient evidence to make out a *prima facie* case of fraud. He referred to a second FTI Consulting report ("second FTI report"), adduced on appeal, which confirmed the suspicions in the first FTI report with new data obtained in respect of the year 2013.

41 Mr Singh also submitted that it was not necessary for him to show a strong *prima facie* case of fraud to obtain the discovery orders. He submitted that there existed two separate and independent jurisdictions for pre-action discovery – the *Norwich Pharmacal* jurisdiction and the *Bankers Trust* jurisdiction. The discovery orders obtainable under the *Norwich Pharmacal* jurisdiction would not be as extensive as orders made under the *Bankers Trust* jurisdiction. Because the orders under the *Norwich Pharmacal* jurisdiction were not as intrusive, his clients need only to show a reasonable case of wrongdoing, as opposed to strong *prima facie* evidence of fraud. He submitted that the discovery orders the Plaintiffs sought fell squarely within the *Norwich Pharmacal* jurisdiction. Additionally, he submitted that the requirements of the *Bankers Trust* jurisdiction were satisfied.

42 Mr Singh responded to Mr Kronenburg's submissions on rescission by arguing that proof of an actual entitlement to rescission was not a prerequisite to the grant of the discovery orders. All that was required, at the interlocutory stage, was for him to show that a proprietary claim was *contemplated*. On the bars to rescission, Mr Singh submitted that this court should not prejudge how the CIETAC tribunal would rule on the Plaintiffs' claim. Further, only substantial restitution was required in equity. Finally, Mdm Zhang could not rely on the fact that fundamental changes had been made to the business as a bar to restitution, because these changes were attributable to her own fault.

43 Mr Singh, while acknowledging that there was no direct evidence of funds being remitted to the DB Account, submitted that there was sufficient *circumstantial* evidence for such an inference to be drawn. He pointed to the fact that DB itself considered that the account was subject to the terms of the Singapore Injunctions and that SETL had not, up to this point, applied to court for the Singapore Injunctions to be discharged.

44 On SETL's submission that it was no longer owned by Mdm Zhang, Mr Singh contended that this was an irrelevant fact given that the Plaintiffs were entitled to seek disclosure from any third parties to whom Mdm Zhang may have dissipated her assets, as these third parties were potentially liable to account to the Plaintiffs as constructive trustees. Mr Singh also submitted that in any event, the evidence unequivocally showed that SETL was still owned by Mdm Zhang beneficially.

45 Mr Singh next argued that the jurisdictional objections raised by SETL were not relevant. There was no reason why *Norwich Pharmacal* orders could not be granted in aid of foreign proceedings. Section 175 of the EA was also satisfied because OS 305 and OS 307 constituted "legal proceedings" within the meaning of s 175.

The various applications on appeal

46 Before I set out the issues that fell for determination, I should highlight various other applications that had the effect, whether intended or not, of protracting the hearing of the appeal. OS 305 and OS 307 were commenced on 6 April 2015 with only DB and CS named as defendants in the respective originating summonses. On 24 April 2015, SETL filed summonses for leave to intervene in the proceedings. On 2 June 2015, leave was granted and SETL was named as the second defendant in both OS 305 and OS 307. The hearings on the substantive merits were held before the AR over five days from October 2015 to February 2015. The AR rendered her decision on 26 February 2016. Three days later, SETL filed a summons for a stay of execution. Subsequently, they filed the present appeals.

47 On 16 March 2016, the hearing of the appeals against the AR's decision to order discovery commenced. Surprisingly, before I began hearing the appeals, counsel for Mdm Zhang appeared, having filed two summonses for leave to intervene in the proceedings. According to her counsel, the AR had made certain findings that cast aspersions on Mdm Zhang necessitating the applications. The Plaintiffs objected on the basis that Mdm Zhang had no locus given that no relief had been sought against her and that she had almost a year to seek leave to intervene. Counsel for Mdm Zhang then, most peculiarly, submitted that I should defer making a decision on whether leave to intervene should be granted and in the meantime allow him to sit quietly by. I roundly rejected this submission and dismissed the applications for leave to intervene.

48 Mr Kronenburg then sought leave to adduce further evidence on appeal. He sought to adduce six volumes of evidence, including Mdm Zhang's affidavit affirming that she had no interest in SETL. Of all the evidence Mr Kronenburg sought to adduce, I only allowed those parts which were relevant to the issues in dispute. That included the text of Mdm Zhang's affidavit, the text of the defences filed in the CIETAC arbitration, an expert report controverting the findings of the first FTI report ("the Mazars Report") and exhibits explaining why Mdm Zhang had no beneficial interest in SETL. It was only after this that the hearing of the appeals commenced. However, parties did not conclude their submissions so the matter had to be adjourned.

49 On 18 March 2016, the AR declined to stay the execution of her orders pending appeal. SETL appealed her decision and the matter came

before me on an urgent basis on 23 March 2016. I allowed the appeals and granted a stay of execution pending the resolution of the appeals before me.

50 On 10 May 2016, the parties attended before me with the Plaintiffs now seeking leave to adduce further evidence in response to the Mazars Report. In particular, the Plaintiffs sought to adduce the second FTI report. I allowed their application since it was only right that they be given an opportunity to respond to the Mazars report.

51 The hearing of the appeals then resumed on 5 July 2016. Before I could hear the substantive merits of the case, I had to rule on an application by SETL for production of documents for inspection. SETL sought production of all the documents referred to in the affidavit annexing the second FTI report. I dismissed the application since, in my judgment, it was not necessary to the final analysis of whether a *prima facie* case of fraud had been established. I had made it clear to the parties at several hearings that the question of fraud was not one that I had to try. I was also critical of their conduct of the proceedings, given that the matter had still not been concluded 14 months after it had been commenced. The hearing of the appeals then resumed and I rendered my decision, dismissing the appeals at the conclusion of the hearing.

Issues

52 The issues which fell for determination can broadly be characterised as follows:

(a) whether the requirements for pre-action discovery under O 24 r 6(5) of the Rules of Court had been satisfied; and

(b) whether there existed jurisdictional bars to the grant of pre-action discovery.

My decision

The jurisdiction of the court to grant pre-action disclosure

53 The parties were in broad agreement on the requirements that had to be satisfied before pre-action discovery would be granted under O 24 r 6(5). Essentially, the Plaintiffs had to show that:

(a) DB and CS had facilitated wrongdoing;

(b) there was wrongdoing on the part of Mdm Zhang; and

(c) disclosure was necessary, just and convenient.

54 These requirements were drawn from the Court of Appeal's decision in *Dorsey James* ([29] *supra*). As parties were aligned and the AR approached the matter in a similar manner, I adopted this framework. On the second requirement, I noted Mr Singh's submissions on the

two separate jurisdictions – the *Norwich Pharmacal* jurisdiction and the *Bankers Trust* jurisdiction (see [41] above). It was not necessary for me to decide the point because there was, in my judgment, sufficiently strong and cogent evidence to establish a *prima facie* case of fraud (see [59]–[65] below).

55 I should, however, highlight that Mr Singh did not elaborate on whether the two jurisdictions he referred to were inherent in O 24 r 6(5) or hailed from the inherent jurisdiction of the court (see *Tokio Marine* ([23] *supra*)). If it indeed stemmed from O 24 r 6(5), I should point out that none of this was apparent from the words of that rule. Order 24 r 6(5) read as follows:

> An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to *identifying possible parties to any proceedings* in such circumstances where *the Court thinks it just to make such an order, and on such terms as it thinks just*. [emphasis added]

56 The only criterion made express in O 24 r 6(5) was that it was "just" for such a discovery order to be made. Order 24 r 6 was subject to O 24 r 7, which imported a requirement of necessity. As the Court of Appeal explained in *Dorsey James*, the prescribed test then becomes one of "justness underpinned by 'necessity'" (at [33]). The Court of Appeal in *Dorsey James* also explained that O 26A r 1(5) was meant to be a codification of the Court's *Norwich Pharmacal* jurisdiction (see [24] and [28]). The extent (if any) to which recourse may be had to the inherent jurisdiction of the court for an order for pre-action disclosure (see *Tokio Marine*) and how this interacts with the provisions in the Rules of Court on pre-action disclosure and para 12 of the First Schedule to the SCJA will have to be considered at an appropriate time. For the time being, it sufficed for me to proceed on the basis that if the requirements at [53] above were satisfied, then the Plaintiffs would be entitled to succeed under O 24 r 6(5). In other words, if those requirements were satisfied then disclosure would clearly meet the prescribed test of justness underpinned by necessity.

57 Further, as the Plaintiffs were seeking to obtain information to trace funds, I proceeded on the basis that they had to show a *prima facie* case of fraud and good ground for thinking that the money in the CS Account and DB Account was the Plaintiffs' money (see the *Bankers Trust* case ([26] *supra*) at 1282 *per* Lord Denning MR). The second of these requirements could properly be subsumed as part of the inquiry as to whether there was a facilitation of wrongdoing by either DB or CS (requirement (a) at [53] above). In the *Bankers Trust* case, the English Court of Appeal was satisfied as to this requirement as there was strong *prima facie* evidence of fraud on the part of two men who presented cheques to the plaintiff bank which credited large sums of money to the defendant bank (at 1279 and 1283). As

there was good ground for thinking that the money in the defendant bank was the plaintiff bank's money, wide ranging disclosure orders were made.

58 It thus was logical for me to decide the question of *prima facie* evidence of fraud before turning to whether there was facilitation of wrongdoing by DB or CS (*ie*, whether there was good ground for thinking that the money in DB and CS was the Plaintiffs' money).

Prima facie *case of fraud*

59 SETL submitted that there was no cogent and compelling evidence sufficient to constitute a *prima facie* case of fraud against Mdm Zhang. Before the AR, the Plaintiffs relied on the first FTI report which relied on data in respect of sales in 2014 to extrapolate that it was highly likely that manipulation also occurred in 2013, which was the material time since the acquisition agreements were entered into in late 2013. It could have been argued that such extrapolation was purely speculative and therefore not cogent and compelling evidence.

60 Such an argument had been put to bed by the second FTI report. To recapitulate, SETL obtained leave of court to file the Mazars Report, which sought to controvert certain findings of the first FTI report. The Plaintiffs then obtained leave to file the second FTI report. The second FTI report was based on "point of sale" ("POS") data from individual restaurants of South Beauty for the year 2013. The data was derived from the computerised till systems within the restaurants and contains detailed records of transaction information. Representatives of the Plaintiffs had, on 27 and 28 February 2015, raided the Beijing headquarters of South Beauty to obtain the POS information for 2013. In addition, total assessment report ("TAR") spreadsheets were discovered.

61 The second FTI report concluded that "the financial information on South Beauty that was relied on by the Claimants and their advisors prior to the Acquisition was subject to fraudulent manipulation and overstatement [and] [t]his manipulation is unambiguously documented in the TAR spreadsheets, and is also visible in the POS [point of sale] data and GLs [general ledgers]". It suffices for me to highlight a few findings of the second FTI report:

(a) In relation to account transactions, there were *over a thousand falsified transactions* charged to accounts to increase recorded sales activity. A closer examination revealed implausible (if not impossible) transactions. Examples include a group of 5,000 diners recorded as having eaten on 27 September 2013 at the Beijing Financial Street branch (which had a seating capacity of 382). The group ordered duck breasts, vegetables, pork, chicken and three bowls of rice for which they paid in cash. The group was also recorded as having placed orders for 15,000 other dishes (including 450 orders of each of

18 different dishes) but this was charged to account and not settled immediately. As a result, a total of RMB689,085 was billed but only RMB150 was paid in cash with the remaining amount charged to account. The time between the opening of the table and the bill being paid was recorded as merely 55 minutes (inconsistent with a restaurant business where such a large order is made). On the following day an almost identical transaction occurred and this time 20 minutes elapsed between the opening of the table and the bill being settled. Further, the report observed a low correlation (19%) between inventory consumed (for cooking) and meals sold to customers.

(b) Account transactions were recorded to highly unusual and falsified client accounts, including client accounts in the names of employees of the restaurant. These client accounts were generally settled in bulk, either by a small number of credit cards wholly unrelated to the transaction or by bank transfers. For example, a client account was in the name of an employee and eight different credit cards were used to carry out a total of 45 separate payments to settle the outstanding balance in that account, which stood at RMB1,857,112. On top of this, there were a number of examples where one credit card was used to settle multiple client accounts.

(c) The manner in which the accounts were settled suggested that the fraudulent transactions charged to accounts were settled using South Beauty's own funds previously transferred to a related party. In this way, funds appear to have been circulated around so as to make it seem that legitimate sales were occurring.

(d) The TAR spreadsheets obtained in the raid showed that South Beauty's management precisely documented the scope of the fraud. The TAR spreadsheets summarised adjustments made to South Beauty's restaurant level income. This information showed upward adjustments made to the restaurant level income. The adjustments were labelled in the documents as "*falsifications*" thus revealing the fraud. The second FTI report noted that the TAR speadsheets reconciled with the unusual transactions charged to accounts and the other irregularities they had previously identified. The TAR spreadsheets also reconciled with the income statements and general ledger provided by South Beauty to the Plaintiffs. In addition, the largest revenue "uplift" was in mid-2013 during the negotiations for the acquisition. By way of an example, the Beijing Financial Street restaurant's TAR in January 2013 showed a revenue adjustment of RMB1,453,456 while the irregularities identified by the report (which include receivables in the form of accounts in an employee's own name and website transactions) also amounted to RMB1,453,465. This showed a precise documentation of the uplift and the manipulation done by the management. The explanatory notes in the

TAR for adjustments included certain of the following statements (translated from Chinese) which confirmed falsification:

(i) "this month the company falsified revenue";

(ii) "falsify increase in income for current month";

(iii) "falsify income";

(iv) "falsify costs"; and

(v) "increase revenue".

62 Mr Kronenburg submitted that no weight should be given to the second FTI report because the Plaintiffs did not produce for inspection the primary documents relied on by FTI Consulting. I rejected this submission. The second FTI report was detailed and spanned some 64 pages (with the addition of four appendices which brought it up to a total of 113 pages). All the information that SETL required in order to respond to the second FTI report was set out in that report. Mr Kronenburg submitted that there was no way of verifying if the data relied on had been falsified. His submissions would have been persuasive if I were tasked with trying the issue of fraud. However, given that I had to determine the question of fraud only on a *prima facie* level and that Mr Kronenburg had not raised any reasonable ground to doubt the affirmation of the Plaintiffs' representative in his affidavit that this data was genuine, I was satisfied that weight could be given to the second FTI report.

63 Mr Kronenburg also submitted that it was only FTI Consulting which concluded that there was fraud. He reasoned along the following line: The auditors of South Beauty in 2013 returned a clean report. KPMG who audited the company's account in 2014 recorded in their report that there were "unusual findings on South Beauty's sales transactions, costs of sales, expense items, and unexplained material related party transactions in both 2013 and 2014". However, KMPG qualified that their report was incomplete and the audit was still in progress. KMPG added a caveat that their report should not be relied upon for any other purpose. Despite this, FTI Consulting relied on the KPMG report. For this reason, Mr Kronenburg said that the second FTI report was unreliable.

64 I had no hesitation in rejecting these submissions. The qualifications in the KPMG report were expressly for the purposes of disclaiming any liability that may arise from a third party's reliance on the report. This did not mean that the findings in the KPMG report, while based on an incomplete audit, were not reliable. On the contrary, the findings of the KPMG report, while not stating unequivocally that there was fraud, noted unusual transactions. This was broadly in line with the second FTI report. The clean audit return in 2013 therefore did not leave much of an impression on me given the second FTI report and the KPMG report which noted unusual transactions in both 2013 and 2014. The same can be said of

the Mazars Report, which only responded to the first FTI report. It did nothing to affect the credibility of the second FTI report.

65 In the premises, I was satisfied that there was indeed strong and cogent evidence of a *prima facie* case of fraudulent manipulation by Mdm Zhang in the lead up to the acquisition. I now turn to discuss whether DB and CS had become involved in the wrongdoing, even if completely innocent.

Facilitation of wrongdoing

66 As explained at [57] above, in the context of *Bankers Trust* orders, which were aimed at assisting an applicant in a potential tracing claim, the applicant would have to show good ground for thinking that the money in the bank accounts were the applicant's money. This brings to the fore the vexed issue whether one retains beneficial ownership in the moneys which had been taken from it by fraud. I should, however, caution that the discussion that is to follow is made in the context of a pre-action discovery application and all the Plaintiffs had to show was that there was an *arguable* case that the money in the DB Account and the CS Account was its own money. I did not have to rule definitively that the Plaintiffs had an equitable interest in the moneys in the DB Account and the CS Account.

67 The starting point was that contracts tainted by fraud were voidable and not void (*The Directors of the Reese River Silver Mining Company Limited v Joseph Mackrill Smith* (1869) LR 4 HL 64). In the *Bankers Trust* case ([26] *supra*), Lord Denning proceeded on the premise that there was a good ground for thinking that money in a defendant bank's account was the applicant's money in circumstances where the customer of the defendant bank had obtained the money by fraud (at 1282). Therefore, if there was no arguable case that property acquired by fraud somehow revested in the party defrauded, it would be hard to see how the *Bankers Trust* orders could have been justified in that case itself. This was highlighted by Rimer J in *Shalson v Russo* [2005] Ch 281, a case which I derived much assistance from.

68 In *Shalson v Russo*, Rimer J squarely confronted the issue of property acquired by fraud. He considered the authorities such as *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") where Lord Browne-Wilkinson, citing the *Bankers Trust* case, opined that money acquired by fraud was held on constructive trust. Rimer J observed that the reasoning in *Westdeutsche* was problematic. He then considered the authorities "supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee". As Rimer J described it, "[t]he representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded

as having always been in equity his own property". Millet J had explained in *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 at 12 that the beneficial interest in the property is treated as having remained vested in the representee throughout, at least to the extent necessary to support a tracing claim. Subsequently, Millet J opined that property revested on an old-fashioned institutional resulting trust (*El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 734).

69 Rimer J then reconciled this line of authorities with the Privy Council decision of In *re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 where Lord Mustill, writing for the board, explained that rescission merely entitled one to a personal right to recover moneys paid under a contract and not any sort of proprietary right in respect of those moneys. Rimer J concluded that the position was that property would revest in the representee unless third parties had obtained an interest in the property while it was the unencumbered property of the representor (*ie*, prior to any rescission by the representee). But in cases where no third party rights had intervened, the representee would be able upon rescission to assert a proprietary right sufficient to support a tracing claim (at [126]).

70 Importantly for our purposes, Rimer J held that property revested in the representee upon the implied rescission of the contract (at [127]). This segued neatly into Mr Kronenburg's submission that the Plaintiffs had not rescinded the contract. It was noteworthy that Mr Kronenburg did not submit that third party rights had intervened preventing the Plaintiffs from arguing that they had a sufficient proprietary right to support a tracing claim. He instead argued that the Plaintiffs had left it to the CIETAC tribunal to order rescission. He said that it was telling that the Plaintiffs sought in the arbitration an order for rescission instead of a *declaration that they were correct* in rescinding the acquisition agreements. This submission seemed to me to elevate form over substance. In any case, there was clearly no merit to this submission. Mr Kronenburg placed reliance on the following passage in Dominic O'Sullivan *et al*, *The Law on Rescission* (Oxford University Press, 2008) at para 11.19 ("*O'Sullivan*"):

> If a writ or pleading does not demonstrate an unequivocal intention to avoid the contract, as where a claimant vendor seeks to recover both the property transferred and the price payable, it would not be effective as an election to rescind.

71 In my view, reliance on this passage was misplaced because it simply stood for the proposition that one could not blow hot and cold at the same time – the election to rescind had to be unequivocal. The fact that the Plaintiffs prayed for an order for rescission as opposed to some form of declaratory relief was immaterial. What was important was that no intention to affirm the contracts had been conveyed. SETL accepted that rescission could be effective by communication (*Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525). In *Shalson v Russo*, the plaintiff claimed

restitutionary relief without asking for rescission or a declaration that they had rescinded the contract. Rimer J nevertheless accepted the plaintiff's counsel's submission that the mere making of the claims amounted to an implied rescission of the contracts. He reasoned that there was no evidence that the plaintiff had unequivocally affirmed the loan contracts since discovering the fraud and he accepted that the claims made (which were consistent only with an implied rescission) did evince a sufficient intention to rescind the contracts (at [120]).

72 In the present case, it did not seem to me that the Plaintiffs were blowing hot and cold and not evincing an unequivocal intention to rescind the acquisition agreements. In the CIETAC arbitration, it sought return of the moneys paid, or alternatively, an indemnity for losses suffered. It did not evince an intention to retain South Beauty (which was the situation described in *O'Sullivan* as being ineffective to effect a rescission (see [70] above)). In addition, it did not in any way affirm the acquisition agreements after discovery of the alleged fraud. The Plaintiffs' claim for return of the purchase price paid was only consistent with an intention to rescind the agreements.

73 It was also convenient at this point to deal with Mr Kronenburg's submission that rescission was not available as a remedy because *restitutio in integrum* was impossible (see [35] above).

74 In my judgment, these submissions were without merit. Complete restitution was not necessary and it was trite that in equity, restitution need only be substantial. I derived some assistance from the following passage in *O'Sullivan* when it came to effecting restitution upon a sale of a business (at para 18.87):

> Where an interest in a business has been sold it may be incapable of return if *the basic nature of the business has changed in the interim*. Thus *restitutio in integrum* was said to be impossible in *Northern Bank Finance v Charlton*, a decision of the Supreme Court of Eire, where the company in question had changed from one operating licensed premises to substantially a property holding company. The English case of *Thomas Witter Ltd v TBP Industries* is similar, although the changes said in that case to preclude rescission were not so fundamental. The fact a business has failed may preclude rescission, but not where the failure was due to an inherent vice that existed at the time of the sale, and especially not where the misrepresentation related to that vice [citing *Adam v Newbigging* (1888) 13 App Cas 308 and *Senanayake v Cheng* [1965] AC 63 (PC – Singapore)]. [emphasis added]

75 Therefore, even though assets of the business might have been disposed of, as long as the fundamental nature of the business had not changed, rescission would not be barred. There was no evidence before me that this was indeed the case. Moreover, even if the business had failed, it was arguable that this was a result of the alleged fraudulent misrepresentation and falsification of accounts perpetrated by South

Beauty's management before the sale of the business. If the fraud was in any way causative of the first plaintiff now being in receivership, I did not think that Mdm Zhang could rely on that fact to resist rescission. If she could, it would be akin to allowing a fraudster to profit from his or her own fraud.

76 There were two more related issues in relation to whether DB and CS had become involved in the wrongdoing. First, was the fact that there was no evidence of a transfer of moneys into the DB Account and second, was SETL's assertion that Mdm Zhang no longer had an interest in it.

77 On the first of these issues, there was clear evidence of a transfer from Mdm Zhang's HK Bank Account to the CS Account. No such evidence existed in relation to the DB Account. Mr Kronenburg submitted that the AR made logical leaps in holding that it was highly probable that DB had become involved in the wrongdoing (at [45] of the Judgment ([22] *supra*)). In my view, there was circumstantial evidence which pointed to the fact that there could possibly have been a transfer from the CS Account to the DB Account. In brief, these were:

(a) DB automatically froze the DB Account when it was notified of the Singapore Injunctions, which were only directed against Mdm Zhang. These injunctions were obtained after Mdm Zhang transferred her interest in SETL. SETL did not protest the fact that the DB Account had been frozen. If no moneys linked to Mdm Zhang had come into that account, I would have expected SETL to apply to set aside the Singapore Injunctions in respect of the DB Account. This did not happen.

(b) The Singapore Injunctions were obtained in March 2015. From March 2014 to July 2014 a sum in excess of US$100m was transferred into the CS Account (see [20] above). Almost a year had elapsed from the first transfer of US$50,000,000 to the time of the injunctions. Moreover, even on SETL's case, Mdm Zhang had control over SETL at least until 4 June 2014. Only the last sum of US$2,000,000 was remitted after Mdm Zhang apparently transferred her interest in SETL to Asiatrust. Even then, as will be explained in greater detail below (see [79] below), Mdm Zhang appeared to have regarded SETL as belonging to her despite the apparent transfer to Asiatrust. She thus had control over SETL's accounts for a period significant enough to transfer moneys out of the CS Account, while it was not subject to any injunction.

(c) Correspondence from Mdm Zhang's relationship manager in Bank Sarasin, Janet Luk, to her supervisor alluded to the fact that Mdm Zhang desired to put the purchase moneys out of the Plaintiffs' reach. I set out the relevant e-mails to show that it was not a fanciful possibility that moneys would be transferred out of the CS Account.

The first was an e-mail dated 13 March 2014 (after the first transfer of US$50,000,000) from Janet Luk:

> Dear Ken,
>
> Client insisted to cust-out the assets to the *BVI company* ac first as chasing by her lawyer, and as indicated by the client her lawyer will *further transfer the assets other structure*. My understanding is it is not only for tax planning purpose, but *her lawyer is helping her to ease the concern on the with-recourse term of her business sold to an PE*.
>
> According to client, 'after structure is well established, assets would be *re-allocated*'.
>
> …
>
> [emphasis added]

Reading the above e-mail, the "BVI company" referred to was most probably SETL, which was a company incorporated in the British Virgin Islands. Further, there was talk of a *further* transfer once the money was transferred to the "BVI company". Even the motive for the transfer was revealed in the e-mail. Mdm Zhang wished to have the money transferred to put it out of reach in case the "PE" (which most probably was CVC) attempted to claw it back. While this e-mail was not written by Mdm Zhang herself, it was written by Bank Sarasin's relationship manager and I thus see no reason for the information to have been fabricated. The above e-mail was then forwarded by the recipient on 13 March 2014 to Edmond Michaan, the Global CEO of Bank Safra Sarasin, with the following message:

> Dear Edmond,
>
> I'm sorry I don't have good news on Janet's case.
>
> You will see from Janet's email below that client has confirmed that the assets should be transferred out to CS *first* …
>
> [emphasis added]

This e-mail again shows that the transfer to the CS Account was meant to be but a step in the process of moving the funds.

78 Considering all these three circumstances together, namely, the fact that SETL did not challenge the injunction over the DB account, the large sums of money transferred into the CS account with significant time for Mdm Zhang who was in control of SETL to effect further transfers out of the CS Account and the fact that there was a clear intention on her part to set up a structure such that the Plaintiffs could not reach those moneys, there was to my mind a good arguable case that moneys may have been transferred from the CS Account to the DB Account. This led to the conclusion that the Plaintiffs had shown good grounds for thinking the moneys in the DB Account were their moneys.

79 On the second of the issues raised at [76] above – that SETL was no longer owned by Mdm Zhang – I regarded this as a red herring. Even if SETL was not owned by Mdm Zhang, the Plaintiffs would be entitled to trace the moneys into the accounts unless SETL was a *bona fide* purchaser for value. There was no evidence that SETL provided any consideration for the transfers. It was at all times a mere volunteer. In any event, there was *prima facie* evidence before the court that Mdm Zhang regarded SETL as her company even after she apparently transferred her sole share to Asiatrust on 4 June 2014. As the AR noted in her Judgment (at [64(a)(ii)]), it was recorded in the remittance instruction form for the 21 July 2014 transfer, that Mdm Zhang stated that her relationship with SETL was that "Success Elegant Trading Ltd is owned by [Mdm Zhang]". Also, no reasons were given as to why Mdm Zhang would transfer some US$2m into SETL's bank account after she had apparently divested her interest. It was therefore arguable that Mdm Zhang still owned SETL beneficially.

80 To conclude this part, I held that there were good grounds for thinking that moneys in both the CS Account and the DB Account belonged to the Plaintiffs and that both CS and DB had innocently been involved in wrongdoing.

Just, necessary and convenient

81 The third requirement was that disclosure be just, necessary and convenient. The AR explained why, in her judgment, this requirement was satisfied (at [71] of the Judgment):

> In my view it is necessary and just to order the disclosure of these documents from the banks. [Mdm Zhang] has stated her intention to transfer the funds out of reach of the plaintiffs and has taken steps to transfer the funds to other bank account. Without the court's assistance, the plaintiffs would not know or would not know any information as to what happened to the funds. It is clear that the documents sought are necessary for the plaintiffs to trace the funds.

82 I was in complete agreement with the AR. Mdm Zhang had made it clear that she wished to set up a structure to put the moneys out of the Plaintiffs' reach. Furthermore, the last transfer into the CS Account was made in July 2014 and the Singapore Injunctions were obtained in March 2015. There was significant time for the assets to be dissipated. The accounts might have been frozen but the Plaintiffs would require information to attempt to trace and freeze moneys (if any) which had been transferred out of the accounts prior to the grant of the Singapore Injunctions. All in all, it was clearly just and necessary for the disclosure orders to be made.

83 I turn now to the jurisdictional objections raised by SETL.

Jurisdictional objections

Proceedings in Singapore

84 SETL argued that *Dorsey James* ([29] *supra*) made clear that the court's powers to order pre-action discovery did not extend to ordering discovery in aid of foreign proceedings. I set out the relevant passage in *Dorsey James* (at [68]–[69]):

> 68 Pre-action interrogatories can only be ordered in relation to intended proceedings in a Singapore court. The High Court's jurisdiction to order interrogatories is derived from s 18(2) of the SCJA, which states that the High Court shall have the powers set out in the First Schedule to the SCJA. Paragraph 12 of the First Schedule, once again reads as follows:
>
>> Power before or after any *proceedings* are commenced to order discovery of facts or documents by any party to the *proceedings* or by any other person in such a manner as may be prescribed by the Rules of Court. …
>
> 69 The term 'proceedings' as used in para 12 of the First Schedule must refer to proceedings before the Singapore courts … As such, considering WSG's vague allegations of Dorsey's wrongdoing, the sheer uncertainty of where this alleged wrongdoing took place is a strong factor which weighs *against* the ordering of pre-action interrogatories as the court's powers do not extend to interrogatories in aid of proceedings beyond Singapore.
>
> [Court of Appeal's emphasis in *Dorsey James*]

85 The AR held, correctly in my view, that the above passage, though made in the context of pre-action interrogatories, applied just as well to pre-action discovery. However, the AR held that *Dorsey James* could be distinguished because in the present case there was a clear nexus to Singapore. Given that both the DB Account and the CS Account were in Singapore, there was a real possibility of proceedings being commenced in Singapore, especially if there were moneys remaining in the CS Account and DB Account or there were moneys which had been transferred from these accounts to other accounts located in Singapore. There was thus, in her judgment, a likely prospect of subsequent proceedings being commenced in Singapore. I agreed with her.

86 This made it unnecessary for me to decide if the AR was right in holding that even if the court's jurisdiction under O 24 r 6(5) did not extend to granting the orders sought, due to para 12 of the SCJA, the orders could still be made under the inherent jurisdiction of the court. As I had mentioned earlier (see [56] above), the precise scope of the inherent jurisdiction of the court to order pre-action disclosure and how it interacted with the Rules of Court would have to be considered at an appropriate time.

The duty of bank secrecy

87 The final objection raised by SETL was that the disclosure orders were directed at banks, which were subject to the duty of bank secrecy under s 47 of the BA. The Plaintiffs had to show that disclosure in this case was permitted by the Third Schedule of the BA. One of the situations where disclosure was permitted was where it was necessary to comply with an order of the Supreme Court or Judge thereof pursuant to the powers under Pt IV of the Evidence Act. The Plaintiffs submitted that s 175 of the EA applied (see [30] above).

88 The AR referred to the case of *Chan Swee Leng* ([31] *supra*) for the proposition that there had to be *separate* independent legal proceedings, apart from OS 305 and OS 307 (at [93]–[94] of her Judgment). She then went on to hold that the CIETAC arbitration could constitute *separate* independent legal proceedings for the purposes of s 175 (at [96] of her Judgment).

89 It was unnecessary for me to decide if the AR was correct in holding that the CIETAC arbitration allowed the Plaintiffs to satisfy s 175 because in my view she fell into error when she held that OS 305 and OS 307 did not constitute "legal proceeding" within the meaning of s 175. It should be highlighted that on the face of it, s 175 did not expressly state that there had to be a *separate* legal proceeding. This requirement was gleaned from *Chan Swee Leng*.

90 In *Chan Swee Leng*, Roberts CJ of the Bruneian High Court considered s 7 of the Brunei's Bankers' Books (Evidence) Act, which is *in pari materia* with s 175 of the EA. There, the plaintiff had sought an order for inspection of bank books in order to ascertain the whereabouts of "missing" bank drafts. Roberts CJ had the opportunity to consider what "legal proceeding" meant within the meaning of s 7. He stated unequivocally that he had "no doubt that the wide terms of this definition will include an originating summons or motion taken out under the Brunei Rules of the High Court 1990 ('the BRHC') or otherwise". He then went on to state:

> Although s 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.
>
> *The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself.*
>
> Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR [Brunei Rules of High Court]. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank.

> *In summary, the applicant, before an order is made in his favour under s 7 of the Act for the inspection of a ledger kept by the bank, must first show that he is a party to separate legal proceedings.*
>
> [emphasis added]

91 If one followed the reasoning of Roberts CJ carefully, he reached his conclusion that the applicant *must first show that he is a party to separate legal proceedings* (which the AR applied), because he reasoned that the Bankers' Act was not meant to confer an independent and alternative right for discovery against banks. Therefore, an applicant had to first show that he had a right to disclosure of the documents. Pertinently, Roberts CJ was not in *Chan Swee Leng* considering a case in which an application for pre-action disclosure had been made. Robert CJ's decision should thus be read as holding that a party had to establish a substantive right to obtain disclosure before an order would be made under the Bankers' Act.

92 Therefore, if a party could demonstrate a substantive right to the documents, without relying on s 175 of the EA, an order could be made under s 175 for disclosure. The "legal proceeding" in s 175 would refer to the very application for disclosure, in which the applicant demonstrates a right to discovery independent of s 175. In fact, any reliance on s 175 alone for disclosure would be misconceived since that section did not provide an independent right to inspection of bankers' books where none existed. As the Court of Appeal explained in *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91 (at [19]):

> We must also stress that Part IV does not expand a party's right of discovery. Whether a party may inspect the bank account of another person is subject to his right to discovery. In *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, the Court of Appeal, in considering the equivalent provisions in the English *Bankers' Books Evidence Act, 1879*, held that an order for inspection would only be made if the litigant was entitled to the information under his right to discovery. Similarly, in *R v Bono* [1913] 29 TLR 635, the court refused to grant to a defendant in a libel action an order to inspect the plaintiff's bank account on the ground that the 1879 Act was not intended to accord to a litigant greater facilities for discovery than what would be allowed under normal discovery principles.

From this passage, it could readily be seen that s 175 was not meant to confer an independent right of discovery. As the AR herself put it, Pt IV "relates only to *how* evidence is to be provided by the banks …" (at [91] of the Judgment ([22] *supra*)). If this was the case, s 175 should also, concomitantly, not be read as abrogating whatever substantive rights a party might have to discovery. By requiring an *independent* set of legal proceedings before pre-action disclosure was granted, banks would be generally exempt from pre-action disclosure orders unless there was an on-going separate legal proceeding. I did not think s 175 was meant to have that effect given that it was enacted to ease *how* evidence of bankers' books would be adduced in court.

93 Therefore, I held that s 175 should be interpreted purposively such that OS 305 and OS 307 each constituted "legal proceeding" within the meaning of s 175. There was no additional requirement of a *separate* legal proceeding. Further, the phrase "for any of the purposes of such proceedings" as it appeared in s 175 would include the purpose of tracing and following moneys which was the very *raison d'etre* of the applications. In the light of this finding, I did not have to consider if the CIETAC arbitration constituted a "legal proceeding" within the meaning of s 175.

Conclusion

94 For all the reasons expressed above, I dismissed SETL's appeals and affirmed the orders of the AR (see [2] above).

95 As for costs, the AR had ordered that each party bear their own costs. The Plaintiffs filed separate Registrar's Appeals against the costs orders of the AR. In my view, there was no reason for costs not to follow the event, either in the appeals or in the hearing below. I thus allowed the Plaintiffs' appeals against the costs orders of the AR and granted the Plaintiffs costs here and below, to be taxed if not agreed.

Reported by Afzal Ali.