IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 162 OF 2019 (RPJ)

BETWEEN

RAIFFEISEN INTERNATIONAL BANK AG

Applicant / Plaintiff

AND

SCULLY ROYALTY LTD
(a company incorporated in the Cayman Islands)

Respondent / First Defendant

LTC PHARMA (INT) LTD.
(a company incorporated in the Marshall Islands)

Second Defendant

MERKANTI HOLDING P.L.C.
(formerly MFC Holding Ltd, a company incorporated in Malta)

Third Defendant

1178936 B.C. LTD.
(a company incorporated in British Columbia, Canada)

Fourth Defendant

APPEARANCES:	Tim Penny QC, instructed by Marc Kish, Ilona Groark and Will Waldron of Ogier for the Plaintiff
	Peter McMaster QC and Heather Froude of Appleby Cayman) Ltd for the First and Fourth Defendants and the proposed Fifth Defendant, MFC 2017 II Limited
	No appearance for the Second and Third Defendants or for the proposed Sixth, Seventh and Eighth Defendants
BEFORE:	THE HON. RAJ PARKER
HEARD:	23, 24 and 29 January 2020
Draft Ruling Circulated:	30 June 2020

Ruling
Delivered: 7 July 2020

Headnote

Freezing orders - good arguable case - unlawful means conspiracy - Fraudulent Dispositions Law (15 of 1989, 1996 Revision) - service out of the jurisdiction - necessary or proper party - alleged asset stripping - cap on world wide freezing order - real risk of dissipation.

Introduction

1. This case concerns a claim by RBI that D2, which is the guarantor of RBI under a guarantee dated 2 January 2017 (the Guarantee), was asset stripped by D1 and other subsidiaries of D1 at an undervalue and for the purposes of putting D2's assets beyond the reach of RBI to avoid enforcement of a claim against those assets.

2. On 30 September 2019 the court granted an injunction *ex parte* against D1 prohibiting the disposal of certain assets worldwide and made an order for service out of the jurisdiction on D4 and others. On 4 November 2019 the court refused an application that the injunction be stayed pending an application to discharge it and made ancillary orders as to compliance and the listing of the *inter partes* hearing and the provision of evidence.

3. The *inter partes* hearing involved a number of applications and arguments from Leading Counsel for RBI, Mr Tim Penny QC, and Leading Counsel for certain of the defendants (D1, D4 and D5) (the represented defendants), Mr Peter McMaster QC, on 23 and 24 January in Cayman and on 29 January 2020 by video link from London. I have also had the benefit of extensive written argument from both sides.[1] There is also substantial factual and expert written material before the court in addition to the material provided at the *ex parte* stage.[2]

4. Mr McMaster QC advanced a number of arguments that there is no good arguable case and/or serious issue to be tried against any of the represented defendants (D1, D4, and D5), no real risk of dissipation, no need for injunctive relief, that the jurisdictional gateways are not satisfied in respect of D4, and that the Cayman court is not the proper forum for the claim. I have rejected Mr McMaster QC's arguments.

5. At the conclusion of the last hearing I indicated that I would provide the parties with a note of my decisions with reasons to follow in due course. I also made it clear that

[1] Mr Penny QC's written submissions ran to 109 pages at the *ex parte* stage and 207 pages at the *inter partes* stage.
[2] Smith 3, 4 and 5, Morrow 1 and 2, Dellemann 3, 4 and 5, Lawler 3, Knoetzl 1 and 2, Wolf Theiss 1.

no party would be prejudiced in relation to an appeal by receiving my reasons subsequently, because time will only start to run in respect of any appeal upon provision of the written reasons. I provided that ruling on 3 February 2020. In summary I granted RBI's continuation application in respect of the WFO against D1, rejected D4's application to set aside, granted RBI's WFO application against D5, granted RBI's application to amend to join D5, D6, D7 and D8 and granted permission to serve the amended claim outside the jurisdiction on D6, D7 and D8 as well as D2 and D3.

6. These are now my written reasons.

The parties

7. RBI, Raffeisen Bank International AG, the Plaintiff, is the obligee/creditor under the Guarantee provided by D2 under a Credit Facility Agreement with certain borrowers who were all at the time subsidiaries of the MFC group. RBI is an Austrian bank headquartered in Vienna and is Austria's second-largest bank. It is listed on the Vienna stock exchange.

8. D2, LTC Pharma (Int) Ltd, is the guarantor under the Guarantee and by reason of a demand having been served on 21 February 2018 is facing liability under the Guarantee. It is a Marshall Islands incorporated entity following a re-domicile on 18 July 2017. Prior to that it was incorporated in British Columbia, Canada. It takes no part in these applications, but the serious allegations made concerning the movement of its assets is the reason why RBI brings these proceedings.

9. Following the Plan of Arrangement which reorganized the MFC group, D1, Scully Royalty Ltd, became the parent entity of the MFC group and the 100% ultimate owner of D2, until D2 was transferred out of the MFC Group later in 2017. D1 is a Cayman entity incorporated on 5 June 2017.

10. D3, Merkanti Holding PLC, is a Maltese entity which is also owned by D1. It is the immediate parent entity of the Merchant Bank asset.

11. D4, 1178936 B.C. Ltd, is a British Columbia company, also a subsidiary of D1 and so also within the MFC group.

12. D5, MFC II Ltd, is a Cayman entity which on its incorporation was 100% owned by D1 and which became the immediate parent of D2.

13. D6, 1128349 B.C. Ltd, is a British Columbia company within the MFC group.

14. D7, IEM Services Co Ltd, is a Marshall Islands company within the MFC group.

15. D8, LTCM Asset Private Ltd, became the owner of D2 in late 2017 when D2 was transferred out of the MFC group. It is or was a Marshall Islands company.

16. Leading Counsel for RBI, Mr Penny QC, made it clear at the *ex parte* stage that these proceedings and applications were intended to be a first step to enforce the Guarantee against D2 and that in due course RBI may bring court proceedings against D2 under the Guarantee, most likely in the Marshall Islands, and/or in Austria by way of arbitration in order to obtain an enforceable judgment/award against D2 for the debt allegedly due.

17. At the date of the *ex parte* injunction this debt allegedly stood at EUR 43,776.378.81.

The parties' submissions on the continuation of the WFO against D1

18. Mr Penny QC points to dispositions of shareholdings from D2 to D1 and its subsidiaries, the estimated value of which at the time of the transfers was between C$216m and C$437m. He argues that those transactions should be set aside and that the shareholdings in question, or the value of the same, be restored to D2 because those dispositions were made for no apparent value or at an undervalue, pursuant to a conspiracy made in bad faith and with an intent to defraud, so as to defeat the obligations owed by D2 to RBI.

19. Demand was made under the Guarantee on 21 February 2018. At the time of the Guarantee D2 was listed on the New York Stock Exchange and was a publicly traded Canadian parent entity of an international group of companies referred to as 'the MFC group'.

20. The Guarantee is governed by Austrian law and contains an arbitration clause. Apart from the Guarantee no other security was provided to RBI in relation to liabilities the MFC borrowers assumed under a credit facility agreement. The relationship between RBI and the MFC group dated back to around 2001 and appears to have been built on trust with little in the way of documented security. RBI has lent hundreds of millions of Euros to the MFC Group. MFC Group's exposure to RBI is far wider than the amount claimed under the Guarantee.

21. A Plan of Arrangement, sanctioned by the Canadian courts, restructured the MFC group with effect from 14 July 2017. RBI was aware of this Plan of Arrangement but not the subsequent transactions which it heralded. The Plan of Arrangement introduced two new Cayman parent 'hold co' companies above D2 namely D1, which became the ultimate holding company for the MFC group, and D5 which became the immediate parent of D2. These two companies Mr Penny QC submitted were the 'corporate masterminds' behind the conspiracy and only two individuals were behind the scheme: Mr Smith and Mr Morrow, both of whom have submitted written evidence to the court.

22. On the same day that the Plan of Arrangement became effective D2 was re-domiciled from British Columbia, Canada to the Marshall Islands without any notice or explanation to RBI.

23. Mr Penny QC argued that this event as well as the transfers which began to take place thereafter, were inconsistent with what had been represented to RBI by D2 over the course of a series of meetings and in documents from December 2016 to May 2017. He said that the effect of this series of representations made at meetings and in documents gave RBI the clear impression that as regards D2 nothing would change as regards RBI's security. The obvious consequence of the re-domicile and transfers is that the assets which would have been available to D2 to satisfy liability under the Guarantee are no longer available.

24. The transfers are the subject of *Fraudulent Dispositions Law (15 of 1989)(1996 Revision)* (FDL) and tortious conspiracy claims in these proceedings. Pursuant to the FDL case relief is sought that the dispositions of shareholdings are set aside and that the shareholdings in question are restored to D2, alternatively that the value of those shares is restored to D2, or is otherwise made available to satisfy RBI's claims against D2.

25. Pursuant to the unlawful means conspiracy case relief is sought seeking the return of the shares and other assets and interests allegedly wrongfully transferred by D2 to D1, D5 and/or their subsidiaries, including D3, D4, D6 and/or D7, alternatively damages payable by D1 and D3 - D8 to D2, alternatively damages payable by D1 - D8 to RBI and further or alternatively declaratory relief against D8 that it was a party to the conspiracy.

26. RBI has engaged Mr Lawler who is a forensic accountant with 30 years experience. He is with Kroll, a division of Duff & Phelps, and has forensically examined the facts and matters at issue in these proceedings.

27. Mr Lawler's initial investigations suggested the following:

    a) D1's consolidated accounts for the MFC Group did not show or explain any of the transfers or reveal any good consideration having been provided for them.

    b) the shares of D3, a company incorporated in Malta, which itself holds the shares of the merchant banking business, were transferred from D2 to D1. Mr Lawler says that on the basis of the MFC group's own evidence the value of the Merchant Bank was between C$21.2m - C$37.9m at the time of the transfer.

    c) D2 was transferred out of the MFC group (Mr Lawlerinitially thought that this must have taken place during 2018, but as it turned out this took place in late 2017). Mr Lawler initially took the view that, as the MFC group continues to hold many of D2's former valuable shareholdings and assets, it followed that these must have been transferred from D2 to D1 and to wholly-owned subsidiaries of D1 prior to 31 December 2018. His initial view turned out to be correct.

d) As for an interest in 'the Scully Mine' (the Mine) which according to the Lawler report is worth approximately C$273m, this asset he submits was transferred away from D2 through a series of convoluted transactions so that the present owner is D4, a company incorporated in British Columbia, Canada, a subsidiary of D1 and which also forms part of the MFC group.

28. There are a number of further transfers to entities which were under the control of D2 which are alleged to have taken place which it is not necessary to detail at this point.

29. The only assets now held by D2 on Mr Penny QC's case are wholly inadequate to satisfy the outstanding debt claimed, being shares in D1 valued at under US$1m as at 28 June 2019 and shares in another Canadian entity which are not valued.

30. Mr Penny QC submits that:

a) it is just and convenient to continue the injunction against D1, the ultimate parent company of the MFC group, as that as far as possible prevents dealings with all of the assets transferred by D2 into the current MFC group, other than dealings in the ordinary and proper course of business. The injunction therefore needs to cover assets owned by D1 and assets owned by D1's subsidiaries worldwide.

b) since the *ex parte* stage it now appears from the evidence disclosed by the represented defendants (D1, D4 and D5) that the case on asset stripping is clear and that there is a very strong if not overwhelming inference, at least for the purposes of interim relief, that this was carried out in order to put those assets out of the reach of RBI.

c) the FDL and conspiracy claims are strong both against those defendants joined at the *ex parte* stage (D1 to D4) but also against the other defendants who are sought to be joined (D5 to D8). He further submits that there is a real risk of dissipation.

31. Mr McMaster QC for the represented defendants submits that:

a) the WFO against D1 should be discharged, alternatively that if it is continued it should be capped to the amount allegedly due under the Guarantee plus any interest that might properly be due (EUR 40.57m).

b) RBI has not demonstrated that it has a good arguable case in relation to the claims made, sufficient to justify the scope of the WFO; that RBI has not established a real risk of unjustified dissipation; that it is not just and convenient to grant the relief; and alternatively that an order worth over C$500 million is oppressive and ought to be limited to the

amount that RBI claims to be owed under the Guarantee, plus interest.

c) there have been no attempts to bring proceedings under the Guarantee and that despite this assets worth in excess of C$500 million have been frozen since September 2019 when the *ex parte* order was granted. This is he submitted is simply a tactic to exert pressure on the defendants to yield to RBI's demands and amounts to oppressive and abusive conduct.

32. Mr Penny QC counters this latter point in part by submitting that there is no need for RBI to take steps to enforce the Guarantee against D2 to establish its claims pursuant to the FDL or in tort. D2 presently has no known assets of any value which would justify taking steps to enforce the Guarantee as yet. The appropriate time for RBI's claim against D2 under the Guarantee to be brought would be when the assets which have been stripped out of D2 or their value are transferred back, so that it can then meet the claim in full.

Good arguable case in relation to FDL and conspiracy claims

33. *The test*

a) The test for a good arguable case in the context of freezing injunctions has recently been held in the English courts to be a not particularly onerous one: see *Lakatamia [2019] EWCA Civ 2203 at § 35 (*where Gee on Commercial Injunctions (6th Edn, 2016 at [12-026] is quoted).

b) *'The central concept at the heart of the test was 'a plausible evidential basis'* - see §38 citing *Kaefer [2019] 2 All ER (Comm) 315* CA

c) The court should look at *'who has the better argument' - see § 73 and §79 of Kaefer per Green LJ.* It is not always necessary for the court to resolve every point in issue between the parties at an interim stage, where it needs to move with due speed and without hearing oral evidence and without the benefit of discovery of documents. A plausible case is not one where the claimant has to show it has 'much' the better argument as long as it can show that it has the better case relatively - see §77, §119 and §117 of *Kaefer*. It is not a 'balance of probabilities' test.

d) There needs to be a good arguable case that there is a real risk that judgment would go unsatisfied by reason of the disposal of assets unless there was a restraint imposed by the court from disposing of them and that it would be just and convenient in all the circumstances to grant the freezing order-approving *Thane Investments [2003] EWCA Civ 1272 at §21 per Gibson LJ.*

Summary of RBI's case against each defendant

34. There are two 'anchor defendants' D1 and D5.

35. D1 is a Cayman Islands exempt company, which is now a publicly traded entity on the NYSE, under the symbol "*MFCB*", which is the indirect recipient of all of the transfers and continues to hold at least an indirect interest in all of the assets that were transferred which remain within the group. It was the direct recipient and still holds over 99% of the shares in D3 which in turn holds over 99% of the shares in the Merchant Bank, with D5 directly holding the only other share. It is also the 100% direct shareholder of D5 - the other Cayman Islands anchor defendant. D1 argues that there is no good arguable case against it.

36. D5 is a Cayman Islands company which was the 100% parent of D2 at all times following the Plan of Arrangement and prior to D2 being transferred out of the group to D8 pursuant to two Cayman Islands law agreements, the latter of which had an exclusive Cayman Islands jurisdiction clause. It was the indirect recipient of all of the shares transferred by the Dividend as well as the direct recipient of M Financial Corp. The Dividend was entered into on terms between D2 and D5 which were governed by Cayman Islands law and subject to exclusive Cayman Islands jurisdiction. It received the only cash consideration of C$41m for the interest in the Mine which was paid pursuant to a Cayman Islands law agreement with an exclusive Cayman Islands jurisdiction clause. It continues to be 100% shareholder of the companies that hold the interest in the Mine (D4 and D6) the traceable proceeds of which include the C$41m D5 received. It also holds one share in D3 representing a small indirect interest in the Merchant Bank. D5 argues that there is no good arguable case against it.

37. D2 is a Marshall Islands company, having been re-domiciled there as of 18 July 2017. It has by the Dividend to D5, the transfer of the shares of D3 to D1 prior to its leaving the group and the transfers of interest in the Mine and of CTF MEG International Services (CTF), divested itself of substantially all of its assets. All of the relevant transfers and the Dividend have agreements associated with them which were subject to Cayman Islands law and exclusive jurisdiction or involved Cayman Islands companies. It takes no part in these proceedings.

38. D3 is a Maltese company which holds over 99% of the interest in the Merchant Bank, the remaining share of which is held by D1 which is a Cayman Islands company. D3 is over 99% owned by D1 a Cayman Islands company to which it was transferred by D2. Its remaining share is held by D5 another Cayman Islands company. It holds 85% of the shares in MFC A and MFC D which were transferred by D2 by the Dividend indirectly to D5. On or around July/August 2019 it charged those shareholdings to the amount of EUR 25 million and a bond issue on the assumption that the companies were worth EUR 35 million.

39. D4 is a British Columbia company and is the present holder of the royalty interest in the Mine. It received that interest by transfer from 1178923 B.C. Ltd (117 BC) when

117 BC was wound up. 117 BC had received the same from D6 in exchange for its shares which followed D6's original receipt of the interest (including the leasehold interest) from D2 in exchange for D6's shares. D6's shares were on the same day transferred to M Financial Corp with a cash payment of C$41m which was paid to D5, a Cayman Islands entity, pursuant to a Cayman Islands law agreement with an exclusive jurisdiction clause. It is to be inferred according to RBI that D4 is a shell company through which transfers were made at an undervalue or for no consideration to conceal assets from D2's creditors. D4 argues that there is no good arguable case or serious issue to be tried against it under the FDL or conspiracy and in addition there is no good arguable case on permission to serve out. It does not accept that it is a necessary or proper party to the claim or that the Cayman court is the proper forum to resolve the claims against it.

40. D6 is a British Columbia company and is the present holder of the leasehold interest in the Mine. Its parent company is D5, a Cayman Islands entity, whose parent is D1, another Cayman Islands entity. It received the leasehold interest in the Mine by transfer (which also included the royalty interest at the time) from D2 the consideration for which was its own shares (in D6) which was paid as explained above to D5. It then transferred the royalty interest to D4 through the transfer of D6's shareholdings in 117 BC as explained above. It is to be inferred according to RBI that D6 is another shell company created for the same purpose as D4.

41. D7 is a Marshall Islands company and is the 100% direct shareholder of Notine Holdings Inc., 9.9% direct shareholder of MFC A and MFC D and directly holds 94.5 % of the shares in Sai Kung Properties LP which itself holds shares in MFC A and MFC D. All of these entities were transferred away from D2 to D5 pursuant to the Dividend (defined below). Since then D7 has transferred 85% of the shares formerly held in MFC A and MFC D to D3 which D3 then charged the amount of EUR25 million in the bond issue and transferred to Brock Metals a third party. D7's ultimate parent entity is D1.

42. D8 is a Marshall Islands company which purchased D2 from D5 (a Cayman Islands company) pursuant to two Cayman Islands law agreements one of which contained an exclusive jurisdiction clause. It also received the interest in the Mine and CTF through its shareholding in D2. CTF was then sold back to the MFC group. RBI contends that D8's purchase of D2 was at an undervalue and also had no commercial purpose except to assist the concealment of the transfers from D2's creditors.

The history of the transfers

43. At the time that the Guarantee was entered into D2 was the New York Stock Exchange listed and publicly traded Canadian parent entity of the MFC group. At that time D2 held direct or indirect shareholdings in all of the assets and subsidiaries of the MFC group.

The Plan of Arrangement

44. RBI understood that the MFC group was to be restructured such that it would gain two Cayman Islands 'topcos' one of which would assume the role of being the public NYSE listed parent, with D2 becoming a private wholly-owned subsidiary. That was achieved by way of the Plan of Arrangement which was approved by the directors of D2 and its shareholders and by the Supreme Court of British Colombia on 12 July 2017.

45. RBI maintains that over the course of December 2016 to May 2017 the MFC group had represented to it that there would be no other changes to the group structure and in particular that D2 would continue to hold all of the shares and interest in the Scully Mine and would remain within the group. The case, which is disputed by the represented defendants, is put on the basis of false representations intended to be relied on by RBI and others which were continuing and which were at the time they were made false or which became false at the time of each of the dispositions or transfers, as well as when D2 itself was transferred out of the group.

D2 is re-domiciled and becomes owned by D8

46. D2 was then re-domiciled from British Columbia, Canada to the Marshall Islands without prior notice or explanation to RBI which was effective as of 18 July 2017. D2, following the Plan of Arrangement was a 100% subsidiary of D5 (a Cayman islands company) which was in turn a 100% subsidiary of D1. On or around 29 September 2017 D5 sold its shareholding in D2 to D8 (then a Marshall Islands company) pursuant to an agreement governed by Cayman Islands law for the consideration of C$2. RBI maintains that there is no obvious commercial basis for the sale of D2 by D5 to D8. RBI maintains that it clearly shows that D2 was being asset stripped by the transfers and redomiciled to a different jurisdiction in which more limited company information is publicly available, and that D2 itself was transferred out of the group itself.

The Dividend to D5

47. On 21 August 2017 D2 declared a dividend (the "Dividend") of all of the shares it held in two entities (M Financial Corp and KHD Investments Ltd) in favour of its then parent shareholder D5. M Financial Corp held shares in a number of valuable subsidiaries including a Ugandan mine and a Chinese medical business.

48. The board resolution provided that D2 had a surplus of approximately C$247,486,000 comprised of its investments in the shares of those two entities and that this was available for dividends. On the same date D2 and D5 entered into a Cayman Islands law and exclusive Cayman Islands jurisdiction agreement by which D2 agreed to assign and D5 agreed to receive all of the shares D2 held in one of the entities for the stated consideration of US $1. On the same date D2 executed a share transfer form for its shareholding in this entity in favour of D5 without any specified consideration (except that good and valuable consideration is stated to have been

provided). RBI contends that an equivalent agreement and share transfer form were executed as regards the other entity, but has not seen any documentation to that effect as yet.

49. By these agreements D2 transferred the entirety of its indirect interest in M Financial Corp which held assets in a number of other entities to D5 for US$1. RBI contends that the real value transferred was C$247m and so there was a transfer at a substantial undervalue.

50. Mr McMaster QC submits that the real issue is whether the purpose of the Dividend was to put the assets beyond the reach of D2's creditors.[3] He argues that a dividend transaction does not result in value to shareholders and cannot be measured in that way.

51. Mr Lawler says D2 was not in a position to pay full value at the time and the effect of this transaction left D2 insolvent. The Guarantee liability that the group had should have been provided for in full for up to EUR 130m. This in effect rendered D2 insolvent and has an effect in relation to the second stage of the transaction, the consideration for which was an offset of intercompany liabilities.

52. Mr Lawler also says that this Dividend was unlawful under both UK and Marshall Islands law because D2 was rendered insolvent as a result of the Dividend and it should not have been paid.

53. Mr Penny QC submits in relation to this transaction that RBI has at least a good arguable case that the Dividend and the exercise by which it was arrived at were part of a fraud on RBI and D2's other creditors and were not executed in good faith.

54. After the Dividend was declared D2 had approximately C$60m of assets which it soon sold. It sold the merchant bank for €12 million, the interest in the Mine for C$41 million and its interest in CTF for C$3.2m. No evidence has been adduced that it had any other assets. At the time of the Dividend, D2 had contingent liabilities in the form of guarantee claims of C$130m.[4]

55. No consideration was paid to D2 for these transfers.

56. A month later D2 was sold to D8 for what is purported to be an arms length figure of US$2.

57. As a matter of law the Dividend is a disposition under the FDL by analogy with English section 423 Insolvency Act 1986 proceedings.[5]

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[3] See paragraph 114 of his skeleton argument

[4] The Guarantee had been called on in February 2018 and should be looked at as a contingent liability of D2 at the time with the benefit of hindsight for the purposes of the *FDL* claim

[5] See BTI 2014 LLC v Sequana [2019] Bus. L.R. 2178

58. He also submits, relying on a letter of advice of 12 December 2019 from RBI's Marshall Islands lawyers, that RBI has at least a good arguable case that the Dividend was unlawful as a matter of Marshall Islands law.

The merchant bank transfer of D3 to D1 and D5

59. On 23 August 2017, 2 days after the Dividend transaction above, D2 sold all of the shares it held in D3 (which held all but one of the shares in the Merchant Bank) to D1. The stated consideration was said to be an intra MFC group set off of company debts in the amount of C$18.1m.

60. RBI do not accept that these debts existed or that any consideration was provided. There is no evidence to support them. RBI does not accept that the value of any debts represented full consideration for the shares in D3 and the Merchant Bank at that time and in any case they were not of any real or actual value to D2 because the consideration provided by D2 was enhanced. This is because it conferred on D1 a significant benefit beyond the value of a claim on those debts in D2's insolvent liquidation.[6]

61. Further RBI contends that the transaction may have amounted to a preference in the light of D2 having been rendered insolvent at the time of the sale of the Merchant Bank. If debts did exist Mr Lawler is unable to assess the fair value of D3 including the Merchant Bank at the time of the transfer but states that in the light of valuations contained in audited financial statements and accounts he has reviewed of the MFC group, the transaction appears to be at an undervalue - see Lawler 3 at §152-153. The Merchant Bank had been previously valued in the accounts at C$80m and was transferred for EUR 12m.

62. RBI also contends that even if such debts existed and were set off and for a sum which constituted full value for the transfer of D3 and the Merchant Bank this is still a problematic transfer. This is because it is said to have been paid exclusively by way of the set-off and reduction of debts owed by D2 to other MFC group entities without any cash or assets being transferred to D2 and after it had been rendered insolvent by the Dividend. At the time RBI contends that D2 owed EUR 105m to its banking creditors including RBI and so the consideration was of no real or actual value because of D2's insolvency. D2 did not receive any real economic benefit from a transaction that wrote off part of its indebtedness if those with an interest in the company time were its creditors rather than shareholders. Sale of shares to a related party in return for writing off D2's liability had the effect of preferring the position of D5 compared with that of the creditors.

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[6] See *Pena v Coyne [2004] 2 B.C.L.C. 703 per Hildyard J at § 109-115 and Phillips v Brewin Dolphin [2001] 1 WLR 143 HL at § 26 pp 153B per Lord Scott -for* where *ex post facto* events may be taken into account when assessing the value of consideration in a claim alleging a transaction at an undervalue.

63. Mr Penny QC submits that RBI has at least a good arguable case that the transfer concerning the Merchant Bank was at an undervalue as the basis of the claim which is pursued pursuant to the FDL and in tort. Mr McMaster QC submits that there is no good arguable case for this.

D2 leaves the group

64. On 29 September 2017 D2 left the group. The represented defendants accept in evidence that D2 had left the group and contend that this was obviously through an arm's-length sale to a third party-the intended D8.[7] Mr Smith asserts that D2 was solvent at the time although onlyUS$2 was paid for it. At the time D5 owned the shares in D2 and the agreement to sell to D8 contains a Cayman Islands law and a Marshall Islands jurisdiction clause.

Transfer of the interest in the Scully Mine to D6 and D5-first transfer

65. On 26 October 2017 D2 sold the interest in the Mine to D6 a British Colombia entity that was incorporated in or around 27 July 2017. The stated consideration was C$40,918.725 to be paid by D6 to D2 by allotting and issuing shares in D6 in favour of D2. The represented defendants' evidence indicates that the price is attributable to the royalty interest and receivables which in itself according to Mr Lawler is not problematic, but RBI contends that it cannot be described as a transaction at arm's-length with a third party for value. D2 received consideration at best equating to exactly what it already had.

66. On the same date D2 then sold the shares in D6 to another entity M Financial Corp (a subsidiary of D5) with the stated consideration to be the same purchase price, but this was not paid by that entity to D2, rather it was paid to D5. This was said to be a discharge of an obligation on the part of D8 to D5.On 6 March 2018 D2 transferred legal title to the interest in the Mine to D6 for C$1.

67. The net effect of this is that the interest in the Mine was held by D6 which was a direct subsidiary of D5. Mr Penny QC submits that no consideration moved to D2 for the transfer of its shares in D6 by which it also transferred the interest in the Mine to a subsidiary of D5. No cash was paid to D2 save for C$1. The only consideration which could be said to have moved in this transaction was between D8 and D5. He submits that the money has simply gone round in circles within the MFC group. Mr McMaster QC submits that there is no good arguable case that the transfer was at an undervalue or that it was made with an intent to defraud.

The CTF transfer

68. On 1 March 2018 D2 sold its interest in a company called CTF to a Chinese company for C$3.2m. The purchaser's ultimate parent was D1 and as such is an entity within

[7] Smith § 190-195

the MFC group. Its immediate parent since 6 November 2017 was a company which is ultimately a subsidiary of D5. There is no evidence that this consideration has been paid to D2.

69. The MFC group appears to have subsequently sold CTF to a third party by year end 2018 at a price of C$4m which is what it had been valued at in December 2017. It was also valued at C$5.1m in September 2017. Mr Penny QC submits that following *Pena* as a matter of impression the transfer was also made at an undervalue. Mr McMaster QC submits there is no good arguable case on the FDL or conspiracy claim for this.

Transfer of interest in the Scully Mine by D4 to D6 -second transfer

70. A year earlier when D2 sold its legal title to the interest in the Mine and declared a trust in favour of D6, it entered into a settlement agreement with a British Columbia company called Tacora Resources Inc. (Tacora) as regards its interest in the Mine. On 17 November 2017 D2 and Tacora entered into a sublease of the Mine pursuant to which Tacora as lessee was obliged to make royalty payments to D2.

71. Mr Penny QC submits that the document appears to have been designed to conceal that D2 had been transferred out of the MFC group some two months prior, in September 2017, and was now owned by D8, and that it had been re-domiciled for some four months by that time in the Marshall Islands. On 4 October 2018 D6 and another entity (117BC) incorporated in British Columbia entered into three further agreements by which D6 agreed to split the interest in the Mine such that 99% of the royalty interest was transferred to 117BC which was further granted significant security interests in the leasehold interest that remained with D6 for a stated consideration of C$29.7m but did not receive any real economic benefit from a transaction that wrote off part of its indebtedness with those with an interest in the company at the time (who were its creditors rather than its shareholders) and paid by 117BC allotting and issuing shares in favour of D6. He submits that by the end of 2018 D6 transferred its shareholding so that D4 became the immediate parent of 117BC.

72. The upshot of this convoluted series of transactions is, according to Mr Penny QC, that D4 presently holds the royalty interest in the Mine after transactions which were of no value or at an undervalue. The entire value of the interest in the Mine had previously been sold by D2 to D6-see the first transfer above.

73. In the alternative he contends that the traceable proceeds of the transfer of the interest of the Mine away from D2 include the C$40,918,726.

74. He submits that there has been no proper account from the defendants as to the transfer of the shares in 117BC from D6 to D4 and there is no credible case that the transfer of the interest in the Mine had been made at a proper value. The only consideration that appears to have been provided by D4 was that it would bear the costs of winding up 117BC.

75. No commercial rationale was put forward for this series of transfers and the evidence shows that 117BC was in fact wound up on 4 January 2019, less than four months after it was incorporated, having assigned the interest to D4 on 14 December 2018. He submits that these transfers were carried out in an attempt to protect the interests of the Mine from D2's creditors at a time when the Mine would be restarting operations which led to it being significantly revalued in November 2018 at C$218m.

Analysis and decision

76. A permanent feature of this case has been that notwithstanding the detailed and extensive narrative that has been provided by Mr Penny QC both extensively in writing and orally which support the submission that all of the material activity that has been detailed was intended to put D2's assets out of the reach of RBI, no overall counter narrative has been advanced by Mr McMaster QC. There is no positive case advanced explaining the purpose and legitimacy of the transactions and conduct complained of. Mr McMaster QC, no doubt on instructions, has not dealt with the evidence as a whole but chosen to deal with only certain aspects of it and indeed has attacked the reputation of RBI. That strategy is of course a matter for his clients, but it is relevant to the court's approach to and assessment of the basis for the relief claimed.

77. Mr Penny QC makes a number of points about the represented defendant's evidence from Mr Morrow and Mr Smith:

a) He describes the attempt to disparage RBI[8] as irrelevant, prejudicial, not grounded in fact, denied and to be disregarded.

b) He describes the allegation that the bank engaged in financial chicanery as untrue, denied, not raised at the time and not supported by any evidence.[9]

c) The contention that only an electronic signature in an electronic copy of the Guarantee was provided is demonstrably untrue.[10]

d) The assertion that there was a partnership between RBI and D2 is inherently fanciful and unlikely, not supported by any documents and inconsistent with contemporaneous documents and denied[11]. It relies on oral agreements and is misleading and does not make out an arguable case under Austrian law for a partnership.

[8] Smith 5 § 15-21
[9] Smith 5 §94
[10] Smith 5 §26 26 and ref 114.3 and Morrow §1, 23-28.
[11] Smith5 § 36-75,Dellemann3 §16and Zimmerman 1 § 8-11

e) The contention that Mr Smith became cautious in his dealing with RBI following the insolvency of the German Pellets firm and in relation to not disclosing at the time the reasons behind the new domicile for D2 is untrue and is a deliberate smokescreen to cover up the deliberate withholding from RBI of information and is inconsistent with the ongoing liaison between the MFC group and RBI.[12]

f) The contention that the business relationship between RBI and the group was based on verbal assurances and agreements is inherently unlikely, not evidenced by the documents, inconsistent with those documents that are contemporaneous and untrue.[13]

g) The contention by Mr Smith and Mr Morrow that the bank repeatedly assured the group that it would not call on the Guarantee is rejected by the banks witnesses, inconsistent with the documents and inherently unlikely and untrue.[14]

h) The contention that the parties always understood that the Guarantee once given in documentary form would never be called on and was 'just a piece of paper' to allow RBI to meet some regulatory and internal requirements and reduce the risk and impact of a substantial loan to the group (for mark to market losses which would negatively reduce RBI's equity).[15] Mr Penny QC described as a staggering allegation. It would amount to an attempt to mislead regulators, representatives of RBI internally, and others including investors, shareholders and creditors and should colour the approach the court should take to the represented defendants' evidence generally as being inherently absurd and fundamentally untrue. The Guarantee was still included in the group's financial statements as a contingent liability, which if it was a sham all along, would have consequences of misleading auditors, creditors, shareholders and the like.

i) The assertion made by Mr Morrow that he repeatedly informed KPMG that the Guarantee was invalid and of no value is inconsistent with the contemporaneous documents, inherently improbable and untrue.[16]

[12] Smith 5 §76 and 178
[13] Smith 5 § 84 and 86
[14] Smith5 § 96 ref 114.5(c) and 187.3 and Morrow 1 §19
[15] Smith5 § 109 ref 114.5
[16] Morrow 1 § 18

j) The contention that when Mr Morrow signed the guarantee in 'wet ink' he did not intend to create any legal obligation is self-serving, inherently improbable, and untrue.[17]

78. Mr Penny QC put these points forward in order to show that RBI has the better of the argument at this stage and the represented defendants' evidence has no plausible basis.

79. I agree that the represented defendants' evidence on these issues is questionable at the very least and that Mr Penny QC has the better of the argument at this stage.

80. I deal now with the thrust of Mr McMaster QC's submissions.

The FDL claim on the Mine transfer

81. Mr McMaster QC submits that the court should not look beyond the transfer by D2 to M Financial Corp pursuant to which C$41m was paid as consideration.

82. However, no good reason has been advanced as to why the court should so limit its enquiry. The court should look at the further transfers of interests in the Mine and indeed all the transfers as a whole.

83. Even if one looked at the transfer in a more limited way no consideration was paid to D2, nor has any proper explanation been given as to why no benefit was derived from the transfer of the asset and interests which it once held. It follows that there is a plausible evidential basis for the FDL claim in respect of the transaction being at an undervalue and the motivation for the transfer, which it is to be inferred was to defeat a claim against D2, and the value related to it.

84. There is also a strong connection to the Cayman Islands. D5 is a Cayman Islands company and the agreement which underpinned the transfer had a Cayman Islands law and jurisdiction clause.

85. Mr McMaster QC then argues that any order following trial would be futile as it would not be followed by overseas courts (as part of the argument relating to D4's set-aside challenge).

86. However RBI is seeking an order *in personam* against D1-D7, not title to property situated overseas. There is no evidence before the court to the effect that orders made would or would not be followed in any particular relevant jurisdiction, for example in Canada or Malta.[18] In the circumstances the court should assume that the usual process of recognition and enforcement of a foreign *'in personam'* order

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[17] Morrow 2 § 12

[18] Unlike in Erste Bank v *VMZ Red October [2015] 1 CLC 706* where significant evidence of foreign law had been put before the court

would take place following trial and judgment in the Cayman Islands-see *Dicey Chapter 14.*[19]

The conspiracy claim on the Mine transfer

87. I bear in mind, as Mr McMaster QC correctly submits, that RBI has the burden of satisfying the court that: the claim against D1 raises a serious issue to be tried/good arguable case on the merits; the amended claim against D4 raises a serious issue to be tried/good arguable case on the merits; D4 is a necessary or proper party to the claims against D1; joinder of D4 would confer a real advantage on RBI; and the Cayman Islands are clearly or distinctly the appropriate forum for trial of the dispute.

88. Mr McMaster QC argued that:

a) there is no serious issue to be tried/good arguable case on the conspiracy claim regarding the transfer of interest in the Mine. This is part of D4 set-aside challenge but also adopted by D1 and D5.

b) the rights of the mine in real property were in Canada and the royalty agreements were governed by the laws of British Columbia, the Federal Laws of Canada or the laws of Newfoundland and Labrador.

c) when D2 disposed of its interest in the mine to 112 BC (D6), a British Columbia company, the agreement was governed by the laws of British Columbia and the Federal Laws of Canada.

d) through a series of transactions by agreements not governed by Cayman law D4 acquired its interest in the Mine from 117 BC, another British Columbia company which was wound up pursuant to the provisions of British Columbia and Canadian Federal Law.

89. For the reasons given above in relation to the FDL claim I have formed the view that there is a plausible evidential basis for the conspiracy claim on the Mine transfer. There are undoubted connections to Canada but they are not determinative of the issue. As to the balance of Mr McMaster QC's arguments, I summarise them and the reason I have rejected each of them below.

e) He argues that D4 did not exist at the time of the first transfer having only been incorporated on 11 September 2018 and so could not have been party to the conspiracy or for the damage caused when the shares were transferred from D2.

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[19] See for example *Bandone [2008] CILR 301 per Henderson J* where the Cayman court gave effect to the *in personam* order of the Brunei court where it did not disturb the structure and effect of the Cayman legal system.

90. However, a party can join a conspiracy at a later stage, even if the conduct had started earlier, once it had been incorporated.[20] D6, D4, D1 and D2 were all involved in the arrangement to transfer the Mine's assets from D6 to D4. I find that there is a good arguable case that D4 is a party to the conspiracy to cause loss to cause damage and assisted by putting assets beyond the reach of RBI.

f) He argues the tort is governed by Canadian law and does not satisfy the 'double- actionability test'.

91. However, since no evidence of Canadian law has been adduced it is to be inferred that it is substantially the same as Cayman Islands law on this point.[21]

g) He argues the rule against reflective loss (which would ordinarily bar a creditor of a company from pursuing a wrongdoer from harm caused to the company) bars the tort claim in its entirety.

92. This is dealt with in further detail below. The submission is not sound because the principle does not appy to the grant of relief *other* than damages and further where, as in this case, the damages sought are payable to D2 rather than RBI, it is also inapplicable. Damages in any event will not be an adequate remedy for RBI's loss if they cannot be recovered by reason of the application of the rule against reflective loss.[22]

h) He argues D4 is not a necessary or proper party and the joinder of D4 does not confer a 'real advantage'.

93. This is not the case, since if there is a trial concerning transfers to D4 then D4 should be a party to it so that it can participate. There is a serious issue to be tried against D4 as a transferee of the successor in title of the mining interests.

i) He argues if the Dividend claim is good it will provide adequate relief and no order against D4 would be necessary.

94. It is not relevant to this question that D1 is D4's ultimate parent and is a party. RBI is entitled to advance its case, which has a plausible evidential basis against both D1 and D4 and there is a real advantage in having D4 at trial. There is a clear juridical advantage in having all alleged conspirators at the same trial so all the evidence and argument can be considered together. That would be fair to all parties and in the interests of justice.

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[20] See *Clerk &Lindsell § 24-97* and *Kuwait Oil [2000] 2 All ER (Comm) 271 at § 3, 106, 111 and 132*.

[21] RBI did submit some last-minute Canadian law evidence, which I did not exclude. However, given the lateness of that evidence and the relevant rule in Dicey, it is unnecessary for me to rely upon that evidence.

[22] See *Zhikun* at § 81 which at § 76 also makes clear that if the rule bars the action in damages, that does not mean there is no injunctive remedy available.

j) He argues the court should take the view that proceedings have not been brought to enforce the Guarantee and that it is to be inferred that RBI has no intention to do so. Freezing orders are made in support of claims that are or are definitely going to be pursued and the relief RBI seeks is consequently abusive and should not be granted. D1 has a market capitalisation of US$150m, has had its assets frozen and is well able to pay any claim due.

95. The court is not prepared to take that view or that it has been shown that there are sufficient realizable assets at D1 to meet the claim. These Cayman Islands proceedings seeking in effect a reversal of the transfers made in order for any subsequent litigation RBI commences to be worth 'powder and shot' are in themselves expensive and time intensive. I am prepared to accept Mr Penny QC's submission that he could not have made the submissions he did at the *ex parte* stage of the proceedings if his client had no intention to commence proceedings.

96. Moreover, there is no basis upon which the court can make the inference that no claim would ever be brought under the Guarantee. The FDL claim is a freestanding claim not dependent upon any underlying proceedings in any case. Mr Penny QC explained RBI's strategy of ensuring there are the assets to support a claim under the Guarantee first which I accept.

k) He argues as a matter of Austrian law the Guarantee was not properly signed so as to meet the necessary formality requirements under Austrian law - also known as the 'wet ink' point.

97. This is a matter for trial as the parties' respective experts have given opposing views on the issue. It will depend upon the factual evidence as well. On the evidence as presented[23] I find that RBI has at least a good arguable case that the Guarantee is valid.

98. The final argument Mr McMaster QC made is in relation to the necessary 'intent to defraud'. The reason I reject it on the facts is set out below.

***Whether there is a good arguable case for the FDL and conspiracy claim regarding the* Dividend**

99. Mr McMaster QC submitted that the critical question is whether the purpose of the Dividend was to defraud creditors. He relies on Cayman Islands authority[24] to maintain that this means it will have to be shown D2 was knowingly acting to defeat obligations that it owed to RBI as a contingent creditor under the Guarantee and entered into this transaction with that very intention. Proof of fraud or equivalent wrongdoing in a civil case is on the balance of probabilities, but the court does not

[23] From the Knoetzl and Wolf Theiss opinions and Mr Morrow's evidence
[24] *Weavering [2015] (1) CILR 45*

readily assume fraudulent intent and all the facts must be scrupulously considered. I accept this submission.

100. However, I find that there is a plausible evidential basis that the purpose of the Dividend was to defraud creditors of D2. This is because of the nature of the transfer in question is unnecessarily complex and convoluted. It was not revealed and the surrounding documentation was not made clear to third parties, regulators and courts. In all the circumstances it is to be inferred that the Dividend was part of the unlawful scheme to assist D2 to avoid its contractual obligations to RBI.

101. I note in this context that the Excel spreadsheet upon which Mr McMaster QC based his case on the lawfulness or otherwise of the Dividend was not disclosed in native format, despite being requested, and therefore RBI was unable to interrogate when it was created in order to test the provenance and authenticity of the document.

102. At the time of the transaction there was C$130m of guarantees which were the subject of demands and it is not appropriate to split them up and only look at the Guarantee at issue in this action against the Dividend that was declared. Mr McMaster QC referred to meetings between the parties at which 'a haircut' was mentioned, but there are no notes to support the assertion that this was agreed and the court is not able to conclude from what Mr Morrow says happened at the meeting that there was a good reason not to make any provision for the guarantee liabilities.

Whether there is a good arguable case on the transfer concerning the Merchant Bank under the FDL or on the basis of conspiracy

103. Mr McMaster QC argues that consideration was for full value, there is an insufficient case on dishonesty and that EUR 12.2m was not so low to show an undervalue.

104. In my view Mr Penny QC has the better of the argument on this and that the transfer was at an undervalue. This debt, if it existed, was of little if any value to D2 or RBI compared to the value of the Merchant Bank.

105. It is telling in my view that there is no evidence adduced by the represented defendants of the terms of any intercompany debt which is relied upon. I accept that at the time there is a good arguable case that D2 was insolvent.

Result of transfers

106. In summary, I accept Mr Penny QC's submissions that:

a) There is at least a good arguable case that these transfers were made with the express purpose of D2 avoiding its obligations to its creditors. They were carried out without notice to RBI or indeed other creditors, and were made for no value or at an undervalue.

b) The effect of this is that D2 has been left without any substantial assets save for shares worth less than US $1 million.

c) As a matter of Austrian law there have been arguable breaches the terms of the Guarantee in a number of respects.

d) There is a plausible evidential basis for the case set out in detail at § 38-39 of the Statement of Claim and that representations were made by D2 to RBI between December 2016 and May 2017 that all of the shares and interest in the Mine would remain held by D2 notwithstanding the Plan of Arrangement.[25]

e) The represented defendants' evidence in relation to these representations is contradictory and weak. It consists of denying that there were any representations and asserting that RBI had misunderstood or misconstrued what was being represented. It is also suggested by the represented defendants' evidence that it was obvious that D2 would not remain in the MFC group and therefore the MFC group did not think to explain these matters to RBI. The represented defendants' evidence is to the effect that these were well known and readily discoverable reorganisations. That in my view is not credible in view of the conduct of the represented defendants and the lengths undertaken to move companies and assets in this case.

f) The Plan of Arrangement, as approved by the directors and shareholders of D2 and the Canadian courts, made no mention of the proposed transfers.

g) The evidence shows evasive conduct and a lack of candour on the part of the MFC group following the Plan of Arrangement leading up to mid-2018 when relations finally broke down with RBI.

h) The represented defendants have not explained how and on what terms, including as to any consideration, were the shares of 117 BC transferred from D6 to D4. Nor what debt if any was it that was set off as the consideration for the transfer concerning the Merchant Bank.

i) Mr Lawler's evidence assists the court to form the view that MFC group's accounts were opaque and there were breaches of accounting standards within them.

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[25] Particulars of these alleged representations are given relating to a memo dated 12 December 2016, a letter to shareholders at the front of the 2016 annual report, at a meeting on 19 April 2017 and again at a meeting on 8 May 2017

107. This it seems to me in totality amounts to more than a plausible evidential basis for RBI's case.

The legal principles

The FDL and tortious conspiracy claims.

The FDL claim

108. It is RBI's case that each of the transfers of D2's assets to D1 or wholly owned subsidiaries of D1 are relevant *dispositions* under the FDL. This is not in dispute. A dividend can also be set aside under this provision.[26]

109. It is not in dispute that the dispositions were made by a transferor which either directly or indirectly held the assets of D2 or which were held by a direct subsidiary of D2.

110. It is not in dispute that there were a number of transferees immediately or by way of successor in title.

111. As to the contention that there is a good arguable case that each disposition was at an *undervalue,* save for the Dividend, which is disputed for other reasons, all of the transactions are contested in relation to this issue.

112. The contention that there is a good arguable case that each disposition was made *with an intent to defraud* on the part of the *transferor* is also contested.

113. *Intent to defraud* is defined in section 2 FDL as meaning *'an intention of a transferor willfully to defeat an obligation to a creditor'*; and obligations means *'an obligation or liability (which shall include a contingent liability) which existed on or prior to the date of a relevant disposition, and of which the transferor had notice".*

114. Under English law in order to establish a claim under section 423 of the Insolvency Act 1986 to set aside a transaction made at an undervalue (as a fraud on creditors) the creditor needs to show that it was *a* purpose of the transferor to defeat its creditors. It need not show that this was the *dominant* purpose or the *sole* purpose.[27] It follows that the court may be presented with a number of purposes which motivated transfers and that this in itself would not preclude the conclusion that a transfer was made *willfully* to achieve the purpose of defeating creditors. The court should look closely at each of the transfers to see if the test was satisfied in each case assuming there is evidence to show that the transfer would have been made in any event or was made for a different and legitimate purpose.

[26] See *BTI 2014 LLC [2019] Bus L R 2178 under s423 Insolvency Act 1986, by analogy with the FDL.*

[27] *JSC BTA v Ablyazov [2019] B.C.C.96 § 13-16 per Leggatt LJ and Coulson and Gloster LJJ at § 67 and 70 affirming IRC v Hashmi [2002] B.C.C.943*

115. RBI has to show that there is a good arguable case that a creditor is *thereby prejudiced.* A creditor is a person to whom obligations are owed which includes both present and contingent liabilities.[28]

116. Mr Penny QC submits that if the circumstances are met as a matter of fact and law the court should avoid and set aside each disposition *to the extent necessary* per *FDL s.6.* RBI has a good arguable case for dispositions up to the maximum value of D2's creditors to be set-aside ie EUR 105m. He relied on the phrase *'to the extent necessary'* which gives the court flexibility to satisfy the obligation to a creditor. S.6 does not say the disposition may only be set aside up to the amount of the obligation owed to the creditor (and costs) and should not operate as a fetter on the court's discretion.

117. Mr McMaster QC argues that RBI has no interest in setting aside dispositions that exceed EUR 40.57 m and should not be allowed to do so.

118. However, this ignores the commercial reality that D2 when its actual and contingent liabilities are considered may well be insolvent and RBI would only recover a fraction of the alleged liability under the Guarantee in an insolvent liquidation if there was a cap placed on s.6 in these proceedings. The assets would be restored to D2 and be available to all other creditors as much as RBI.

119. Mr McMaster QC also argues that the language of section 6 does not have the words of section 424 of the English Insolvency Act 1986 which provides that a claim under section 423 may be *'brought by a victim'* so it should not be construed to do more than set aside dispositions to the value of the amount claimed under the Guarantee *ie 'only to the extent necessary'.*

120. However, where the transferor is insolvent, what is required to restore a particular creditor will exceed the amount of the obligation on which the FDL claim is based. The FDL claim is not treated as made *'on behalf victims'* and it is not part of RBI's case that it should be. RBI's case is that the total value of the assets that have been transferred pursuant to fraudulent dispositions at an undervalue exceeds C$500m. The total value of the obligation and costs on which the FDL claim is based is approximately EUR 40m. However, the total debt owed by D2 to all its creditors is EUR 105m and its assets are wholly inadequate to meet those liabilities.

121. It is true that section 6 of the FDL allows a court in certain circumstances to reverse a transfer only in part where that was sufficient to satisfy the obligation to a creditor. However, it was not applied in *Johnson* where it was not possible to contemplate a partial setting aside of the transfer of a property - see § 427.

[28] Under the FDL the creditor does not have to be a judgment creditor: *Johnson v Cook Bodden [1999 CILR 399*]

122. RBI has filed evidence which supports the fact that D2 has total liabilities to creditors of EUR 105.3m which includes a further EUR 45m which RBI says it is owed under other guarantees which it has not yet brought into these proceedings.

123. I construe section 6 as giving the court a discretion to satisfy the obligation to a creditor which takes account of the commercial reality that D2 was placed into. It follows that RBI has a good arguable case that the dispositions up to the maximum value of D2's creditors claims (EUR105m) should be set aside so that D2's obligations to RBI together with costs could be satisfied in full. Therefore,on a liquidation, D2 would pay RBI out on a *pari passu* basis at a percentage (approximating 45%) such that RBI's claim satisfied in full (EUR 45m).

The claim in the tort of unlawful means conspiracy

124. The tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who suffers the intended damage.[29]

125. There needs to be a combination or agreement or understanding between the conspirators. They need not all join in at the same time or have the same precise aim. The parties need not understand the legal effect of the concerted action taken pursuant to the agreement.[30]

126. An intention to injure the claimant is sufficient, it need not be the conspirators' predominant intention. However, the conspirators must have an intention to injure the claimant by the unlawful means such that these can be said to be directed at the claimant, in this case RBI.[31]

127. The categories of what constitutes or may constitute unlawful means have recently been analysed and left open.[32] The unlawful means do not have to be actionable by the party damaged, although in this case RBI argues that the unlawful means on which it relies are actionable under the *FDL* against D1 and D3 to D7 and that the Dividend is unlawful as regards at least D2. The test for what constitutes unlawful means to establish the tort is whether there is a just cause or excuse for combining to use the means alleged, which depends on the nature of the unlawfulness and its relationship with the resultant damage to the claimant.

[29] Clerk & Lindsell (22 Edn 2018) at § 24-98

[30] *International Credit [1996 CILR 89] per Schofield J at § 104,107-9 and 114 and Torchlight [2018] (1) CILR 244 per Kawaley J at § 40-44*

[31] *JSC BTA Bank v Khrapunov [2028] 2 WLR 1125 (UKSC) at § 13 and 14*

[32] *Khrapunov at § 15*

128. A series of decisions in the English courts in recent years have suggested that at least for the purposes of establishing a good arguable case, facts which establish claims under section 423 of the Insolvency Act 1986 can constitute unlawful means.[33]

129. The damage alleged which flows from the conspiracy is that suffered by RBI which appears to have no means of enforcing D2's guarantee liability against its assets which have been transferred to D1 and its subsidiaries.

Cayman Islands law is the proper law of tort

130. Only D1 has filed a defence, which does not assert that the proper law of the unlawful means conspiracy claim is anything other than Cayman Islands law. Indeed, since D1 positively asserts that RBI's claim is barred by the principle of reflective loss it seems to me it must thereby accept that the claim is governed by Cayman Islands law.

131. As to the other represented defendants D5 and D4, they will need to plead and prove the applicability of foreign law by reference to expert evidence or the court will proceed on the basis that the foreign law is the same as Cayman Islands law-see Dicey Rule 25 (2).

132. Mr McMaster QC argued that the tort or breach of duty was in substance committed in a foreign country and the acts constituting that tort or breach of duty had to be shown to be actionable under the law of the foreign country in question as well as the law of the Cayman Islands.[34]

133. In my view Mr Penny QC is right that there is a good arguable case that the unlawful means conspiracy took place in the Cayman Islands and therefore Cayman Islands law is the law of the tort, or there is a good arguable case that the exception to the double actionability rule applies so that Cayman law is more closely connected such that Cayman Islands law is the proper law.

134. Alternatively if Marshall Islands or Canadian law is the proper law of tort, I find that there is a good arguable case of an unlawful means conspiracy under each of those laws.

Mandatory injunctive relief sought as RBI's remedy in tort against D1 to D7

135. In *Xie Zhikun v Xio [2018 (2) CILR 508]* the CICA confirmed the decision in *Peak Hotels [2015] EWCHC 3048* per Birss J and *Maroil [2017] EWHC 45* per Teare J that providing there was a sufficiently arguable case (to survive a strike out application) mandatory injunctions were available as a remedy with respect to the tort of

[33] *Concept Oil [2013] EWHC 1897 per Flaux J at § 50,Avonwick [2015] EWHC 3832 (Ch) at § 16 and 25-27 per HHJ Dight and Gerald Metals [2017] EWHC 1375 per Knowles J at § 14*
[34] *Boys v Chaplin [1971] A.C. 356*

conspiracy. Therefore an injunction to prevent and restore loss was available in response to claims including the tort of unlawful means conspiracy. On this basis there is a good arguable case that D1 and D3 - D7 should be required to transfer back and restore, or in the case of D1 and D5 to procure the transfer back by wholly-owned subsidiaries the assets that they have received wrongfully, to D2.

The two alternative damages claims against D1 - D8

136. Mr McMaster QC contends that RBI's claim for damages in tort is barred by the rule against the recovery of reflective loss as stated by the recent decision of the English Court of Appeal in *Marex [2019] Q.B. 173 (EWCA)* which was followed and applied in *Xie Zhikun* and *Primeo (CICA 13 June 2019)* in the Cayman courts. He relies on the fact that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss.[35]

137. On this point I again accept Mr Penny QC's submissions that:

a) the principle of reflective loss does not apply to RBI's tortious conspiracy claim because it is not based on breaches of duty owed by D2's directors to D2. Rather the claim relies on the corporate acts of D2 and an unlawful combination with D8, D1, D5 and the subsidiaries of the latter two entities (including in particular D3, D4 & D6-7). The claim is also for an unlawful transfer of assets at an undervalue in order to defraud creditors contrary to the FDL and includes the declaration of an unlawful Dividend.

b) although *Marex* was also a case of asset stripping, the claimant in *Marex* did not base the alleged tort under section 423 of the Insolvency Act 1986 as a 'class action' for the benefit of all of the creditors of the company. Rather the claim for unlawful means conspiracy in *Marex* was premised on breaches of fiduciary or other duties by the directors of the companies in question as constituting the necessary unlawful means.[36]

c) the principle does not apply to the grant of relief other than damages and in particular does not apply to the grant of a mandatory injunction. The reflective loss principle applies only so as to prevent the recovery of particular remedies.[37]

d) a series of cases have established that where relief was sought so as to require assets to be paid over-*Maroil*, or restored to another company-*Peak,* or to prevent their dissipation from the company in

[35] *Gardner v Parker [2004] EWCA Civ 781*
[36] *The UKSC decision is awaited*
[37] *See Gardner*

question-*Xie Zhikun,* this would fall outside the scope of the rule against the recovery of reflective loss.

e) the principle does not apply to damages payable to D2 rather than RBI. RBI claims that as an alternative to mandatory injunctive relief the court should order D1 and D3- D7 to pay damages to D2 in a sum equivalent to the assets transferred.

138. In *Primeo at §382-395* the court found the principle to be based upon the need to avoid double recovery, the policy of facilitating settlement and the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors. If damages are paid to D2 rather than RBI instead of a mandatory injunction[38] the reflective loss principle does not apply.

The declaratory relief sought against D8

139. Finally RBI seeks declaratory relief that D8 was a party to the conspiracy alleged. The court has jurisdiction to grant such relief.[39] RBI contends that it has at least a good arguable case that such a declaration would serve a useful purpose in that it turns on the same facts and matters as the overall conspiracy alleged against D1-D7 and as such evidence from D8 is likely to be called at trial through its officers and by way of discovery of documents. A single trial will save time and expense and avoid the risk of conflicting judgments.

Real risk of dissipation

140. Mr McMaster QC argued:

a) Not only that the FDL and tortious conspiracy claims cannot be made out, but there is no risk of any unjustified dissipation because the MFC group believed that it was highly unlikely that the Guarantee would ever be called upon and so the reorganisation activity was not aimed at seeking avoid any liability under the Guarantee.

b) The Guarantee was made for the sake of appearance only and there was a common understanding that it would never be called upon and as such it was void under Austrian law.

c) Moreover, RBI and the MFC group were in partnership as a matter of Austrian law such that RBI is not entitled to call on the Guarantee pursuant to Austrian law and indeed that RBI owed money to the MFC group pursuant to a counterclaim. [40]

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[38] See *One Step [2019] A.C 649*

[39] See *Insurco [1999 CILR 532]*

[40] See Smith 5 § 36-75 and responsive evidence from Dellemann 3 § 16 and Zimmerman 1 § 8-11

141. However, no evidence of Austrian law is filed in support of these arguments. The court cannot determine conflicts of evidence at interlocutory hearings definitively especially where questions of Austrian law arise and where evidence has not been filed and where the conflict of evidence is the period of many years. I reject these submissions for the reasons given above.

142. It is the case that RBI has to show that there is a real risk that D1 and D5 will unjustifiably dissipate their assets such that judgment in favour of RBI would remain unsatisfied.[41]

143. The relevant propositions are derived from *Fundo Soberano [2018] EWHC 2199* per Popplewell J as approved by *Lakatamia CA* per Haddon Cave LJ:

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

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

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

4. *It is not good enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be*[42] *dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.*

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

6. *What must be threatened is unjustified dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of or concealing assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate*

[41] *Classroom Investments (CICA) at § 59 §61 -65 JP Morgan at § 8 and Hampshire at §32*
[42] Popplewell J's formulation as corrected by Haddon Cave LJ

defendant from dealing with its assets in the normal course of its business. Similarly it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

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

144. Mr Penny QC also derived the following additional six propositions from recent English authorities:[43]

8. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

9. The nature, location and liquidity of the defendant's assets are important considerations.

10. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

11. So too is the defendant's behaviour in response to the claim or anticipated claim.

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

13. *In such circumstances (i.e. as in proposition 12) it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence.*

145. Applying these propositions I find that there is solid evidence of a real risk of dissipation. There is evidence of the MFC group transferring assets of very significant value which were principally shares in various corporate entities transferred away from D2. This has not been adequately explained by the represented defendants except by the assertion that the MFC Group was entitled to reorganize its business and RBI had no general right to be informed of what was being done.

[43] *National Bank Trust [2016] EWHC 1913* as summarised by Males J

146. The timing of the transfers all took place within a two year period: August 2017-August 2019. RBI has the better of the argument at this stage that each of the transfers was at an undervalue and was made to defeat obligations owed to RBI.

147. There is a plausible evidential basis to suggest that the circumstances of the transfers show that they have been structured in a deliberately convoluted way in particular in relation to the Mine, the Merchant Bank and the Dividend.

148. Although I bear in mind the guidance in the decided cases in relation to the many legitimate uses of complex offshore structures, to my mind the scale and speed of the use by the MFC group in transferring these assets away from D2 points to a plan to conceal or obscure, and a scheme in order to put the assets beyond the reach of RBI.

149. In addition to this there is the re-domiciliation of D2 and the number of jurisdictions that have been engaged for the many corporate entities used, which suggests a complicated plan to confuse and conceal anyone attempting to check the current 'state of play' with regard to the assets which were once held by D2.

150. To leave D2 without any substantial assets to satisfy its creditors, which again has not been adequately explained by the represented defendants, suggests that the reorganisation was, as regards the effect and purpose, precisely as RBI contends. The group retains assets and interests which are substantial, but the counterparty to the Guarantee is apparently no longer able to satisfy its contingent liabilities. No other purpose has been credibly put forward to explain the reason for this 'net' effect.

151. The lack of disclosure or notice given to RBI, creditors, or shareholders also adds to the case that the intention was to conceal matters and transfer assets. The Plan of Arrangement as approved by the directors and shareholders and the Canadian courts do not mention the transfers and the circular provided to shareholders prior to their vote did not do so either.

152. I find that in addition the breaches of the terms of the Guarantee argued for by Mr Penny QC at this stage are also serious issues to be tried.

153. I also find that the representations case set out at §38-39 of the Statement of Claim is also arguable at this stage and that RBI has the better of the arguments on the conflict of evidence on the issues so far adduced. There is a current risk of dissipation based on past events which took place within the last 2 - 3 years.

Jurisdiction D1-D8

The anchor defendants D1 and D5

154. Both defendants are Cayman Islands companies and may be served as of right. D1 has already been served with the claim and D5, if joined, will be served. There is

clearly a serious issue to be tried against both D1 and D5 in respect of the tort of unlawful means conspiracy.[44]

155. D1 apparently submitted to the jurisdiction. The onus would be on D5 to challenge jurisdiction on which it would bear the burden of proof.[45]

156. As far as the amended claim is concerned regarding D4, apparently service will be accepted in the Cayman Islands so no permission is needed. However, the set-aside application as regards the earlier service out of the order made on 30 September 2019 against D2 to D4 is still alive as an issue.

157. Mr Penny QC submits that the court should grant RBI's application to serve out of the jurisdiction the amended claim against D2 and D3 and D6 to D8, should dismiss D4's application to set aside, and grant RBIs application to amend against each of these parties including as to joinder of D6-D8.

158. Mr McMaster QC argues that D2, the company that was allegedly stripped of its asset, has never been a Cayman Islands company and at the time of the events in question was domiciled in the Marshall Islands and formerly had been domiciled in Canada. The asset that was allegedly stripped, which were rights in a mine in Canada, lies outside the jurisdiction. The Plan of Arrangement was completed under the laws of Canada and is subject to the courts of that country, not the Cayman Islands. The alleged victim of the asset stripping is in Austria and the choice of law explicitly chosen in the Guarantee was Austria.

159. The test to be applied to these arguments is first whether, in relation to each defendant, there is a serious issue to be tried on the merits i.e. a substantial question of fact or law, or both, which has a real, as opposed to fanciful, prospect of success. Second, whether there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given i.e. there is a jurisdictional gateway as set out at GCR O.11 rule 1.(1)(*necessary or proper party*). Third, that in all the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for trial of the dispute and that in all circumstances the court ought to exercise its discretion to permit service of the proceeding out of the jurisdiction pursuant to GCR O. 11 rule 4(2).

160. As to the FDL claim, an additional question needs to be considered: is there a serious issue to be determined that at trial the Cayman court will conclude that the claim has a sufficiently substantial connection with the jurisdiction?

161. As to the first test I have reached the view that there is clearly a serious issue to be tried as regards the FDL and the claim in the tort of unlawful means conspiracy as regards each of the relevant defendants. As to the second, the claims against each of

[44] GCR Order 11 r 4(1) (d)
[45] KTH Capital [2004-5] CILR 213 at § 3-4 and §33 per Smellie CJ

them falls within the 'necessary or proper party' gateway under GCR O.11 rule 1(1)(c). It is a claim intimately connected to that which is brought against D1 and D5 (as joined) who are or will be duly served within the jurisdiction.

162. The relevant legal principles are set out by Lord Collins in *Altimo v Kyrgyz[2012] 1WLR 1822 at § 71* and following. This case has been followed by a number of Cayman Islands decisions. I note that the following points apply to the present case:

1. With regard to 'necesssary or proper party' and where there is no territorial connection to the claim or other gateway, caution should be exercised.[46]

2. Although they are expressed as alternatives, in this case RBI asserts the defendants are necessary *and* proper parties.

3. There is no requirement to show that the non-anchor defendant (D4) is the 'real party', rather than the anchor defendant.[47]

4. If all the defendants had been domiciled in the Cayman Islands would they have been proper parties to the proceedings? If the answer to that is yes then the court should give permission to serve them out of the jurisdiction-see *Condoco*.

5. The claim involves one investigation or common thread-see § 87 of *Kyrgyz.*

6. It is not necessary that the alleged liability of the defendants be joint or several with that of D1-see Dicey (15, with 5th supplement 2018 at § 11-165).

163. Looking at the facts and matters set out above relating to the way in which the assets were transferred and their chronology it is clear that these requirements are plainly satisfied in respect of both the FDL and the unlawful means conspiracy claims, which are based on the same facts and evidence. As such these claims involve one investigation or at least are bound by a common thread and are not separate or unrelated transactions.

164. The primary relief claimed is that the transfers are reversed such that the assets in question transferred to these defendants should be restored to D2 and as such those defendants will need to be a party to any final order.

165. RBI has plainly shown it has a good arguable case on the merits against D1 and D5, and the other defendants are necessary or proper parties to the claim.

166. As to D4 it is not necessary to show that D4 was a party itself to any particular transfer. In any event D1 is D4's ultimate parent and D5 is D4's immediate parent. In

[46] Dicey 15th Edition §11-46
[47] *Kenney v ACE* and *Torchlight*

addition, D5 is the Cayman Islands anchor defendant to which the only cash consideration (C$41m) that is said to have been provided for the Mine, was paid.

167. As to *forum conveniens*, RBI has demonstrated that the Cayman Islands are clearly the appropriate forum for the trial of its claims.

168. D1 and D5 are at the apex of the conspiracy and are respectively the parent of the group and its 100% direct subsidiary. D2 has not participated so far or made any challenge as to the jurisdiction of the court.

169. D1 and D5 directly or indirectly hold or held all or substantially all of D2's former assets, and control, directly or indirectly, all of the entities within the group which hold or held those assets.

170. The Merchant Bank transfer and the Dividend have strong Cayman Islands connections. The only cash consideration provided for the transfer of the interest in the Mine was paid to D5 pursuant to an agreement by Cayman Islands law with an exclusive jurisdiction clause.

171. The transfer of D2 itself out of the group was also said to have been executed by D5 pursuant to two agreements which are governed by Cayman Islands law.

172. The FDL claim is brought pursuant to Cayman legislation. Mr McMaster QC submitted that no other case has been brought where both the transferor and transferee were not Cayman entities. He submitted that a decision that the transfer of an asset between two non-Cayman based entities to intentionally defraud the creditor of a third (also non-Cayman entity) would be breaking significant new ground.

173. However, I see nothing in the FDL to suggest that it is limited in territorial scope as to its effect. It should in my view be construed in the same way as s.423 of the Insolvency Act 1986 which has wide territorial scope. The unlawful means conspiracy claim also arises under Cayman Islands law and is of a similar nature to the FDL claim, being based on essentially the same facts and evidence and involving similar relief. There is also a significant connection with the jurisdiction. D1 and D5 can be treated as the alter egos of those subsidiaries that received D2's assets. There is a strong case that the Cayman Islands is the appropriate forum.

174. It is also appropriate to have the case determined in the Cayman Islands to avoid a multiplicity of potential proceedings in a number of different jurisdictions with the risk of conflicting judgments. This is particularly so when a conspiracy is alleged where there is clearly good reason to have all the facts determined in one court. There is no other clearly more suitable forum.

175. The case made by D1 on an Austrian partnership and its counterclaim which raises Austrian law should, according to D1, also be tried in the Cayman Islands and if that

is so, then it follows that all of the transfers should be understood in light of that alleged partnership and should be tried in Cayman.

176. The represented defendants submit that the natural forum for the claim against D4 is Canada on the basis that all the transfers are separate and should not be looked at together. This submission does not work on the facts as I have explained above and I reject it. It would not be just or appropriate to have proceedings separately brought in Canada against D4.

177. The represented defendants also rely on the fact that certain proceedings have been brought by RBI in Alberta, Canada. There is however on examination little if any connection between those claims as advanced in the Canadian proceedings and these Cayman Islands proceedings. There is no issue of asset stripping of D2 in those Canadian proceedings.

D1, D4 and D5- sufficient connection with the FDL claim

178. This arises only in relation to the FDL claim and has no impact on the conspiracy claim.

179. As I have indicated above, in my view the FDL is to be construed to give it extraterritorial effect. In order to have that effect there needs to be a sufficient connection to the jurisdiction before the court will exercise its jurisdiction to grant relief.[48] Whether there is a sufficient connection is a broad test in which the court exercises a wide discretion so that the court will look at all the circumstances.[49] It can do so at this stage of the proceedings and need not wait until trial.[50]

180. Here, two of the key companies are Cayman Islands companies, D1 and D5. I do not accept that one can separate out the transfers in the way the represented defendants would argue. In particular the Mine transfer is part of the continuum of transfers which forms part of the overarching conspiracy. There is at least a good arguable case that RBI has shown a sufficient connection to the Cayman Islands such that it has a good arguable case on the merits that this court would exercise discretion in favour of granting relief under the FDL.

The terms of the WFOs

181. Assets which are not legally or beneficially owned by the respondent to the injunction are not covered.[51] There has been some inconsistency in the English courts as to whether assets include companies of which the injunction respondent is the 100% shareholder.[52]

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[48] by analogy with s.423 Insolvency Act 1986
[49] See *Paramount Airways at § 237G and 239H*
[50] See *Erste Bank [2015] EWCA Civ 379*
[51] JSC BTA v Ablyazov [2015]1 WLR 4754 UKSC
[52] See *Group Seven [2014] 1 WLR 735 per Hildyard J, FM Capital [2019] 1 WLR 1760 and the Lakatamia(CA)*

182. Nevertheless the notification injunction applies to assets which are not owned by D1 or D5. It is similar to the relief granted in *Lakatamia* and is appropriate in this case as the court is able to grant effective relief against the Cayman Islands defendants being the holding companies of the group without immediate need to consider whether injunctive relief should be granted against other subsidiaries.

A maximum sum order

183. The usual practice in respect of freezing orders is for the court to include a maximum sum, although in exceptional cases the court may decide not to do so -see *Gee on Commercial Injunctions at §21 031* and *London and Quadrant [2013] EWCA Civ. 130*

184. I accept Mr Penny QC's submissions on the factors which are relevant to an exercise of discretion *not* to place a cap on an order in the circumstances of this case. It is arguable in this case that:

a) the defendants were responsible for obscuring the true state of affairs and the true financial position;

b) the defendants have given incomplete and misleading evidence; and

c) the defendants failed to comply properly with asset disclosure requirements.

185. In addition, there is an absence of complaint or evidence from the defendants that the order omitting any maximum sum was causing any difficulty or restricting their enjoyment of the assets in question. The order only applies to certain specified assets and not all the MFC group's assets. If the section 6 FDL claim results in an order that the defendants transfer to D2 the total known liabilities it had, such indebtedness would appear to be EUR 105m including interest. Although the shares of D1 are publicly traded there is uncertainty as to their value and the value of the other assets which were transferred by D2 into the group in breach of the FDL. There remains uncertainty as to how some of those assets are held. There has been no reliable third-party appraisal to give the court any comfort in ascribing a notional value to the various assets that have been transferred.

186. I am also not persuaded that D1 has complied fully and openly with disclosure orders. The evidence that has been provided by the represented defendants is in places inconsistent and in many respects simply not credible. The court expects that the parties can work together to make sure that ordinary course of business matters may proceed with the requisite disclosure, transparency and collaboration.

187. Mr Lawler suggests that one should approach the value of the group's assets by adopting the net value of D1 as reflected in its share price. If one does that the share price as of the date of his report was *US$ 128.8m (C$ 172m)* which is about the same as the total value of the indebtedness to D2's creditors. Bearing in mind these considerations in my judgment there should be no maximum sum order.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

GRAND COURT
CIV-03
CAYMAN ISLANDS