EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0047, BVIHCMAP2018/0020

BETWEEN:

[1] MITSUJI KONOSHITA
[2] A.P.F. GROUP CO LTD

Appellants

and

JTRUST ASIA PTE LTD

Respondent

Before:

The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Rolston Nelson — Justice of Appeal [Ag.]
The Hon. Mde. E. Ann Henry — Justice of Appeal [Ag.]

Appearances:

Mr. Benjamin Strong, QC for the Appellants
Mr. Vernon Flynn, QC for the Respondent

2018: December 18.

Civil appeal – Freezing order – Application to discharge freezing order – Whether respondent had a good arguable case – Consequence of material non-disclosure – Whether there was a real risk of dissipation of appellants' assets – Delay – Appointment of receiver – Weight to be given to foreign judgment in related matter

The first appellant ("Mr. Konoshita"), up until October 2017, was the Chief Executive Officer of Group Lease Public Company Limited ("Group Lease"), a Thai company. The second appellant, A.P.F. Group Co Ltd ("APF"), is a British Virgin Islands ("BVI") company in which Mr. Konoshita owns 51% of the shares. APF holds the controlling shares in Group Lease. The respondent, JTrust Asia PTE Ltd ("Jtrust") made certain investments with Group Lease of approximately US$180 million.

In October 2017, the Thai Securities and Exchange Commission ("TSEC") issued a report indicating that it had filed a criminal complaint against Mr. Konoshita for fraud,

misappropriation of Group Lease's assets and falsifying of the accounts of Group Lease. On 21st December 2017, JTrust commenced proceedings against Mr. Konoshita and APF (collectively "the appellants") alleging, among other claims, knowing receipt and dishonest assistance. On even date, JTrust applied for and was granted a world-wide freezing order of the funds of the appellants. On the application of the appellants, the freezing order was varied on 13th February 2018 in several respects including reducing the amount subject to the freezing order. At the inter partes hearing, the learned judge dismissed the appellants' application to discharge the freezing order and continued the freezing order. Following the continuation of the freezing order on 22nd March 2018, on 5th July 2018 the learned judge, on the application of JTrust, made a receivership order appointing two receivers of APF.

The appellants, being dissatisfied with both the freezing order and the receivership order, appealed by separate appeals. The issues for determination in relation to the freezing order are: (1) Whether the respondent had a good arguable case; (2) Whether the ex parte order should have been discharged on the ground of material non-disclosure; (3) Whether there was a real risk of dissipation of assets; (4) Whether costs should have been granted to the appellants. In relation to the receivership order, the issue for determination is whether the judge wrongly exercised his discretion in granting the receivership order after the freezing order was made.

Held: dismissing the appeals against the freezing order and the receivership order and ordering that the appellants pay the respondent the costs of the appeals, that:

1. In determining whether there is a good arguable case on an application for a freezing order, the judge is not required to conduct a mini trial. The judge must assess the claim and evidence before him and determine whether it meets the threshold of a good arguable case. In this case, among the evidence the judge considered was the TSEC report. He determined that the report was sufficient evidence of a good arguable case. In seeking to overturn the exercise of the judge's discretion, the appellants have not discharged the heavy burden by demonstrating that the judge was plainly wrong.

   Finurba Corporate Finance Ltd v Sipp SA and another [2011] EWCA Civ 465 applied; **Kazakhstan Kagazy plc and others v Arip** [2014] EWCA Civ 381 applied.

2. An applicant for an ex parte injunction must make full disclosure to the court of all material facts. Failure to do so however, does not lead to an automatic discharge of the ex parte injunction. The court has a discretion, whether to discharge the ex parte order, to continue the order, or to make a new order on terms. It was open to the judge, having considered the evidence of material non-disclosure not to discharge the order since he had already varied the order. The judge cannot be faulted for finding that no further consequences were necessary.

   Commercial Bank-Cameroun v Nixon Financial Group BVIHCVAP2011/005 (delivered 6th June 2011, unreported) followed; **Kazakhstan Kagazy plc and others v Arip** [2014] EWCA Civ 381 applied; **Brink's Mat Ltd v Elcombe and**

others [1988] 1 WLR 1350 applied.

3. A finding of dishonesty in itself is insufficient to constitute a real risk of dissipation of assets. However, where (as here) the dishonesty alleged is at the heart of the claim, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. The respondent's claim is grounded on the allegations of the fraudulent acts of the appellants. In addition to the judge finding that JTrust had established a good arguable case, he relied on the evidence of Mr. Konoshita's history of misconduct, the breach of the disclosure obligations in the freezing order and the fact that Mr. Konoshita is a sophisticated businessman with a network of companies through which he has the ability to move assets quickly. The evidence on which the judge relied amounted to "solid evidence" that provided a sound basis for a finding that there was a real risk of dissipation of assets by the appellants.

   Holyoake v Candy [2016] EWHC 970 (Ch) applied; **VTB Capital plc v Nutritek International Corp** [2012] EWCA Civ 808 applied.

4. Where there is solid evidence which establishes that there is a risk of dissipation, the fact that there was delay in making the application would not necessarily result in the application being refused. Delay is one factor that the court will take into account in evaluating whether there was a risk of dissipation. An appellate court would be very slow to interfere with a judge's assessment of the risk of dissipation on account of a short period of delay (in this case two months) where a reason for the delay was given and there was evidence in support of the judge's assessment.

   JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others [2015] EWCA Civ 906 applied.

5. Failure to comply with the disclosure obligation in a freezing order is a significant factor in determining whether it is just and convenient to appoint a receiver. Invariably, where there is continuous failure to comply with a disclosure obligation, a court would appoint a receiver. In the instant case, the breach was a continuous breach for several weeks including the day of hearing of the application. In those circumstances, the learned judge was correct in attaching significant weight to the appellants' failure to comply with the disclosure obligation.

   JSC BTA Bank v A [2010] EWCA Civ 1141 distinguished.

6. The weight to be given to a related foreign judgment would depend on the circumstances of the case. In this case, the judge was merely referring to the foreign judgment as confirmation of his own findings in his 22nd March judgment. The evidence on which the judge relied in making the receivership order included, appellants' non-compliance with the disclosure obligation and the statutory declaration of Mr. Rithivit a former nominee of Mr. Konoshita. The evidence, when

considered conjointly, amounts to cogent evidence on which the judge could properly exercise his discretion to grant a receivership order.

REASONS FOR DECISION

[1] **THOM JA**: These two appeals against orders made by Adderley J on 22nd March 2018 ("the freezing order") and 5th July 2018 ("the receivership order") were heard together. On 18th December 2018, we made orders dismissing the appeals and we undertook to give reasons for our decision. These are the reasons.

[2] The first appellant ("Mr. Konoshita"), up until October 2017, was the Chief Executive Officer of Group Lease Public Company Limited ("Group Lease"), a Thai company which traded on the Thai Stock Exchange.

[3] The second appellant, A.P.F. Group Co Ltd ("APF"), is a British Virgin Islands ("BVI") company in which Mr. Konoshita owns 51% of the shares. APF holds the controlling shares in Group Lease.

[4] The respondent, JTrust Asia PTE Ltd ("Jtrust"), between March 2015 and September 2017, made certain investments with Group Lease of approximately US$180 million.

[5] In October 2017, the Thai Securities and Exchange Commission ("TSEC") issued a report which indicated that it had filed a criminal complaint against Mr. Konoshita for fraud, misappropriation of Group Lease's assets and falsifying of the accounts of Group Lease.

[6] On 21st December 2017, JTrust instituted proceedings against Mr. Konoshita and APF (collectively "the appellants") alleging, among other claims, knowing receipt and dishonest assistance. JTrust contended that it was induced to make investments of US$180 million in Group Lease by the fraudulent misrepresentation in Group Lease's financial statements. JTrust contended

further that while Mr. Konoshita was the Chief Executive Officer of Group Lease, APF, which he controls, held the controlling shares in Group Lease. Instead of making loans to established groups of business in Asia in keeping with the representation to investors, he issued loans to companies controlled by him which were incorporated in Cyrus and Singapore and which were not engaged in any business. These Cyrus and Singapore companies also own shares in Group Lease.

[7] JTrust contended further that it was confirmed by Group Lease's auditors, in their report of November 2017, that approximately US$98 million in loans were made to Mr. Konoshita's companies.

[8] On the said 21st December 2017, an application was made by JTrust for a world-wide freezing order of the funds of the appellants. This application was heard on 24th December 2017 and a freezing order was granted. On the application of the appellants, the freezing order was varied on 13th February 2018 in several respects including reducing the amount subject to the freezing order from US$95,865.38 to US$45,000,000.

[9] The inter partes hearing was scheduled for 19th February 2018. Before this hearing, on Friday, 16th February 2018, JTrust filed an amended statement of claim. After hearing arguments from both sides, the learned judge dismissed the appellants' application to discharge the freezing order and continued the freezing order.

[10] The appellants, being dissatisfied with the order, appealed on several grounds. At the hearing of the appeal, four issues arose for determination:

(a) Whether the respondent had a good arguable case on the original claim and on the amended claim.

(b) Whether the ex parte order should have been discharged on the ground of material non-disclosure and no freezing order granted at the inter parties hearing as a result of the material non-disclosure.

(c) Whether there was a real risk of dissipation of the appellants' assets.

(d) Whether costs should have been granted to the appellants.

Issue A - Good Arguable Case

[11] The learned judge having outlined JTrust's case and the appellants' case, stated at paragraph 22 of the judgment:

> "At this stage it is not the function of the court to launch on a mini trial of the issues. In applying the test of good arguable case all that is required to do is no more than a preliminary appraisal of the claimant's case. The arguments presented in the application demonstrate that there is certainly a serious issue to be tried and in my judgment the claimant has a good arguable case."

[12] Mr. Strong, QC submitted that in so finding the learned judge erred in two respects. Firstly, in his approach in determining whether JTrust had established a good arguable case and secondly, the learned judge misapplied the test. He contended that the judge was required to first consider whether JTrust had established a good arguable case at the ex parte hearing on its original claim and then consider whether JTrust had done so on the amended claim. He argued that had the learned judge done so he would have found that JTrust had no arguable case on the claims in the original claim. This is evident from the substantial amendments made in the amended claim one working day prior to the hearing of the claim. He submitted further that JTrust also had no good arguable case on the amended claim.

[13] While I agree that the learned judge did not deal separately with the application to discharge the injunction and the application to continue the injunction in the judgment, when the judgment is considered as a whole, in my opinion, it is not correct to say that the learned judge did not consider whether he should discharge the ex parte injunction on the basis that JTrust had not established a

good arguable case. The learned judge referred to JTrust's case and then outlined the appellants' case. In doing so, the learned judge stated at paragraph 18:

> "The respondents contend that the claims have no chance of success. This is because the necessary ingredients of the claims cannot be satisfied as a matter of law based on the substratum of facts of the case and therefore the case is bound to fail. Accordingly, they say, the claimant does not meet the threshold test of a triable issue, and the injunction ought to be discharged."

[14] The learned judge then proceeded to consider the arguments of the appellants and conducted what he referred to as a "preliminary appraisal" of JTrust's claim and concluded that JTrust had established a good arguable case. Among the evidence he considered was the TSEC report which was before him at the ex parte hearing. He determined that the TSEC report was sufficient evidence of a good arguable case. At paragraph 37, the learned judge determined that the application to discharge the freezing order should be dismissed and continued the freezing order. This, in my view, shows that the learned judge did consider whether there was a good arguable case both at the ex parte hearing and the inter partes hearing and determined that JTrust had so established.

[15] Mr. Strong, QC next submitted that the learned judge misapplied the test of a good arguable case. The judge was required to adopt the approach in **Tatneft v Bogolyubov and Others**[1] and **Holyoake v Candy**[2] and critically assess the evidence of JTrust. He contended that the learned judge failed to do so, and this was evident from the judge's failure to give any reasons for his finding in the judgment. If the judge had done so, he would have concluded on both legal and factual grounds that JTrust did not have a good arguable case. On the legal grounds, JTrust's claims as pleaded both in the original and amended claims could not be proved and were thus bound to fail. In relation to the factual issues, Mr. Strong, QC argued that the learned judge appeared to have simply

[1] [2016] EWHC 2816 (Comm).
[2] [2016] EWHC 970 (Ch).

accepted the factual allegations of JTrust without giving consideration to the points raised by the appellants on those facts, an example being JTrust's case was inconsistent with the fraudulent scheme alleged by the TSEC.

[16] In response, Mr. Flynn, QC submitted that given the TSEC report that Mr. Konoshita had engaged in fraud on investors by, among other things, concealed transactions, asset misappropriation and false accounting, the learned judge was correct in concluding that victims of an investment fraud would have an arguable claim in law. He contended that the technical issues raised by the appellants were issues to be determined at the trial. The learned judge was correct in adopting a "robust approach" once he was satisfied that the fraud described by TSEC report gave rise to an arguable claim. Learned Queen's Counsel referred the Court to **Commercial Injunctions**[3] and **Finurba Corporate Finance Ltd v Sipp SA and another**.[4]

[17] It is a well-established principle that in determining whether there is a good arguable case on an application for a freezing order, the judge is not required to conduct a mini trial. Rather the judge must assess the claim and evidence before him and determine whether it meets the threshold of a good arguable case. The English Court of Appeal in **Lakatamia Shipping Co Ltd v Su and others**[5] and **Kazakhstan Kagazy plc and others v Arip**[6] adopted the words of Mustill J in **The Niedersachsen**[7] in which he described a good arguable case as being one which '…was more than barely capable of serious argument and yet not necessarily one which the judge believes to have better than 50% chance of success.'

[18] The learned judge referred to the arguments of the appellants including the principles of law on which they relied. I agree that the learned judge did not

[3] Stephen Gee (6th end, Sweet & Maxwell).
[4] [2011] EWCA Civ 465.
[5] [2014] EWCA Civ 636.
[6] [2014] EWCA Civ 381.
[7] [1984] 1 All ER 398.

express a view on the appellants' arguments on the knowing receipt claim. However, when the judgment is read as a whole, the judge's approach was in keeping with the approach in **Finurba** where Lord Neuberger MR stated at paragraph 31:

> " I respectfully agree with, and endorse, what was stated in the interlocutory written observations of Rix LJ …In the light of increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the courts should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that fraud has occurred."

[19] It was reiterated in **Kazakhstan** that an appellant who seeks to overturn the exercise of the discretion of a judge in granting a freezing order has a heavy burden and an appellate court should only interfere where the appellant has clearly demonstrated that the judge was plainly wrong. Having considered the evidence that was before the learned judge and the submissions of counsel on both sides, I am of the view that the appellants have not so demonstrated.

Issue B - Material Non - Disclosure

[20] Mr. Strong, QC submitted that the learned judge failed to make any finding in relation to the issue of material non-disclosure even though the learned judge had varied the ex parte order as a result of the non-disclosure. Mr. Strong, QC identified several areas of non-disclosure as outlined in the affidavit of Mr. Daniel Mitchell which was filed in support of the application to discharge the freezing order, and argued that had the learned judge properly considered the material non-disclosure he would have discharged the freezing order on that basis.

[21] I agree that in dismissing the application, the learned judge did not give detailed reasons for doing so. However, when the judgment is read as a whole it shows that the judge, having noted that he had considered the material non-disclosure of JTrust at the hearing of the application to vary the order and had varied the order in his decision of 13th February 2018 on the ground of the material non-

disclosure, determined that there was no basis to discharge the injunction on the same non-disclosure.

[22] It is a well settled principle that an applicant for an ex parte injunction must make full disclosure to the court of all material facts. In **Commercial Bank-Cameroun v Nixon Financial Group**,[8] this Court summarised the principles underlying the duty of an applicant to make full and frank disclosure on an ex parte application for an injunction as follows:

(i) A person applying for holding upon an application made ex parte must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.

(ii) The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application.

(iii) Materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(iv) The duty of candour is a heavy one. The duty of disclosure extends not only to material facts known to applicant, but to additional facts that he would have known had he made proper inquiries. The applicant is under a duty to present fairly the facts so disclosed. The rationale for the duty is that the court is being asked to grant relief in the absence of the defendant and wholly on the information provided by the claimant. Other parties do not have the opportunity to collect or supplement the evidence which has been put before the court. Observance of the duty is essential to secure the integrity of the court process and to protect the interest of these potentially affected by whatever order the court is invited to make.

[8] BVIHCVAP2011/005 (delivered 6th June 2011, unreported).

[23] Failure to do so however does not lead to an automatic discharge of the ex parte injunction. The principles outlined in cases such as **Brink's Mat Ltd v Elcombe and others**[9] and **Kazakstan** show that a judge has a wide discretion when a party seeks to discharge an order on the basis of material non-disclosure. On the proof of material non-disclosure, the court has a discretion whether to discharge the ex parte order, or to continue the order, or to make a new order on terms. A court may well refuse to discharge an injunction on the basis of material non-disclosure where had the facts been disclosed the injunction could properly have been granted.

[24] It is not disputed that there was non-disclosure when the ex parte order was made. The affidavit of Mr. Daniel Mitchell, which outlined the material non-disclosure on which the appellants relied, was before the court at the inter partes hearing. The sole issue before the judge therefore was the consequence of the non-disclosure. It was open to the judge, having considered the evidence of material non-disclosure and the submissions of counsel, not to discharge the order since he had already varied the order. The onus was on the appellants to show that the judge erred in the exercise of his discretion in refusing to discharge the ex parte injunction. The well-established principle is that an appellate court would only interfere if it was demonstrated to the Court that the learned judge had erred in principle and his decision was plainly wrong. The judge cannot be faulted for finding that no further consequences were necessary. In my view, the appellants have not demonstrated that the judge made any error in principle and that his exercise of discretion was plainly wrong. His decision was within the generous ambit of disagreement allowed to him. There is therefore no basis to interfere with the exercise of the judge's discretion.

Issue C - Risk of Dissipation

[25] The appellants contended that the learned judge erred in finding that there was

[9] [1988] 1 WLR 1350.

a real risk of dissipation of the appellants' assets. They submitted firstly, that the learned judge did not provide any reasons for his finding. Had he properly considered the evidence before him, he would have found that there was no real risk of dissipation. Secondly, the learned judge failed to consider the effect of the delay by JTrust in making the application for the freezing injunction. Thirdly, the learned judge applied the wrong test. He was required to apply the test in **Holyoake v Candy** where Gloster LJ stated:

> "…There was some debate as to what was the correct test to establish that there was a risk of dissipation such as to make it just and convenient to grant a conventional freezing injunction. However, the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances."[10]

[26] Mr. Strong, QC submitted that if the judge had applied the above test and scrutinised with care JTrust's evidence on the risk of dissipation, he would have found that there was no solid evidence of a real risk of either of the appellants dissipating their assets so as to render themselves judgment proof.

[27] Mr. Strong, QC further submitted that it was not sufficient to point to allegations of dishonesty in relation to the good arguable case test to satisfy the requirement of a risk of dissipation. In support of this proposition, he referred to the following passage in **Thane Investments Ltd and others v Tomlinson and others**:[11]

> "In my judgment Neuberger J's reasons for finding judge Thompson's order one which should not be discharged are insufficient to justify the order which he made. First, Neuberger J said that the matters which were relied on for the good and arguable case applied in demonstrating that there was a real danger of the defendants dissipating their assets to defeat the judgment. I regret that I do not see that the judgment does

[10] At para. 34.
[11] [2003] EWCA Civ 1272.

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

[28] Mr. Flynn, QC in response referred to paragraphs 25 to 35 of the judgment and submitted that the learned judge had outlined in detail the various factors which led him to conclude that there was a real risk of the appellants' dissipating their assets.

[29] There is no dispute that the above is the applicable test in determining the question of a real risk of dissipation. At the inter partes hearing both sides relied on the test as outlined in **Holyoake v Candy**. While the learned judge did not specifically mention the case of **Holyoake**, when the judgment is considered it is evident that the judge applied the test in **Holyoake**.

[30] I also agree that the cases of **VTB Capital plc v Nutritek International Corp**[12] and **Madoff Securities International Ltd and others v Raven and others**[13] are authorities for the proposition that a finding of dishonesty in itself is insufficient to constitute a real risk of dissipation of assets. However, as stated **in VTB Capital:** '[w]here (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets.' In this case, dishonesty is at the heart of the claim. The respondent's claim is grounded on the allegations of the fraudulent acts of the appellants in

[12] [2012] EWCA Civ 808.
[13] [2011] EWHC 3102.

relation to their investment in Group Lease. In my view, the judge was correct to take into account that JTrust had established a good arguable case in relation to the claim. This, however, was not the only evidence on which the learned judge relied in determining that there was a real risk of dissipation. The learned judge also relied on the evidence of Mr. Konoshita's history of misconduct resulting in a fine of approximately US$39 million by the Japanese Financial Securities Authority, the breach of the disclosure obligations in the freezing order and the fact that Mr. Konoshita is a sophisticated businessman with a network of companies through which he has the ability to move assets quickly. In my view, the evidence on which the judge relied amounted to "solid evidence" that provided a sound basis for a finding that there was a real risk of dissipation of assets by the appellants.

Delay in making the application

[31] The appellants argued that the learned judge erred in not considering the effect of delay in making the application in exercising his discretion. They contended that the delaying in making the application shows that JTrust did not have a bonafide concern that the appellants would dissipate their assets. JTrust did not immediately seek to get a freezing order after the announcement by the TSEC, but instead engaged in negotiations for several months with a view to acquiring a major stake in Group Lease. The appellants submitted that this was clear evidence that there was no risk of dissipation. They contended that it was only when the negotiations were unsuccessful that JTrust instituted these proceedings and made application to the court for a freezing order.

[32] Mr. Flynn, QC in response acknowledged that there was delay of approximately two months and that during that period there were negotiations with Group Lease. He however submitted that such negotiations, with a view to recovering funds, were a usual step in circumstances where there were high value commercial dealings and where shareholder's interests require protection. He further submitted that delay by itself was not a sufficient reason to refuse a

freezing order. He relied on the cases of **JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others**[14] and **Ras Al Khaimah Investment Authority and others v Bestfort Development LLP and others**.[15]

[33] The learned judge did not deal with the effect of delay in his judgment. Delay in making an application does not automatically mean that an application is doomed. Where there is solid evidence which establishes that there is a risk of dissipation the fact that there was delay in making the application would not necessarily result in the application being refused. Delay is one factor that the court will take into account in evaluating whether there was a risk of dissipation. Delay in itself is not a bar.

[34] I agree and adopt the following passage to which Mr. Flynn, QC referred the Court in **JSC Mezhdunarodniy**:

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

[35] Negotiations in itself do not mean that there is no real risk of dissipation. Undoubtedly, the court may refuse to grant relief where an applicant's conduct is dilatory as was the case in **Anglo Financial SA and another v Goldberg**[16] where the negotiations were extended for several years. That is not the situation here. It is common ground that the period of negotiation in this case was approximately two months. An appellate court would be very slow to

[14] [2015] EWCA Civ 906.
[15] [2015] EWHC 3197.
[16] [2014] EWHC 3192.

interfere with a judge's assessment of the risk of dissipation on account of a short period of delay where the reason for the delay was explained and where there was evidence in support of his assessment. This is such a case.

Issue D- Costs

[36] The appellants contended that the judge erred in awarding JTrust its costs of the application since the freezing order could only have been continued on JTrust's changed case, as outlined in its amended statement of claim which was filed less than a working day before the inter partes hearing, and the appellants had to incur costs to prepare to meet the case that was advanced at the ex parte hearing. The judge should therefore have awarded the appellants their costs up to the service of the amended claim.

[37] In view of the earlier finding that there was no basis to interfere with the finding of the judge that the application to discharge the ex parte order should be dismissed, this ground falls away.

[38] For the reasons given above, the appeal against the freezing order is dismissed.

The Receivership Order

[39] Following the continuation of the freezing order on 22nd March 2018, on 5th July 2018 the learned judge, on the application of JTrust, made a receivership order appointing Nicholas James Gronow of FTI Consulting (Singapore) and John David Ayros FTI Consulting (BVI) as joint and several receivers of APF for the purpose of identifying, protecting, preserving and (if appropriate) recovering the assets of the company and the value of such assets with immediate effect pending resolution of these proceedings.

[40] In making the receivership order, the learned judge referred to the following principles applicable on an application to appoint a receiver as outlined by this

Court in **Norgulf Holdings Limited v Michael Wilson and Partners**[17] Limited: (1) The claimant must have a good arguable case; and (2) The evidence must show that the subject matter of the proceedings would have been in danger if left in the possession or under the control of the defendant until trial or at least that there was reason to apprehend that, the party who makes the application would have been in a worse situation if the appointment of a receiver be delayed.

[41] In finding that there was a good arguable case and a risk of the dissipation of the assets of the appellants, the learned judge relied on various matters including his findings in his 22nd March judgment where he continued the freezing order and the appellants' failure to fully comply with the disclosure obligation contained in the freezing order. He noted the Court of Appeal of Singapore judgment of 1st June 2018 in which the injunction was reinstated in **JTrust Asia PTE LTD v Group Lease Holdings PTE Ltd.**, **Mitsuji Konoshita and Cougar Pacific PTE Ltd**.[18] The learned judge also based his decision on the evidence contained in the statutory declaration of Mr. Rithivit who was an independent non-executive director of Group Lease Finance, the sole director and sole shareholder of Pacific Opportunities Holdings SARL (Luxembourg), and Cougar Brazil, all said to be controlled by Mr. Konoshita. After Mr. Rithivit became aware of the TSEC report in 2017, he resigned from the various companies. Mr. Rithivit, in his declaration, stated among other things that, he had acted as nominee for Mr. Konoshita in dealings such as collecting money in the name of Group Lease Finance and distributing the money to various companies. Mr. Rithivit also stated that he was asked to sign documents and thereafter was oblivious to what happened with the transaction thereafter. Further, he was unaware that he was being used through the companies to borrow US$56,346,950.00 from Group Lease and at Mr. Konoshita's request to remit the funds to certain recipients who were acting in concert with

[17] BVIHCVAP2007/0008 (delivered 29th October 2007, unreported).
[18] [2018] SGCA 27.

Mr. Konoshita to carry out his apparent fraudulent scheme. Based on the evidence, the learned judge concluded that because of the control exercised by Mr. Konoshita over APF, Mr. Konoshita had the capability and means to dissipate his assets using APF.

[42] The appellants, being dissatisfied with the grant of the receivership order, seek to set aside the order on the basis that the learned judge made several errors of fact and law and wrongly exercised his discretion. The errors identified were: (1) The judge erred in finding that the injunction provided insufficient protection to JTrust; (2) The learned judge, in exercising his discretion, placed too much weight on the failure of the appellants to make full disclosure pursuant to the freezing order; (3) The learned judge erred in ascribing weight to the terms of the Singapore Court of Appeal decision; (4) There was inordinate delay by JTrust in pursuing its application; (5) The learned judge failed to take into account the respondent's conduct after the freezing order was granted.

Ground 1 -Whether freezing order insufficient

[43] Mr. Strong, QC submitted that the evidence adduced by JTrust was wholly inadequate to support a finding that the freezing order was inadequate protection against a risk of dissipation of the appellants' assets. He contended that there was no dissipation of assets after the freezing order was made, nor was there a risk of dissipation. Further, the appellants did not have a propensity to disobey court orders. The only evidence that was before the court was the evidence of the appellants "partial compliance" with the freezing order and which the appellants explained was due to a misunderstanding by the appellants and their attorney that the stay of the disclosure obligation was not lifted since there was no express reference to the stay being lifted by the learned judge. Also, at that time there was a pattern of oppressive and overreaching conduct by JTrust including, JTrust disseminating the freezing order to some 300 financial institutions that were wholly unconnected to the appellants.

[44] In my view, this ground has no merit. I agree with the submissions of Mr. Flynn, QC in response that, having regard to the principles in **Norgulf Holdings** there was no need for the learned judge to be satisfied that there was evidence that the appellants had dissipated their assets in breach of the freezing order. The learned judge found that on the evidence before him, that in spite of the freezing order, there was a real risk of dissipation of the assets and he outlined the evidence on which he relied in so finding. The failure of the appellants to comply with the disclosure requirement was only part of the evidence on which the learned judge relied. The learned judge also addressed the explanation of the appellants for their breach of the disclosure requirements in the following manner:

> "There was a stay of the December 2017 disclosure obligation ordered that (sic) the February hearing pending the return date hearing. But in light of the wording of the Order, no reasonable person could believe, as the Defendants claims to have done, that the stay continued after the hearing and determination on the 22nd of March of the matters dealt with on the return date hearing."

The appellants were represented by attorneys at all times.

[45] It was not disputed that JTrust had sent the ex parte freezing order to several financial institutions which did not have any connection with the appellants. This issue was raised with the learned judge at the inter partes hearing on 13th February and the freezing order was varied by the learned judge to provide that the express permission of the court must be obtained before any notification of the freezing order is made to third parties outside of the jurisdiction of the High Court.[19] Having regard to the evidence that was before the learned judge, I can find no fault with his findings on this issue.

Ground 2 - Whether the judge placed too much weight on the appellant's failure to make full disclosure

[19] See pg. 4 of the transcript of proceedings dated 5th July 2018.

[46] The appellants contended that the learned judge, in exercising his discretion, placed too much weight on the appellants' non-compliance with the disclosure obligation in the freezing order during the period 22nd March to 25th June 2018 when there was uncertainty as to whether the stay of the disclosure obligation was lifted.

[47] Mr. Flynn, QC in response referred to **Fage UK Ltd v Chobani UK**,[20] where the English Court of Appeal reiterated that an appellate court should be slow to interfere with the evaluation of facts and inferences drawn from them unless it was compelled to do so. Mr. Flynn, QC contended that in view of the allegation of fraud before the court it was reasonable for the learned judge to infer from the failure of the appellants to comply with the disclosure obligation that the appellants were trying to defeat the purpose of the freezing order.

[48] Failure to comply with the disclosure obligation in a freezing order is a significant factor in determining whether it is just and convenient to appoint a receiver. Invariably, where there is continuous failure to comply with a disclosure obligation, a court would appoint a receiver to search, identify, secure and preserve the assets. Orders of the court must be complied with promptly and punctiliously. The breach was a continuous breach for several weeks including the day of hearing of the application. The explanation given by the appellants for their non-compliance was rejected by the learned judge and as stated earlier, in my view rightly so.

[49] Mr. Strong, QC next submitted that the authorities show that the court would usually only appoint a receiver at an advanced stage of the proceedings such as after cross-examination or as a result of lengthy "stone-walling". He relied on the case of **JSC BTA Bank v A**.[21] In response, Mr. Flynn, QC submitted that there is no requirement in the test for the appointment of a receiver that requires

[20] [2014] EWCA Civ 5.
[21] [2010] EWCA Civ 1141.

appointment only to be made at an advanced stage of proceedings or as a result of lengthy stone-walling. He referred to the case of **Lee Kwan Yaw v Tang Liang Hong**,[22] where the Court appointed a receiver after a mere ten days of non-compliance with the disclosure obligations in a freezing order.

[50] In my view, the case of **JSC BTA Bank** does not establish any principle that a receivership order should only be made after there was a lengthy period of stone- walling or at an advanced stage of the proceedings such as cross-examination. On the facts in **JSC BTA Bank** where the disclosure was defective, there was cross-examination of the defendant. However, on appeal, it was considered by the Court of Appeal not to be the usual course for a commercial court to take. Also, while the Court considered the conduct of the defendant to be stone-walling and granted the receivership order it did not express a view that non-compliance over a lengthy period was a prerequisite for the grant of a receivership order. As stated earlier, the breach in the present case was continuous over several weeks including the day of the hearing. In those circumstances, I find that the learned judge was correct in attaching significant weight to the appellants failure to comply with the disclosure obligation.

Ground 3 – The Singapore Judgment

[51] The learned judge, in outlining his reasons, noted that the Court of Appeal of Singapore reinstated the injunction against Mr. Konoshita in proceedings brought by JTrust.

[52] The appellants contended that the learned judge erred in relying on or ascribing substantial weight to the judgment rather than considering the evidence before him. They argued that the Singapore judgment was not about receivership, but an injunction in relation to a different claim and APF was not a party to the claim.

[22] (No.2) [1997] 2 SLR 833.

[53] Mr. Flynn, QC submitted in response that, it was not improper for a court to give some weight to a foreign judgment in a related matter. He argued that the Singapore judgment was cogent evidence that was relevant to the exercise of the judge's discretion. He relied on the case of **Mckee v Mckee**.[23]

[54] I agree that there is no principle of law which prohibits a judge from giving weight to a related foreign judgment. The weight to be given would depend on the circumstances of the case. It is true that APF was not a party to the claim and there is a difference in the claim pursued against Group Lease and Cougar, but the Singapore judgment was in relation to the same investment made by JTrust in Group Lease which is the subject of the alleged fraud in this case. More significantly, I agree with Mr. Flynn, QC that when the judgment is read as a whole, the judge was merely referring to the Singapore judgment as confirmation of his own findings in his 22nd March judgment on which findings he relied in concluding that JTrust had met the requisite threshold for the grant of a receivership order. The learned judge clearly outlined the evidence on which he relied in making the receivership order which included non-compliance by the appellants with the disclosure obligation and the statutory declaration of Mr. Rithivit, a former nominee of Mr. Konoshita, in dealings involving collecting money from Group Lease and distributing to companies controlled by Mr. Konishita. The evidence relied on by the learned judge when considered conjointly amount to cogent evidence on which the judge could properly exercise his discretion to grant a receivership order.

Ground 4 – Delay

[55] Mr. Strong, QC submitted that there was inordinate delay by JTrust in pursuing the application for appointment of a receiver. The application was filed on 4th January 2018 and was not pursued until some 8 weeks after the injunction was continued on 22nd March 2018. Having regard to time that has elapsed learned Queen's Counsel argued that it was likely otiose at the time it was pursued. He

[23] [1951] 1 All ER 942.

also argued that having regard to the delay, relief should not have been granted. He further argued that the powers granted to the receivers were too wide which would result in JTrust obtaining documents which it would not have had access to bearing in mind the existing jurisdiction application.

[56] Whether a period of delay is inordinate depends on the circumstances of the case. Where as in this case, the learned judge found that the requirements for the appointment of a receivership were met and it was just and convenient to appoint a receiver, the fact that there was delay in pursuing the application would not be a bar to the grant of relief, in particular where the appellants have not demonstrated that they have suffered any prejudice as a result of the delay. Having examined the receivership order, in my view, the terms are not unusual.

Ground 5 - Respondent's conduct

[57] The appellants contended that the learned judge failed to take into account either adequately or at all the conduct of JTrust and the likelihood that the receivership order would be deployed or exploited as a means of oppression rather than for its true purpose. The conduct they referred to included JTrust's failure to make full and frank disclosure in the application for the freezing order, the dissemination of the freezing order to several financial institutions without regard to whether they were in any way connected to the appellants and delay.

[58] The learned judge did not deal in detail in his oral judgment with the conduct of the appellant. He merely made mention of it and found that nonetheless this was an appropriate case to grant a receivership order. In my opinion, there was no evidence on which the learned judge could have drawn the inference that it was likely that the receivership would be used as a means of oppression. Also, some of the conduct complained of were addressed in earlier proceedings such as the failure to make full and frank disclosure, and the dissemination of the freezing order and as a result, the freezing order was varied. It is unsurprising that the learned judge having found that JTrust had established a case for the

grant of a freezing order did not find that the conduct complained of by the appellants to be of such significance as to cause him to conclude that it was not just and convenient in all of the circumstances to grant a receivership order.

[59] The principles on which an appellate court would interfere with the exercise of a judicial discretion by a trial judge are well established and have been applied by this court on numerous occasions including **Dufour and others v Helenair Corporation Ltd and others**[24] and **Edy Gay Addari v Enzo Addari**[25] and need not be repeated here. In my view, the appellants have not demonstrated any error in principle by the judge in the exercise of his discretion. I find that there is no merit in the appeal.

[60] For the reasons given above, the appeals against the freezing order and the receivership order are dismissed. The appellants shall pay the respondent the costs of the appeals being 2/3 of the costs assessed in the court below.

I concur.
Rolston Nelson
Justice of Appeal [Ag.]

I concur.
E. Ann Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar

[24] (1996) 52 WIR 188.
[25] BVIHCVAP2005/0002 (delivered 27th June 2005).