EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

CLAIM NO. BVIHC (COM) 47 OF 2016

Between:

JINPENG GROUP LTD

Applicant

and

[1] ADRIAAN ZECHA
[2] GHM HOLDINGS LIMITED
[3] IDEAL LANDMARK LIMITED
[4] PARTNERSHIP ZECHA LIMITED
[5] AZULA MANAGEMENT CO LTD
[6] AZULA GOCEK HOLDINGS LIMITED
[7] GENERAL HOTEL CORPORATION LIMITED
[8] SETAI HOTELS & RESORTS LIMITED

Respondents

Appearances:
Mr. Gerard Clarke and with him Mr. Oliver Clifton of Walkers for the Applicant
Mr. Alexander Cook for the First Respondent and with him Mr. Daniel Mitchell of Forbes Hare.

2018: May 22
December 17

JUDGMENT

[1] ADDERLEY J: (AG) This is the decision on the *inter partes* hearing held on the return date following an ex parte hearing in this matter. There were three applications before me by the claimant. Firstly, pursuant to rule 48.8(4) of the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR) the applicant seeks a final charging order over the shares ("the charged assets") in the second, third and fourth defendants. Secondly, it seeks enforcement by way of sale of the charged assets pursuant to CPR 48.11(1). Thirdly, it asked that the extant order appointing the interim receivers Russell Crumpler and Christopher Farmer of KPMG (BVI) be continued by way of equitable execution in respect of the first defendant's interest in the second defendant.

[2] On 1 February 2018 the court granted an ex parte provisional charging order over the direct and indirect interest of the first respondent in the shares of the second, third, and fourth respondents. The court also made an interim appointment of receivers in the following terms: "*4. The Provisional Charging Order be secured and the value of the Applicant's interest in the Second to Fourth Respondents be preserved by the appointment of interim receivers pending the hearing of the Applicants application for a final charging order or further order*."

[3] At the hearing the first respondent agreed to a final charging order in respect of the second and fourth respondents subject to certain terms, but seeks a discharge of the provisional charging order granted over the shares in the third respondent, and a discharge of the interim receivers.

The Background

[4] The applicant is a judgment creditor pursuant to an order of the British Virgin Islands ("BVI") court entitling it to enforce a final award made in arbitration proceedings held in the Hong Kong International Arbitration Centre. The amount of the award with interest as at the 22 December 2017 was US$38,329,780 ("the final Award"). This comprised US$ 42,769,366.63 due under the final award, plus interest of US$ 6,360,413.10 (daily rate of US$ 8,630.14 x 737 days from 16 December 2015 up to and including 22 December 2017); minus (iii) US$ 10,800,000 from the sale of the first respondent's ownership of 75% of the shares in General Hotel Management Limited ("GHM").

[5] Mr Zecha incurred the primary liability as a guarantor of a loan in the sum of US$35 million to Peak Hotels and Resorts Limited ("PHRL") to purchase the Aman Resorts Group of Companies, a group of exclusive global luxury resorts and hotels in Asia, Europe and the Americas.

[6] The claimant took related security over Mr Zecha's shares in General Hotel Management Limited representing a 75% shareholding (the "**GHM Shares"**). Mr Hans Jenni is the co-shareholder in GHM. It is a company involved in the business of management and operation of luxury hotels and resorts.

[7] It was the default on that loan which led to various proceedings eventually leading to the final arbitral award against Mr Zecha on 25 February 2015. The award was recognized in the BVI by order of the BVI court on 19 April 2016. At the same hearing of 19 April the court appointed Mr Crumpler and Mr Farmer as interim joint receivers of the GHM shares. At a hearing of 12 April 2016, Bannister J had refused Mr Zecha's proposal to have his English lawyers, CANDEY, manage the sale of the GHM shares.

[8] According to the evidence, Mr Zecha is a renowned individual in the luxury hotel industry. He is the creator of Aman Resorts. The US$ 35 million loan from Jinpeng to PHRL was made for the purpose of the acquisition of Aman Resorts following Mr Zecha's decision in 2013 to sell his stake in Aman Resorts, having previously sold his controlling interest to DLF Global Hospitality Limited ("**DLF"**). DLF's equity stake in Aman Resorts was purchased by Mr Omar Amanat ("Mr Amanat") and his partner Mr Vladislav Doronin ("Mr Doronin"). Unbeknownst to Mr Zecha, in a case unconnected with Aman Resorts, Mr Amanat had a conviction for fraud in the United States. They purchased Aman Resorts from DLF for US$358 million and the bid was effected through PHRL. Jinpeng stepped in to enable PHRL to meet its share of the US$358 million purchase consideration, together with the Beijing Tourism Group ("**BTG"**). The loan was governed by two documents between PHRL and Jinpeng and BTG: A Memorandum of Understanding (the "**MOU"**) and a Loan Agreement (the **"Loan Agreement"**) both dated 24 January 2014. The MOU is governed by the laws of Hong Kong.

[9] Following the acquisition of Aman Resorts, the relationship between Mr Amanat and Mr Doronin deteriorated, resulting in litigation commenced by PHRL in June 2014 (the "English proceedings"), relating to who had the right to control the business of Aman Resorts. Mr Zecha describes how he felt caught in the middle of a deal "…*that was rapidly unraveling in relation to which I had been instrumental in securing an investment of US$35 million from trusted business associates."* (Zecha 4).

[10] In September 2014 Jinpeng had initially sought an order for the appointment of liquidators over PHRL, which was subsequently refused by Bannister J, but on 1 October 2015 the Court of Appeal allowed Jinpeng's appeal against the decision. By this stage, arbitration proceedings had commenced on 28 October 2014 between PHRL and Jinpeng and a cross-arbitration launched by Jinpeng against Mr Zecha, where Jinpeng sought payment under the guarantee and enforcement of the obligations undertaken in the second MOU. Shortly before the handing down of the award and in compliance with the Court of Appeal's decision, Bannister J had made an order appointing liquidators over PHRL on 8 February 2016. PHRL submitted that Jinpeng would not receive anything from PHRL if the English proceedings were not pursued and won, because liquidators had been appointed. The English proceedings were ultimately settled including the participation of the liquidators. According to the Respondents the settlement did not leave PHRL with sufficient assets with which to discharge its liability to Jinpeng, leading Jinpeng to pursue Mr Zecha by these proceedings.

[11] Jinpeng was able to identify Mr Zecha's interest in the relevant shares through a Norwich Pharmacal disclosure order granted by this court on 26 October 2017 against Vistra Trust (BVI) Ltd ("Vistra") its registered agent. The disclosure occurred during November and December 2017.

[12] Jinpeng states that since liquidators were appointed to PHRL, no distributions to creditors have been made and noted that the English High Court had found in February 2015 that PHRL had "*taken steps to denude itself of most of the liquid resources*" and that "*there are no firm grounds for believing that any substantial further recoveries will be made in the foreseeable future."*[1]

[1] Schiller's Affidavit 36 [MS4/266-293] (See Peak Hotels Resorts Limited v Tarek Investments Ltd et al [2015] EWHC 386 (Ch)

THE LAW:

THE FINAL CHARGING ORDER

[13] The final charging order was sought under CPR 48.8(4)(c). This rule provides that any person served with the order must not permit the transfer of any stock specified in the order or pay any interest or dividend payable out of the stock to any person whilst the order remains in force (CPR. r.48.9(2)). If any transfer or payment is made, then that person would be liable to pay the judgment creditor an equivalent amount of the value of the transfer, or as much as is necessary to satisfy the judgment debt and costs (r.48.9(3)).

[14] The provisions are set out as follows:

"Effect of provisional or final charging order

48.9 (1) A disposition by a judgment debtor of an interest in property subject to a provisional or final charging order is not valid against the judgment creditor.

(2) Any person or body on whom an order was served under rule 48.6 (2) (a) or (e) must not permit the transfer of any stock specified in the order or pay any interest or dividend payable out of the stock to any person while the order remains in force.

(3) If after service of the order the person or body listed in rule 48.6 (2) (a) or (e) makes a transfer or payment prohibited by paragraph (2), that person or body is liable to pay the judgment creditor an amount equivalent to the value of the stock transferred or payment made or as much of it as is necessary to satisfy the judgment debt and costs."

[15] A judgment creditor can also apply for the protection of a stop notice under CPR 49.7. This prohibits future dealings with the shares in question without the consent of the judgment creditor.

[16] Finally, the judgment creditor may seek sale of the charged asset. In such case the court may give directions for its sale. The relevant rule 48.11 is set out below:

"Enforcement of charging order by sale

48.11(1) If a judgment creditor wishes to enforce a charging order of stock or personal property by sale, the judgment creditor may apply to the court for an order for sale of the stock or personal property.

(2) The application must be supported by evidence on affidavit.

(3) Notice must be served on the judgment debtor.

(4) The court may give such directions as seem appropriate to secure the expeditious sale of the stock or property charged at a price that is fair to both creditor and judgment debtor.

APPOINTMENT OF THE RECEIVER

[17] The West Indies Associated States Supreme Court (Virgin Islands) Act 1969 CAP 80 ("Supreme Court Act") provides the jurisdiction to the court for appointing a receiver. Section 24 (1) states: "*an injunction may be granted or a receiver appointed by an interlocutory order of the High Court…in all cases in which it appears to the Court or Judge to be just or convenient".* Its English equivalent is s.37 (1) of the English Senior Courts Act 1981 ("the English Act").

[18] If an application for an immediate injunction is made CPR 51.2(3) provides that a receiver may be appointed without notice as ancillary to the ex parte without notice application for the injunction.

[19] CPR 51.3 sets out the factors that the Court must have regard to when appointing a receiver

(a) amount likely to be obtained by the receiver

(b) amount of the judgment debt; and

(c) probable costs of appointing and remunerating receiver.

[20] Counsel for the First Respondent assisted the court by summarizing some of the principles distilled from the authorities relating to the exercise of the court's discretion in appointing a receiver: Some of them are referred to below:

(i) The overriding consideration in determining the scope of the court's jurisdiction under s.37 is the demands of justice[2]

(ii) The appointment is generally only made where the normal forms of execution are not possible because of the nature of the property.

(iii) In an appointment sought by way of equitable execution, the jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution[3]

(iv) It works in personam and does not create a charge on the property[4]

(v) The appointment does not automatically give a power to sell the property over which it is given to satisfy the judgment debt[5]

(vi) The appointment of a receiver following a judgment may serve a similar purpose to a receiver in support of a freezing order where there is a real risk that the judgment debtor would act in breach of a freezing order.[6]

[21] Particularly germane to this case is the English Court of Appeal authority of JSC BTA Bank v Ablyazov [2010] EWCA Civ 1141 **("JSC")** which supports the view that the appointment of a receiver is an intrusive remedy, and that it would not be appropriate where an injunction would be sufficient on its own. In Ablyazov the court agreed with the rejection by the trial judge of the submission that before a receivership order could be made, there must be evidence that the defendant has breached or is about to breach the terms of a Freezing Order made against him. They quoted with approval the approach that had been taken by the judge's statement that:

> "There may be other circumstances which show that the defendant cannot be trusted to obey the Freezing Order. In the present case reliance is placed on the defendant's inadequate disclosure of assets. In my judgment inadequate disclosure may, depending

[2] Masri v Consolidated Contractors International UK Ltd (No 2) and Cruz City Mauritius Holdings v Unitech [2015] EWCA Civ 338

[3] Manchester & Liverpool District Banking Co Ltd v Parkinson (1888) 22 QBD 173

[4] Masri (supra)

[5] Flegg v Prentis[1892]2 Ch 428

[6] Cruz (supra)

on the circumstances of the case, enable the court to conclude that the Freezing Order does not provide the claimant with the adequate protection."

[22] The Court of Appeal at [17] further stated its approval of the approach taken by the trial judge:

"We agree that that is the right approach and if, therefore, a Freezing Order does not of itself, provide adequate protection to a claimant because there is a measurable risk that a defendant may use the structure by which he holds his assets to deal with those assets in breach of the Freezing order, then a receivership order will normally be justified."

[23] They concluded at [18] that whether there is a measurable risk is primarily a matter of judgment in the light of the ascertainable facts which the judge, familiar with the case, is in by far the best position to make, and the Appeal court will be reluctant to interfere. In other words the appointment will be justified

"*in cases where there is a measurable risk that, if it is not granted, a defendant will act in breach of the freezing order or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be given against him. If, therefore the method by which a defendant beneficially holds his assets is transparent, a receivership order may well not be necessary.*" (Court of Appeal at [18]).

[24] The effect of the appointment of a receiver by way of equitable execution was discussed in Masri v Consolidated Contractors International UK Ltd (No 2) [7] **("Masri").** In that case Collins J relied as a starting point on a summary from Snell Equity 31st ed McGhee, para 17-25 as follows:

a. "A judgment creditor normally obtains satisfaction of his judgment by execution at common law using the *writ of fiere facias*, attachment of debts and, formerly, in the case of land, the writ of elegit. There were cases, however, where the creditor could not levy execution at law owing to the nature of the property, the principle case being where the property was merely equitable, such as an interest under a trust or an equity of redemption. Another example was a covenant of indemnity or other chose in action of which the debtor has the benefit, but could not be reached by attachment. In order to meet this difficulty, the court of Chancery evolved a

[7] [2008] EWCA Civ 303

process of execution by way of appointing a receiver of the equitable interest, and if necessary supplemented this by an injunction restraining the judgment debtor from disposing of his interest in the property. This process was not 'execution' in the ordinary sense of the word, but a form of equitable relief for cases where execution was not possible. The effect of such an appointment is that it does not create a charge on the property, but that it operates as an injunction against the judgment debtor receiving the income or dealing with the property to the prejudice of the judgment creditor."

[25] As stated in [53] *ibid* the appointment has no proprietary effect, it does not vest the property in the receiver.

[26] The overarching principle, however, as propounded in Masri is that the demands of justice are the overriding considerations in determining the scope of the jurisdiction under section 37(1) of the English Act (and Section.24 (1) of the Supreme Court Act). Secondly, that the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations as happened in Masri itself. The background to the decision in Masri was that it had long been thought that the power in what is now s 37(1) of the 1981 Act to 'appoint a receiver in all cases in which it appears to the court to be just and convenient to do so' could only be exercised in circumstances which would have enabled the court to appoint a receiver prior to the Supreme Court of Judicature Act 1873, s 25(8), when it was first put on a statutory basis. But in Masri it was held that the court was not bound by pre-1873 practice to abstain from incremental development and expanded the concept of "property" to include the power of appointment under a trust with the consequence that a receiver could be appointed over it.

[27] Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd and others [2011] 4 All ER 704,[2011] UKPC 17 was an appeal to the Privy Council from the Court of Appeal of the Cayman Islands which considered whether the Cayman Islands court should apply the decision in Masri so as to appoint receivers over a judgment debtor's power of revocation of trusts established by him in the Cayman Islands under Cayman law, the assets of which were exclusively in the Cayman Islands. The Cayman Grand Court dismissed the claimant's application

and the Court of Appeal had dismissed the appeal, holding that the effect of Masri was that although the jurisdiction to appoint a receiver was not limited to property available for legal execution it was still necessary for it to be in the nature of property. The Privy Council allowed the appeal from the decision of the Court of Appeal in the Cayman Islands approving the principle in Masri. Their Lordships held that the decision of the Court of Appeal in Masri had established that the demands of justice was the overriding consideration in determining the scope of the jurisdiction under s.37(1) of the 1981 Senior Courts Act; that a receiver by way of equitable execution could be appointed over an asset whether or not the asset was then amenable to execution at law; and that the jurisdiction to appoint receivers by way of equitable execution could be developed incrementally to apply old principles to new situations.

[28] Cruz adopted the position in Masri and Tasarruf and went further to determine that it fell within the scope of the receivership jurisdiction to function so as to support the policy that arbitration awards should be enforced[8] and this represented a justifiable example of an incremental development of the existing position that appropriately responded to the demands of justice.[9]

The Facts

[29] Ms Miranda Schiller a member of the law firm Weil Gotshal and Manges LLP in her Fourth Affirmation filed 19 December 2017, chronicled alleged evasive action giving the applicant cause to believe that Mr Zecha had deliberately dissipated his assets to avoid satisfying the judgment debt.

[30] She stated that Mr Zecha had consistently sought to evade enforcement of his contractual obligations towards Jinpeng. At paragraph 34 she set out a non-exhaustive list (a) to (h) of examples of Mr Zecha's conduct since Jinpeng entered into the Loan and Guarantee in January 2014 whereby he flouted the order of this court by refusing to make payment under the award and subsequently the recognition of this court. All of the matters from (a) to (e) took place between May 2014 and 15 December 2015. Mr Zecha explains that it was around 15 December 2015 that he "*threw in the towel*". It would appear that up until this date Mr Zecha still had hopes for his case.

[8] Cruz, Males J at para 21, referring to Gloster LJ who cited Colman J in The Nafilos [1995] 1 WLR 299, at 309-310 (see[2013] EWCA Civ 1512 at [36])
[9] Cruz, Males J at para 62

[31] Ms Schiller's affidavit omitted to say that when the Tribunal handed down its award, it found in Mr Zecha's favour in relationship to the type of security obtained by the Second MOU, namely whether it entitled Jinpeng to an equitable charge over Mr Zecha's shares in GHM, or whether it constituted Jinpeng as an equitable mortgagee. The tribunal found that Jinpeng only had an equitable charge.

[32] Also there was no BVI court order in place at the time some of the matters outlined as flouting the court order occurred, so the introductory statement that Mr Zecha flouted the order of this court is perhaps not an entirely accurate representation.

[33] The alleged conduct dates back to his conduct prior to the arbitration, since Jinpeng entered into the Loan and Guarantee in January 2014. Ms Schiller's Fourth Affirmation exhibits details of what is said to be a series of broken promises by Mr Zecha for repayment of the loan. Events then escalated due to Mr Zecha's apparent attempts to dissipate the GHM shares, notably through alleged discussions to sell the shares, culminating with Jinpeng applying for an injunction from the Hong Kong High Court ("the HK O**rder"**) to restrain Mr Zecha from disposing of his GHM shares in contravention of Jinpeng's security interest.

[34] The terms of the HK injunction were in the end agreed by way of a consent order dated 15 May 2015.

[35] The affirmation in support of the HK Order states that Mr Zecha reneged on his promise to grant an equitable charge to Jinpeng over the GHM shares as security for repayment of the loan, which had been formalised under a second memorandum of understanding (the "Second MOU") because Mr Zecha did not make the notation of the charge on GHM's register of charges. It was also noted that on 20 May 2014 Mr Zecha wrote to Daniel Pang (who provided consultancy and advisory services to Jinpeng) stating that he had agreed to sell 49% of GHM for US $25million and offering a 75% portion of that amount to cover half of the outstanding US $35million loan, as well as offering 75% of the remaining 51% shareholding in GHM to cover the remaining balance of the loan, US $17.5 million, plus one year's interest. In the same email he asked for the right to settle in cash so that he may retain the GHM shares. Jinpeng contends that this proposal was in breach of Mr Zecha's

obligations under the Second MOU which required the shares to remain in Mr Zecha's name until the loan was repaid to ensure the effectiveness of the security that had been granted (email from HK lawyers Dacheng). He had apparently not disclosed this proposed sale at the time of signing the Second MOU. Concerns over the proposal led Jinpeng to obtain a Stop Notice from the BVI Court dated 18 December 2014.

Conduct following the GHM receivership:

[36] Following the issuance of the final award, Mr Zecha allegedly rejected Jinpeng's request for payment of the judgment debt and transfer of the GHM shares. Accordingly on 5 April 2016, Jinpeng made the GHM receivership application. Mr Zecha says that Jinpeng made the GHM Receivership application without notice (like the present one) in circumstances where he had voluntarily consented not to sell his shares in GHM at Jinpeng's specific request. This he says, was demonstrated in particular by his agreement to extend the protection provided to Jinpeng by the HK Order (which expired after the final award) and signed the further consent order for an injunction.

[37] Mr Pang was described by the respondent as a "trusted intermediary of both parties" and reference is made in the evidence to "multiple and continuous discussions" between Mr Pang and Mr Zecha during 2017 in an effort to resolve the issues. As explained by Mr Zecha in his evidence, the applicant omitted to mention this evidence in support of its ex parte application. Ultimately the parties reached an impasse over a proposal involving both GHM and GHM Holdings and discussions broke down. The respondent contends that the fact that such discussions took place support Mr Zecha's position that he has not acted evasively and should be considered as evidence of his attempts to engage with Jinpeng: Mr Pang stated that "*Although Jinpeng does not accept that Mr Zecha made a workable proposal, it does not deny that such discussions took place."* Also, Mr Zecha "*made no secret of the fact that he was in discussions with third parties (and Mr Jenni) to facilitate the sale of the GHM shares in 2014, but he did this in order to realize funds to pay Jinpeng and not in an attempt to dissipate assets.*"

[38] The evidence shows that Mr Zecha did not satisfactorily fulfill all of his obligations under the agreements leading up to and subsequent to the HK Order. However, the evidence should give a balanced picture of all relevant events. Taken in context, although all of the terms of the MOU were not observed the omissions made do not present cogent evidence of a risk of dissipation of assets.

Transfers from Ideal

[39] To support its evidence that Mr Zecha is deliberately trying to evade paying his judgment debt the Applicant pointed to significant transfers made by Mr Zecha. There are transfers relating to his interest in Ideal Landmark Limited ("Ideal") in which he is identified as the sole shareholder and director. Following the granting of the interim orders at the February hearing in this court, the Receivers submitted their first report to the court on 22nd February, stating that Mr Zecha's shares in Ideal had allegedly been pledged to Mr Hassan Abas, a friend of Mr Zecha's prior to the appointment of the receivers. An alleged pledge agreement in favour of "FCOMI – L Global Capital SICAF-SIF" ("FCOMI") is noted on the register of members as having occurred on 12 November 2012 but the receivers found the evidence on this to be incomplete (Receiver's Report 15 March 2018). As at the date of the reports, the receivers had not been provided with a copy of the updated register of members for Ideal or any written instruments of transfer (22nd February report). Mr Hassan Abas was the holder of 100% shares in the fifth respondent, Azula, pursuant to a transfer by Partnership Zecha which transferred 80% of its shareholding in Azula. The receivers had also identified a transfer by Ideal, of the leasehold of a villa ("the Villa") to an "unknown third party"[10] who they suspected was possibly Mr Abas.

[40] Emails from CANDEY on 21st and 25th February 2018, exhibited to the Supplemental report of 15th March 2018 establish the position with the Ideal assets. The email confirmed that Mr Abas made a loan to Mr Zecha of US$9,123,249.16 on 31 August 2015 in respect of his liability. The emails further confirm that the Ideal Landmark shares were not transferred to Mr Abas although they had

[10] Ms Schiller's 4th Affirmation, para 48

been pledged. The only asset that it had, the Amanpuri villa, was then owned by Mr Abas. He was not able to use this as it was currently subject to Court proceedings in Thailand. In his evidence, Mr Zecha explained that he borrowed money from Mr Abas to repay his debts having found himself impoverished after Mr Amanat's conduct. His debts included monies secured against his villa at Amanpuri, Thailand, owned beneficially by him through Ideal.

[41] According to the respondent, a charging order should never have been made over the shares in Ideal, and to this end should not be continued, because these shares have already been pledged to a Swiss Cove Limited ("Swiss Cove"), an entity connected with Mr Abas to secure the indebtedness of Mahaman Investments Limited in the sum of $US 8 million. FCOMI is the original lender in the transaction. Mr Zecha had to date only been able to provide a copy of a Share Pledge Agreement signed by himself alone (exhibited to the Receivers' supplemental report). The respondent submitted that the court must proceed on the assumption that Swiss Cove has been pledged with these shares and allow Swiss Cove as pledgee to exercise its power of sale over the shares.

[42] The court is not satisfied that there is a real risk of dissipation in relation to the Ideal assets. By all accounts Mr Zecha appears to have been indebted to Mr Abas. The share pledge agreement is noted on the register of charges since 2012, indicating that the pledge pre dated his involvement with Jinpeng and the final award. In the circumstances, in the court's judgment the Ideal transfers are indicative of Mr Abas' separate liability to and relationship with Mr Zecha.

Transfer from Partnership Zecha via Azula

[43] The receivers report the alleged transfer of shares in the fifth respondent, Azula Management Co. Ltd from the fourth respondent Partnership Zecha Limited ("Partnership Zecha") to Mr Abas in October 2016 after the final award, with the effect of dissipating the assets of Partnership Zecha. Partnership Zecha reportedly had an 80% holding in Azula, evidenced by Azula's register of members dated 12 March 2015. Following steps of the receivers to remove Mr Zecha as director of Azula, CANDEY provided an updated register of members for Azula. According to the updated

register, the Azula shares were transferred to Mr Abas on 11 October 2016 and as such the resolutions for Mr Zecha's removal had no effect as Partnership Zecha "*did not in fact own the shares in Azula*" (Receiver's report; correspondence from CANDEY). The receivers reported that the updated register of members was not provided to Vistra Trust as registered agent of Partnership Zecha. However they report that upon further requests for verification of the transfer of the Azula shares, they were provided with a copy of the Azula share transfer form dated 16 October 2016, listing Mr Abas as the beneficial owner. From this, they deduced that the date of transfer of the Azula shares must have taken place on 16 October 2016. Therefore the Azula shares appear to have had material value at the date of the receivers' appointment and they say this is contradictory to Mr Zecha's previous evidence dated 18 April 2016 in response to the GHM receivership application (and referred to in Ms Schiller's Fourth affirmation), that he "[does not] *have funds sufficient and readily available to make any meaningful payment to Jinpeng"; has moved all his assets into family trusts; and that the GHM shares were his only property of value*". (Receiver's Report 22 February 2018). The dates are equivocal.

[44] The receivers conclude that the change in ownership of Azula as reflected in the updated register "*has effectively acted as a practical bar to the steps which we have, and would have taken, in accordance with our appointment under the Receivership Order to preserve and protect the assets of PZL".* (Report 22 February).

Transfers to family trusts

[45] As noted, Mr Zecha is quoted as having declared that he had moved his assets into family trusts to support his position that he did not have readily available assets other than the GHM shares, just before the award was enforced and receivers appointed over the shares at the 19 April 2016 hearing. However, Mr Zecha disputes Ms Schiller's allegation that these transfers were a further attempt to dissipate his assets (on the basis that "this allegation appears to be the principal foundation for Jinpeng's suggestion that there is somehow a risk of dissipation"), stating:

" *In 2007, when I sold my shares to DLF (and long before I had even heard of Jinpeng), I was 76 years old and believed it was time to retire. As is normal for people in their late seventies, I decided to pass on what I owned to the younger generation…Ms Schiller appears to be confusing any normal and natural estate planning that occurred 11 years ago with dissipation, which are plainly not the same thing*." (Zecha 4).

[46] Moreover, the respondent says this is not true as a matter of fact as Ms Schiller in paragraph 34(f) of her Fourth affirmation relies on paragraph 22 of his first witness statement to say that he had moved all of his assets into family trusts. Paragraph 22 of his affidavit did not contain such a statement but rather a reference to Ms Schiller's allegation that he sought to dissipate assets by this means and an explanation in similar terms to that stated above.

[47] Counsel for the respondent reasonably raise the timing issue in making such a statement if on Jinpeng's own case the alleged transfer would have taken place in 2007 before any contact with Jinpeng existed. In the circumstances the transfers to family trusts are not sufficient evidence of dissipation.

Prejudice caused by receivership

[48] Mr Zecha opposes the continuation of the appointment of receivers and instead undertakes to sell or otherwise realize the value of the charged shares himself, the process of which will be managed by his lawyers at CANDEY. He undertakes that the proceeds of sale or realization in value of the charged shares shall be applied to his liability under the judgment debt. Mr Zecha argues that the handling of the GHM receivership by Mr Crumpler was highly prejudicial towards him in the following ways:

[49] According to Mr Zecha, Mr Crumpler did not seek to agree a valuation of the shares and wanted to acquire them at the lowest possible price through selling them to Jinpeng at a price of $US10.8 million in June 2017, a substantially lower value than 75% of US$20 million (a valuation based on Mr Jenni's agreement to sell his 25% for $US 5 million). Seeking the order without notice on the basis that he had allegedly failed to engage over the transfer of the GHM shares was therefore not justified in light of the lack of consultation that he received. In addition, in failing to refer to

pertinent facts concerning the involvement of BTG and its commercial relationship with Jinpeng, Jinpeng did not give proper full and frank disclosure. It emerged during the GHM receivership that Mr Jenni had established GHM Holdings which had entered into a joint venture with BTG in relation to a Chinese hotel group, Ahn Lu GHM Holdings. Until this emerged, Mr Zecha had not appreciated that he was 75% shareholder in this separate company. He says that Mr Crumpler did not inform him of this fact and Mr Zecha believes that Jinpeng's real motivation in acquiring the GHM shares at a discount was to further its commercial relationship with BTG.

[50] On review of the correspondence over the GHM shares, Mr Crumpler's position was to conduct an expert valuation process as the best way to maximize the final value of the shares (email from Mr Crumpler of 15 June 2016). An email from CANDEY on 27 June 2016 voiced Mr Zecha's concerns that without an open market sale process, this proposal would unlawfully and unfairly deprive him of a fair value for his shares. Mr Crumpler replied by email of the same date that no sales process can take place without the sanction of the BVI court and in this sense his proposal cannot be unlawful. He sets out his reasons for choosing this option as a means to achieving the highest value obtainable for Mr Zecha's holding. He asked for Mr Zecha's views on the matter.

[51] The Court is satisfied from the correspondence that Mr Crumpler made an informed and reasoned decision and rejects the suggestion that he acted without properly consulting Mr Zecha. According to Mr Crumpler, the receivers responded to all of CANDEY's queries in a manner suggesting they were mindful of their duties to the court. It was consequently agreed that the sale would take place via an open sale process. As regards the Ahn Lu transaction, the implication is that Mr Zecha could possibly have been aware of the existence of GHM Holdings: An email from Mr Crumpler of 14 December 2016 with reference to arbitration proceedings regarding Setai Miami reads as follows:

> *"We further understand that Mr Jenni and Mr Zecha understandably had concerns with regards to the outcome of that arbitration and so took what they considered to be prudent steps to safeguard new contracts by placing that business into Holdings as opposed to GHML. We understand from management that the joint venture partnership in the Ahn Luh*

(Beijing) Hotel Management Co Ltd was one such agreement…Clearly though, the arrangements that Mr Zecha entered into prior to our appointment were not of our making"

[52] Given that Mr Jenni is the co-shareholder in GHM with Mr Zecha it would be reasonable to assume that the two would make joint decisions regarding any significant transactions.

Application of the principles to the facts

[53] Mr Zecha whilst stating his preference for independent sale of the shares, is not saying that the shares should not be sold, but only that KPMG should be replaced by his litigation lawyers CANDEY. He preferred his assets to be managed by CANDEY, in relation to which he has proposed a number of undertakings.

[54] He argued that the charging order already provides a powerful protection and the court could grant an injunction to support the charging order, asserting that a receivership is not just and equitable in the circumstances. The Applicant says that the previous conduct of Mr Zecha demonstrates that he would likely be in breach of the injunction and it would not in itself be sufficient protection over the assets.

[55] The court has power on the judgment creditor's application, to grant an injunction to secure the provisional charging order under CPR 48.5(2). This is pending any hearing on making the provisional order final. The Applicant relies on the proposition in JSC[11], which was followed in Cruz, that the appointment of a receiver by way of equitable execution may serve the same purpose as a freezing order in the case where the method by which the defendant holds their assets is opaque, and there is reason to believe that there is a risk that the defendant would act in breach of an ordinary injunction or otherwise divert his assets from being available to satisfy a judgment debt.

[56] Counsel for the Respondent made the submission that the test in JSC set the specific parameter of a "measurable risk" and this has not been met. He argued that there is a lack of clear and

[11] (supra) at [14])

compelling evidence that Mr Zecha would not obey a freezing order and as such the applicant's position falls short of meeting the "measurable risk" requirement propounded in JSC. The court shares that view.

CONCLUSION

[57] Mr Zecha did not oppose the charging order over the second and fourth respondents. In my judgment the totality of the evidence does not rise to the level of establishing a real risk or of dissipation of the shares in the second respondent by him nor does it show a measurable risk that he will not comply with the extant charging order. His assets are transparent; there was no evidence that any are hidden in opaque structures. The assets are subject to control by the charging order given by the BVI courts which has *in personam* jurisdiction over him. In all the circumstances, in my judgment, it is a case where it is not just and convenient to continue the interim receivership order while both a final charging order and an order for sale are in place.

[58] As I have decided to grant the order for a sale I am leaving the receiver in place.

[59] For all of the foregoing reasons I grant the following relief:

(i) I grant a final charging order over the shares in the second and fourth defendants namely GHM Holdings Limited, and Partnership Zecha Limited, and an order for the sale of the said shares.

The receiver shall work closely with Mr Zecha to sell the charged assets to obtain a price that is fair to both Jingpeng and Mr Zecha and the net proceeds of sale shall be used to extinguish the debt or such part of it as the net proceeds of sale can cover. The completion of the sale requires the prior sanction of the court.

(ii) I discharge the charging order over the shares of the third defendant, namely Ideal Landmark Limited

[60] In light of the pending sale the parties have liberty to apply.

[61] I will hear the parties on costs.

[62] I wish to thank counsel for their input, and my Judicial Assistant, Ms Rachel Trotman for her contribution in summarizing the facts.

Hon. Mr Justice K. Neville Adderley
Commercial Court Judge

By the Court

Registrar