

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0024

BETWEEN:

[1] SANCUS FINANCIAL HOLDINGS LIMITED
[2] CARSON WEN
[3] JULIA YUET SHAN FUNG

Appellants

and

CHAD CHRISTOPHER HOLM

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal
The Hon. Mde. Cadie St. Rose-Albertini	Justice of Appeal [Ag.]

Appearances:

Mr. Alex Hall Taylor KC, for the Appellants
Mr. Michael Faye KC with Ms. Colleen Farrington, for the Respondent

2024: February 15;
2025: March 28.

Commercial appeal – Interlocutory appeal – Risk of dissipation – Freezing injunction – Applicable test for granting freezing injunction – Whether the learned judge properly applied the test for granting a freezing injunction – Whether there was delay in applying for the freezing injunction - Just and Convenient - Whether the learned judge erred in determining that it was just and convenient to grant the freezing injunction- Ordinary course carve out exception - Whether the learned judge erred by refusing to provide a general ordinary course exception to the second and third appellants

In January 2017, the respondent initiated proceedings against the appellants for breach of an oral contract, claiming entitlement to 22% in the founding shares of a BVI company, Bank

of Asia (“BOA”). On 19th December 2018, judgment was pronounced on liability in favour of the respondent (the “liability judgment”). The appellants appealed the liability judgment and in March 2020, this Court dismissed the appeal. The appellants thereafter appealed to the Privy Council and on 29th June 2022, the appeal was dismissed. By written judgment delivered on 10th November 2022, the Board determined the central issues between the parties by accepting that an oral agreement existed between the appellants and the respondent, and that the appellants had breached the terms of the agreement.

In 2019, the respondent applied for and was granted a freezing order, which the appellants appealed. This Court upheld the findings of the judge at first instance in granting the injunctive relief sought and confirmed that: (i) Mr. Holm had a good arguable case, (ii) there was a real risk that the appellants would dissipate their assets; and (iii) the balance of convenience weighed in favour of granting injunctive relief to Mr. Holm. However, the Court found that the order lacked clarity and afforded the appellants the opportunity to provide undertakings, failing which the Court would make the appropriate injunctive order. The appellants took up the offer and provided undertakings which were formalised in a 2019 Undertakings Order.

Since then, the respondent has applied for an interim payment order pending trial of assessment of damages, and an application to appoint a receiver over the shares in BOA, on account of the failure of the appellants to pay judgment costs.

Therefore, on 20th July 2023, the respondent filed an *ex parte* application for the following relief: (i) post-judgment injunctive relief to restrain the appellants from disposing of, transferring, selling, gifting, encumbering, or otherwise dealing with their assets, whether held directly or indirectly and (ii) asset disclosure orders pursuant to CPR 17.1(e) to obtain certain information from the appellants by way of asset disclosures. These orders were intended to replace the 2019 Undertakings Order, to ensure that the respondent could enforce various costs orders already granted in his favour, an interim damages order, and any further award of damages he would receive in due course.

By Order dated 12th September 2023, after an inter partes hearing, a learned judge in the Commercial Division of the High Court of the Territory of the Virgin Islands granted freezing and asset disclosure orders against the appellants.

The application filed by the respondent on 20th July 2023 and the Order of the learned judge dated 12th September 2023 are the subject of this appeal.

Being dissatisfied with the learned judge's decision, the appellants initially advanced 8 grounds of appeal, which were reduced to 5 main grounds by counsel for the respondent. The five grounds of appeal are as follows:-

Ground 1 - The learned judge erred in law and fact in finding there was a real risk of dissipation, failed to apply the correct test or to require solid evidence of a real and imminent risk of dissipation and took account of irrelevant matters when considering this matter;

Ground 2 - The learned judge erred in law and fact in not taking account of delay in bringing the application;

Ground 3 - The learned judge erred in law and fact in determining that justice and convenience favoured granting of WFO and Asset Disclosure Order;

Ground 4 - The learned judge failed to take into account the fact that Mr. Holm has no assets, and had put forward no evidence to demonstrate that his cross undertaking in damages has any value or that he has any means of satisfying it; and

Ground 5 - The learned judge erred in wrongly refusing to provide a general ordinary course exception to Mr. Wen and Ms. Fung (the second and third appellants).

Held: dismissing the appeal, and ordering the appellants to pay the respondent's costs of this appeal, to be assessed, if not agreed within 21 days of the date of this judgment, that:

1. Generally, an interlocutory injunction is a discretionary relief and the decision whether or not it ought to be granted is vested in the judge hearing the application. It is also well established that an appellate court has a limited role in reviewing the exercise of discretion by a judge below and is not to exercise an independent discretion of its own, but rather, defer to the judge's exercise of the discretion and not interfere with it merely because this Court would have exercised the discretion differently.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied; **Multibank FX International Corporation v Von Der Heydt Invest SA** BVIHCMAP2022/0061 (delivered 5th July 2023, unreported) followed; **Hadmor Productions Ltd and others v Hamilton and another** [1983] 1 A.C. 191 followed.

2. The success of an applicant on an application for a freezing injunction depends primarily on whether a court is satisfied that: (i) there is a good arguable claim in the amount sought to be frozen; (ii) there is a real risk that a respondent will dispose of its assets in such a manner that a judgment against it will go unsatisfied; and (iii) it is just and convenient to make the order sought. These standards are conjunctive and all three must be satisfied. It is trite that the threshold for establishing a good arguable case is not a high one. An applicant must satisfy the court that its case is more than barely capable of serious argument, and it need not necessarily be one that the judge believes has a better than 50% chance of success.

Emmerson International v Renova Holding Limited BVIHCMAP2019/0018 (delivered on 7th February 2023, unreported)

followed; **Multibank FX International Corporation v Von Der Hyte SA** BVIHCVAP2021/0009 (delivered on 23rd February 2023, unreported) followed.

3. The question whether a judge has considered irrelevant material or gave too little, too much, or no weight to relevant material, is not answered by an overzealous dissection of the language of the judgment. It is evident that the judge applied the relevant tests and considered all the evidence before him and correctly exercised his discretion to grant the freezing orders inclusive of the asset disclosure orders. Consequently, there is no error in principle and the learned judge's findings do not exceed the generous ambit within which reasonable disagreement is possible, to warrant appellate interference.

Dufour v Helenair (1995) 52 WIR 188 applied; **Hadmor Productions Ltd & Others v Hamilton & Others** [1982] 1 All ER 1042 applied; **Ming Siu Hung & Others v JF Ming Inc & Another** [2021] UKPC 1 applied; **Lakatamia Shipping Company Ltd v Morimoto** [2019] EWCA Civ 2203 followed.

4. Delay will usually be considered in relation to risk of dissipation. There is no general rule that delay in applying for a freezing order is necessarily a bar to obtaining injunctive relief. However, in seeking to rely on delay as a factor a respondent must demonstrate that the applicant never really believed that a real risk of dissipation existed, or if an applicant seriously thought so, an application would have been made much earlier.

Emmerson International Corporation v Renova Holding Limited BVIHCVAP2019/0018 (delivered 7th February 2023, unreported) applied; **Madoff Securities International Ltd v Raven** [2011] EWHC 3012 (Comm) applied.

5. A freezing injunction can have a serious effect on a company's business. The ultimate question is whether it is just and convenient to grant a freezing order, bearing in mind that it has the nuclear effect of prohibiting the affected party from dealing with its assets. The Court must therefore be satisfied, even in a case where a good arguable case and a risk of dissipation have been established, that the grant or continuation of an injunction is not automatic. The court must be satisfied that it is just and convenient to grant or continue the injunction. Accordingly, the learned judge conducted the evaluative exercise required by law and gave succinct and precise reasons for concluding that the balance of convenience and overriding objective favoured granting the freezing order.

Multibank FX International Corporation v Von Der Hyte SA BVIHCVAP2021/0009 (delivered on 23rd February 2023, unreported) followed.

6. With respect to the appellants' contention that the learned judge did not consider the value of the respondent's cross undertaking, this Court is required to give deference to the learned judge on the consideration or weight to be given to these matters. The value of a cross undertaking on its own would not be determinative of the application but must be viewed against the totality of the circumstances before the court. There is no basis for interfering with the learned judge's decision to grant the freezing order, when one considers that the judge was satisfied of the preponderance of the evidence, the applicable tests, and in furthering the overriding objective, that the freezing order should be granted.
7. In relation to the ordinary course of business carve out/exception, the learned judge considered all submissions placed before him in arriving at a balanced position on the carve out terms to be included in the freezing order. There is no error in principle, or departure from the generous ambit of reasonable disagreement by the learned judge to warrant interference with his decision on this matter.

JUDGMENT

- [1] **ST. ROSE-ALBERTINI, JA [AG.]** This is an appeal against the order of a learned judge in the Commercial Division of the High Court of the Territory of the Virgin Islands, made on 12th September 2023 after an inter partes hearing, in which the learned judge granted freezing and asset disclosure orders against the appellants.
- [2] The appellants contend that the learned judge took into account irrelevant matters and did not consider relevant matters in exercising his discretion to grant the WFO which resulted in a decision which was plainly wrong and the WFO should be discharged.
- [3] The respondent strenuously opposes the appeal and invites this Court to confirm the WFO and dismiss the appeal, with costs.

Background and Chronology

- [4] In January 2017, the respondent initiated proceedings against the appellants for breach of an oral contract, claiming entitlement to 22% equity in the founding shares of Bank of Asia (“BOA”).
- [5] On 19th December 2018, a judge at first instance pronounced judgment on liability in favour of the respondent. The appellants appealed the liability judgment and in March 2020, this Court dismissed the appeal. The appellants appealed to the Privy Council. On 29th June 2022, the Privy Council dismissed the appeal by way of an oral order and formalised its reasons in a written judgment delivered on 10th November 2022. The Board found that this was not an exceptional case which justified hearing a second appeal and departing from the established practice of not engaging with challenges to concurrent findings of fact by the courts below (a practice which has existed for many years).¹
- [6] Thus, the Board finally determined the central issues between the parties by accepting that an oral agreement existed between Mr. Holm, and Mr. Wen acting on his own behalf and on behalf of his wife Ms. Fung and Sancus, and that the appellants had breached the terms of that agreement. In this regard, the Board said the following:
- “Mr. Holm was a founder partner in the enterprise and was well qualified to bring particular expertise to bear in developing the Project. Secondly, Mr Holm worked for some nine months without drawing a salary; and he was prepared to do so because he knew he had a 22% share in the Project. Thirdly, it would have made no sense for Mr Holm to hold his share in the Project through FHL because any value in such a share could have been removed at any time by Mr Wen. Hence the parties’ agreement, as alleged in the amended statement of claim and as well understood by the appellants, that Mr Holm would own his 22% interest in the form of shares in whichever company in the Project was at the top of the relevant corporate structure, and that these shares would rank pari

¹ [2022] UKPC 41 at paragraphs 2 to 8 and 40 to 48.

passu with the 78% of the shares held by or for Ms Fung and Mr Wen.”

[7] With the issue of liability settled, what remains is assessment of the quantum of damages to which Mr. Holm is entitled.

[8] Meanwhile, in 2019 Mr. Holm applied for and was granted a freezing order, which the appellants appealed. This Court upheld the findings of the judge at first instance in granting the injunctive relief sought and confirmed that: (i) Mr. Holm had a good arguable case, (ii) there was a real risk that the appellants would dissipate their assets; and (iii) the balance of convenience weighed in favour of granting injunctive relief to Mr. Holm. However, the Court found that the order lacked clarity and afforded the appellants the opportunity to provide undertakings, failing which the Court would make the appropriate injunctive order. The appellants took up the offer and provided undertakings which were formalised in the 2019 Undertakings Order, and were set out in a Schedule to the order as follows:

“(1) the Defendants will not deal with or dispose of any shareholdings in Sancus Group held directly or indirectly by them;

(2) the Defendants will not cause Sancus Group to deal with or dispose of its shareholding in BOA International Financial Group Limited (“**BOA International**”) to reduce it below 22% of the shares issued by BOA International;

(3) the Defendants will not cause or permit BOA International and/or Sancus Financial to deal with or to dispose of their assets, except in the ordinary course;

(4) the Defendants will not dispose of, transfer, sell, gift, or encumber or otherwise deal with the property at Flat C, 18/F, Upton, 180, Connaught Road West, HongKong (the “**Upton Flat**”); and

(5) for the avoidance of doubt:

(i) nothing in the undertakings shall operate to prevent Sancus Financial from transferring 10% of the shares issued by Bank of Asia to Smart Token Holdings Limited pursuant to clause 8.1 of the Subscription Agreement

dated 7 January 2017 as demanded by Smart Token by a notice dated 30 April 2019; and

(ii) the ordinary course of the business of each of BOA International and Sancus Financial (the Holding Companies) extends to raising capital for the purposes of investment into Bank of Asia and related companies, and nothing within the undertakings shall prevent the Defendants (or any of the Holding Companies) from dealing with their assets for that purpose.”

- [9] Since then, Mr. Holm has applied for an interim payment order pending trial of assessment of damages, and an application to appoint a receiver over the shares in BOA, on account of the failure of the appellants to pay judgment costs.

The Application which is the subject of this Appeal

- [10] On 20th July 2023, Mr. Holm filed an *ex parte* application for the following relief: (i) post-judgment injunctive relief to restrain the appellants from disposing of, transferring, selling, gifting, encumbering, or otherwise dealing with their assets, whether held directly or indirectly and (ii) asset disclosure orders pursuant to CPR 17.1(e) to obtain certain information from the appellants by way of asset disclosures.² It is said that these orders were intended to replace the 2019 Undertakings Order, to ensure that Mr Holm could enforce various costs orders already granted in his favour, an interim damages order, and any further award of damages he would receive in due course. Mr Holm deposed that the appellants had breached the 2019 Undertakings Order five (5) times since the order was made. Further, there was a real risk of asset dissipation on the part of the respondents and that the existing undertakings were insufficient.

- [11] In the application, Mr. Holm stated that the appellants have displayed a continuous pattern of poor conduct throughout the litigation, including (i)

² Draft order, paragraphs 13 to 21.

giving false and misleading evidence; (ii) engaging in multiple instances of asset dissipation; and (iii) more recently, they have repeatedly breached the undertakings.³ At paragraph 6(d) of the application, Mr. Holm contends that the appellants have pursued hopeless appeals on liability for over 4 years. This has caused substantial delay in the proceedings and have allowed them the opportunity to reorganize their affairs and further diminish their estate, all the while not paying him anything in respect of damages, and only a fraction of his costs orders.

[12] At paragraph 7 of the application Mr. Holm contends that the appellants continue to deplete their remaining assets, which must be curtailed, and he must secure full and complete asset disclosure evidencing the current state of affairs of the appellants and all entities that they own and control, as well as the historical movement of their assets over time.

[13] At paragraph 9 he stated that he is a judgment creditor of the appellants, the quantum trial has been ordered to be listed for the first available date after 31st May 2024, and in the intervening period he seeks an order for injunctive relief and asset disclosures.

[14] In the certificate of urgency which accompanied the application, Mr. Holm stated that the application should be heard as soon as possible, as he expects to receive a substantial award of damages and further substantial costs in these proceedings. At paragraph 5, he states that the application flowed from the affidavit of Mr. Wen dated 2nd June 2023⁴ ("Wen 7") which was filed in a separate application⁵ and contained evidence of the appellants' continuous pattern of poor conduct in the proceedings, including the multiple breaches of the 2019 Undertakings, asset dissipation, and

³ Notice of Application filed on 20th July 2023, Paragraphs 6(a) to 6(j).

⁴ Generally referred to by the parties as "Wen 7".

⁵ Application for Extension of Time to Pay Interim Damages Order.

incomplete and unsupported asset disclosure. Mr. Holm further stated that the appellants are placing all possible obstacles in his way to delay or avoid complying with and/or satisfying any and all existing costs awards, future costs awards and/or awards of damages made by the court and are deliberately frustrating the proceedings. He stated further that the application was urgent because there was a real risk that unless restrained, the appellants would further dissipate their assets.⁶

- [15] Following an *inter partes* hearing on 12th September 2023 the learned judge delivered an oral judgment and granted the WFO, which is the subject of this appeal.

The *Ex Tempore* Judgment

- [16] In the oral judgment the learned judge first addressed the grounds of the application and the contents of Mr Holm's affidavit in support.⁷ This was followed by the statement below:

"This has not been an easy decision on my part and the various competing considerations have been balancing themselves in my mind. But on balance, I think it would be just and convenient for a freezing order to be granted. The Court still needs to have further submissions, I think, on the amount and also the various carve out, the amount of the various carve outs. And I note that there has been some considerable argument in the written submissions that the parties have been relying upon as to the figures. The Court probably needs to hear further submissions on these figures."⁸

- [17] Thereafter, the learned judge went on to explain the reasons for his decision. In so doing he engaged in a comprehensive analysis of each of the three limbs of the test for granting a freezing order, citing supporting authorities. In this regard he noted the requirement to satisfy the following: (1) a good arguable case; (2) risk of dissipation and (3) that it was just and

⁶ Certificate of Urgency, paragraph 6.

⁷ See pages A-323 to A-327 of Hearing Bundle A.

⁸ See page A-328 of Hearing Bundle A.

convenient to grant the order. Thereafter he assessed each issue against the evidence before him.

[18] The learned judge stated that the application was premised on the appellants continuous pattern of poor conduct within the litigation including false and misleading evidence at the liability trial and in securing the 2019 Undertakings Order, multiple instances of asset dissipation, and more recently repeated breaches of the undertakings. Further, there was a real risk of asset dissipation on the part of the respondents and that the existing undertakings were insufficient for a number of reasons including that Mr. Wen and Ms. Fung have breached the undertakings by encumbering and re-encumbering a substantial property five times since the 2019 Undertakings Order was made. Additionally, both of these individuals have repeatedly been untruthful with the court about Mr. Wen's supposed non-existent asset holdings, when in reality he holds nearly US\$9 million in his personal name and has personal property which he has fully encumbered after the 2019 Undertakings Order. Further, they have misled the court on the role of a certain company in respect of the BOA project, which has allowed that company to spin off potentially valuable business to their son, Ian Wen, who is not a defendant. The learned judge expressed dissatisfaction with the evidence offered by the appellants to substantiate that the loan proceeds obtained from encumbering their properties was for the purpose in investing in BOA, so as to fall within the exceptions to the undertakings.

[19] The learned judge ultimately concluded that based on the evidence before him all three limbs of the test were satisfied, and the overriding objective would best be served if freezing and asset disclosure orders were granted, and the full terms of the WFO were settled at two subsequent hearings.

The Appeal

[20] The appellants contend that the learned judge wrongly took into account irrelevant matters, failed to take into account or give proper weight to relevant matters, and came to a decision which was plainly wrong. In this regard they challenge several statements made by the learned judge in the ex tempore judgment, which according to them, were erroneous and wrongly formed the basis of his decision to grant the WFO.

[21] The statements are as follows⁹:-

“ a. Concerning Adderley J's judgment granting a worldwide freezing injunction against the Defendants in 2019 the Judge said: ".....it is relevant that the two Respondents, two individual Respondents, Mr. Wen and Ms. Fung, were found to have presented a heightened risk of dissipation, in particular, in relation to the way they have organised their asset holding, even if they might not be intending to do dissipation itself. What we have, we still have that set up which they put in place then. We still have this possibility, this risk of dissipation which that presents. And, as Mr. Levy says, there is no evidence to show some kind of change in character which would wipe the slate clean and say that there is no longer such a risk of dissipation."¹⁰

b. Concerning risk of dissipation the judge said: "I have already alluded to their tendency to dispute everything and appeal everything for four years and try and resist, resist, resist, resist, if notes [sic] everything, then most things, regardless of whether they win or lose, they gain time, regardless of the expense, even now this hearing is very expensive, they gain time. This shows very resistant Defendant, one who resists firmly having to pay money over to a party who has now been found to have a liability judgment in his favour."¹¹

c. Further on risk of dissipation the judge said : "I am satisfied that if there is the possibilities of imminent dissipation, in that, as Mr. Levy says, there are potentially very large sums of money flowing in the very near future. At least one of these transactions which have been spoken of, which had been agreed on, that they might come off. In other words, that money

⁹ See page 154 line 11 to 184 Line 17 of Hearing Bundle A.

¹⁰ See page 169 line 15 to page 170 line 2 of Hearing Bundle A.

¹¹ See page 171 lines 7 to 17 of Hearing Bundle A.

would come in on the back of it and that money could be in the region of about 100 million. And when you very people who present a high risk of dissipation, then one has to be afraid that when they get a large amount of liquid money, they can put it beyond the reach of their enemy, Mr. Holm. So, I am satisfied that there is both imminent risk and a very real risk of one and that Mr. Holm could be left, unless otherwise restrained, with a nugatory judgment. I have to balance that against possible harm."¹²

d. In considering justice and convenience the judge said :
"Now, the potential harm which has been ventilated before me, was that this is bound to have a negative impact upon the Bank of Asia. That is the main harm which has been pressed upon me. And I can see that, of course. But I have to remind myself, that the Bank of Asia is not a party to these proceedings. And as Mr. Levy says, Bank of Asia, as a third party, would not be able to claim on an undertaking and in any event the Bank of Asia has apparently not suffered any prejudice so far from the fact that, as must by now be well known at least in the circles and the actual people concerned at the Bank of Asia circulate, the Bank of Asia has been associated with a contract broker [sic]. He says that that has not caused prejudice to the Bank. And in any event, they do not and cannot adduce evidence of prejudice to the Bank if the freezing order is made."¹³

e. Further, regarding justice and convenience the judge said:
"Of course, an injunction is detrimental to reputation. It is very draconian. It is harmful and people think twice before dealing with somebody who is subject to an injunction. I understand that. At the same time, I have to balance that with the potential harm to Mr. Holm. And because the Bank is not a party, intelligent observers would know that that an injunction is there to protect, is to protect somebody else from potential conduct which might be feared in circumstances where the Bank of Asia itself is only minority owned by Mr. Wen and/or the Respondent, there is a majority owner there. And in circumstances where there has been non-running [sic] litigation involving the shareholders of the Bank of Asia."¹⁴

f. The learned judge conceded that: "... it is a difficult judgment, I admit, because I do not want to be responsible for the collapse of the Bank of Asia, for a start, nor do I want to be

¹² See Hearing Bundle A at page 180, line 24 to page 181, line 15.

¹³ See Hearing Bundle A at page 181, line 16 to page 182 line 7.

¹⁴ See Hearing Bundle A at page 182, line 15 to 183 line 4.

*responsible for the ruination of Mr. Wen and Ms. Fung's reputations."*¹⁵

[22] The appellants contend that the learned judge erroneously made the above findings, notwithstanding that it was an interlocutory application at which no live evidence was adduced.

[23] Eight grounds of appeal were initially deployed, which were reduced to 5 main grounds by counsel for the respondent.¹⁶ Counsel for the appellants agreed with these categorizations, which I will adopt for the purposes of this judgment. The findings complained of will be considered under one or more of these grounds.

[24] The five grounds of appeal are as follows:-

Ground 1 - The learned judge erred in law and fact in finding there was a real risk of dissipation, failed to apply the correct test or to require solid evidence of a real and imminent risk of dissipation and took account of irrelevant matters when considering this matter;¹⁷

Ground 2 - The learned judge erred in law and fact in not taking account of delay in bringing the application;¹⁸

Ground 3 - The learned judge erred in law and fact in determining that justice and convenience favoured granting of WFO and Asset Disclosure Order;¹⁹

Ground 4 - The learned judge failed to take into account the fact that Mr. Holm has no assets, and had put forward no evidence to demonstrate that his cross undertaking in damages has any value or that he has any means of satisfying it;²⁰ and

Ground 5 - The learned judge erred in wrongly refusing to provide a general ordinary course exception to Mr. Wen and Ms. Fung (the second and third appellants).²¹

¹⁵ See Hearing Bundle A at page 184, lines 9 to 13.

¹⁶ Respondent's Skeleton Arguments, paragraph 17

¹⁷ Appellants' Skeleton Arguments, paragraph 15 and 16

¹⁸ Appellants' Skeleton Arguments, paragraph 17.

¹⁹ Appellants' Skeleton Arguments, paragraph 18.

²⁰ Appellants' Skeleton Arguments, paragraph 19.

²¹ Appellants' Skeleton Arguments, paragraph 20.

The Applicable Law

[25] The legal principles which will command the Court's attention on this appeal concerns appellate restraint and the granting of freezing orders.

[26] Appellate Restraint: Concerning appellate restraint **Dufour and Others v Helenair Corporation Ltd and Others**²² is the seminal case. The following pronouncements by Sir Vincer Floissac CJ have been widely accepted as the settled position:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[27] In **Multibank FX International Corporation v Von Der Hyte SA**²³ Webster JA explained the approach to be taken by this Court, when considering whether to interfere with the exercise of a judge's discretion, and said the following:

"The test is in two stages: (1) the Judge must have made an error in principle and (2) as a result, his decision is outside the generous ambit of reasonable disagreement and is blatantly wrong."

[28] It is worth noting that the legal authorities generally accept that an interlocutory injunction is a discretionary relief and the decision whether or not it ought to be granted is vested in the judge hearing the application. It is also well established that this Court has a limited role in reviewing the exercise of discretion by a judge below and is not to exercise an independent discretion of its own, but rather, defer to the judge's exercise

²² (1996) 52 WIR 188.

²³ BVIHCVAP2021/0009 (delivered 23rd February 2023, unreported) at paragraph 37.

of the discretion and not interfere with it merely because this Court would have exercised the discretion differently.²⁴

[29] **Lakatamia Shipping Company Ltd v Morimoto**²⁵ is authority for the position that applications for freezing injunctions come before commercial judges all the time, and from their time in practice they have developed what is best described as an instinct as to what is well arguable and what is not. Such instinct should be respected by this Court which is without the everyday experience of granting and refusing freezing injunctions, unless it is plain that the judge is wrong.

[30] Additionally, the judge hearing the application is required to assess affidavit evidence only, to arrive at findings of fact and law, in relation to each limb of the test. Thus, at the appellate level “...*the question whether a judge has failed to take something into account is not answered by an overzealous dissection of the language of the judgment.*”²⁶

[31] In a nutshell these are the guiding principles which informed the outcome of this appeal, on the question whether this Court should interfere with the discretion of the learned judge to grant the WFO.

[32] Freezing Orders: In **Multibank FX**, Webster JA again provided useful guidance on the current state of the law concerning freezing orders, and said:

“A freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. It restrains the person enjoined from dealing with or disposing of its own assets. The injunction does not restrain the person from dealing with its assets in the normal course of its business and it is not designed to provide security for the enforcement of the claimant’s judgment. Its purpose is to preserve the assets of the defendant in

²⁴ Per Lord Diplock in *Hadmor Productions Ltd and others v Hamilton and another* [1983] 1 A.C. 191 at paragraph 220.

²⁵ [2019] EWCA Civ 2203 at paragraph 78.

²⁶ Per Lord Briggs in *Ming Siu Hung and others v J F Ming Inc and another* [2021] UKPC 1 at paragraph 22.

circumstances where the court thinks that such preservation is necessary so that the assets can be available, if necessary, to satisfy a money judgment obtained by the claimant.....”²⁷

[33] At paragraph 43 of the judgment, he went on to say that the test for the grant of a freezing injunction is three-pronged and all three conditions must be satisfied for an applicant to succeed. Thus, the applicant must prove that (i) it has a good arguable claim in the amount sought to be frozen; (ii) there is a real risk that the respondent will dispose of assets in such a manner that a judgment against such respondent will go unsatisfied; and (iii) it is just and convenient to make the order sought.

[34] These principles were also distilled in **Green Elite Limited (in liquidation) v Mr. Fang Ankong et al**²⁸, a decision of this Court, in which Michel JA said the following:

*“[56] In **Broad Idea International Limited v Convoy Collateral Limited**, this Court approved the test as stated by Gloster LJ in **Holyoake v Candy**, as follows:*

*“... the threshold in relation to conventional freezing orders is well established. **There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets.** But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. **Solid evidence will be required to support a conclusion that relief is justified, although precisely what that entails in any given case will necessarily vary according to the individual circumstances.**”*

*[57] On assessing whether there was a real risk of dissipation, Males J, at paragraphs 69 to 70 in **National Bank Trust v Yurov**¹⁹ had this to say:*

“As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of

²⁷ BVIHCVP2021/0009 (delivered 23rd February 2023, unreported) at paragraph 42.

²⁸ BVIHCP2019/0030 (delivered 11th June 2021, unreported)

assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label 'risk of dissipation'....

Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

- a. The claimant must demonstrate **a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.***
- b. **That risk can only be demonstrated with solid evidence;** mere inference or generalised assertion is not sufficient.*
- c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.*
- d. 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.***
- e. **The nature, location and liquidity of the defendant's assets are important considerations.***
- f. **Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.***
- g. **So too is the defendant's behaviour in response to the claim or anticipated claim.**" [Emphasis added]*

[35] In **MultiBank FX** Webster JA adopted the above extract as good law, and went on to say:

"The factors listed in the preceding paragraph from the authorities constitute a comprehensive but not necessarily exhaustive list of the matters that the court will consider in an application for a freezing injunction. Each case must be decided on its own facts and it is the function of the court to decide whether the defendant should be restrained from dealing with his assets unjustifiably. This is an evaluative exercise by the court and an appellate court will be guided in its review of the judge's decision by the principles for

appellate interference.....”

- [36] The foregoing principles are fully applicable to this appeal. The onus is on the appellants to establish that the learned judge either misunderstood the facts or misapplied the law to the facts when conducting the evaluative exercise, such that the decision to grant the WFO was patently wrong, in order to justify this Court interfering with the learned judge’s decision.

Good Arguable Case

- [37] Counsel for Mr. Holm submitted that although this limb of the test was not raised by the appellants, it could be said that the WFO is post judgment and that Mr. Holm does have a good arguable case for substantial damages. In reply submissions, counsel for the appellants conceded that this was a case in which judgment on liability had already been obtained against the appellants and the remainder of the proceedings concerned assessment of damages based on the value of the shares held by Mr. Holm in the BOA. The main issue in contention is that of pegging the date at which the shares should be valued, for the purpose of assessing damages.

- [38] The transcript reveals that having cited the relevant authority²⁹, the learned judge said the following:

“.....I accept that Mr. Holm has a good arguable case on the merits against the Defendants. He is a judgment creditor, albeit with damages and costs to be assessed.”³⁰

“.....The fact of the matter is, the Court have ruled on liability. Rightly or wrongly, and it has been through several layers of court work, the decision of the Court is that the Respondents, as Defendants, they are liable in damages, they are liable to Mr. Holm.”³¹

“.....And it is a truism here that the value of the Bank of Asia project, the shares in the Bank of Asia, which the Defendants own

²⁹ Derby & Co. Ltd. v Weldon (No. 1) [1990] Ch 48.

³⁰ Hearing Bundle A at page A-329, lines 1 to 4 of transcript.

³¹ Hearing Bundle A at page A-330, lines 11 to 16 of transcript.

basically, that they have been increasing in value, albeit with some ups and downs doubtlessly and overtime that they have been increasing in value. And so the likelihood, therefore, is that a different, later date could be chosen by the Court in terms of pegging the date at which the damages are to be assessed. And therefore, what we, therefore, have is that we have certainly a good arguable case on the merits that Mr. Holm will get a substantial award of damages with costs when the quantum trial takes place. Of course, this Court doesn't have to look into the future or into a crystal ball as to what is going to happen at that quantum trial. It is sufficient that the Claimant has a good arguable case that he will get a substantial award of damages. Now, I am satisfied that that is the case and, in fact, a contrary position has not been argued with any vigor before me today.”³²

[39] I consider it trite that the threshold for establishing a good arguable case is not a high one. An applicant must satisfy the court that its case is more than barely capable of serious argument, and it need not necessarily be one that the judge believes has a better than 50% chance of success.³³

[40] It is the case that Mr. Holm has a liability judgment which is final. As such, he is a judgment creditor of the appellants. The next stage is for damages to be assessed. From all indications, there is a good arguable case that he will be entitled to damages equivalent to the value of his shares in BOA.

[41] I note that the appellants have not taken issue with this limb of the test, except to say that the parties disagree on the date at which the shares should be valued, which will be determined at the quantum trial, and that any damages awarded may be negligible.

[42] In the circumstances, I conclude that the learned judge's finding that Mr. Holm has a good arguable case, is unassailable.

³² Hearing Bundle A line 21 to 25 of transcript on page A-332 of and line 1 to 16 of transcript on page A-333.

³³ BVIHCVAP2021/0009 (delivered on 23rd February 2023, unreported).

Ground 1: Risk of Dissipation - Consideration of irrelevant matters and incorrect application of the test.
The Appellants Submissions

- [43] The appellants submit that Mr. Wen is the founder and principal shareholder in BOA. His wife Ms. Fung has limited involvement in the project. From 2019 (4 years prior to the application for the WFO), Mr. Holms has had the benefit of substantial undertakings under the 2019 Undertakings Order. They maintain that they have limited free assets and are not people who are at risk of dissipating their assets. They do not have a web of structures or bank accounts across the globe and have now given full asset disclosure since the WFO, which shows that there is no real risk of dissipation. The main assets in their portfolio are BOA and their interest in it, along with minor personal possessions.
- [44] They have disclosed a few limited domestic bank accounts, and their other main assets are properties located in Hong Kong which are heavily encumbered. Furthermore, they have borrowed heavily against those properties with numerous mortgages and remortgages, in order to support and invest money into BOA. The appellants admitted that their evidence in relation to the investment of the loan proceeds in BOA did not present a full picture, however it could not be shown that every dollar from the mortgages went into BOA. Nonetheless, there was no evidence before the judge showing that substantial use of the loan proceeds had not gone into supporting the BOA project.
- [45] Counsel for the appellants submitted that regarding dissipation the main evidence before the judge was the 11th affidavit of Mr. Holm³⁴ in which he stated that the trigger for the application was information contained in the affidavit of Mr. Wen filed on 2nd June 2023 (Wen 7). That affidavit was deposited in a different context on an application for extension of time. The

³⁴ Hearing Bundle B, Volume 1 from page B16.

appellants had been ordered to make certain payments and were seeking time to do so, and it was in that context that Mr. Wen disclosed what they had done with their assets. He was not purporting to state everything which had occurred but was explaining their financial position for the purpose of requesting time to pay. In that application the judge determined that there was insufficient justification to allow an extension of time. That information was used to support the WFO application, with the main thrust of Mr. Holm's contention being that the appellants engaged in mortgaging and remortgaging of assets throughout the intervening period, in relation to the Upton Court Flat. The mortgaging began in 2019 and continued throughout 2021 and 2022 and within a period of 3 years there were a series of such transactions, primarily for the purpose of investing in BOA, and to pay for general living expenses.

- [46] Counsel argued that following the 2019 Undertakings Order the first transaction was a second mortgage in October 2019. The order contained an ordinary course of business exception, and there was nothing expressed in it, which prevented the appellants or any of their holding companies from dealing with their assets for the purpose of investment in BOA. As the mortgaging and remortgaging was for the purpose of investing in BOA, the appellants were of the view that they were allowed to do that. Thus, the charges regarding dissipation were all in relation to known properties in Hong Kong and in relation to mortgaging and remortgaging for the purpose of investing in BOA. Further, some of the transaction cited by Mr. Holm were quite historical and predated the action. Others were at least one year prior to July 2023, when the application was filed. Mr. Holm also relied on the fact that Mr. Wen and Ms. Fung had placed the property on May Road in their son's name as a gift. This was a transaction which had occurred prior to the claim and the judgment and pre-dated both the claim and the 2019 Undertakings Order.

- [47] Counsel submitted that although Mr. Holm says that he found out about all this in 2023 when Wen 7 was filed, in reality the new information was only in relation to some of the more recent dealings in relation to the Upton Court Flat. Otherwise, most of the dealings were already known to Mr. Holm and relied on by him in earlier applications. Hence, there was no urgency or imminent threat of dissipation, and Mr. Wen's evidence is clear that the vast majority of the monies borrowed had been spent on BOA. In the short time available to respond to an urgent application, there was simply insufficient time to present a dollar-by-dollar accounting for every single transaction. Counsel says there is no evidence of dishonesty or involvement in other activity by Mr. Wen. Counsel further submitted that he is a respectful senior businessman in his seventies, with a very successful career as a lawyer in the jurisdiction.
- [48] Counsel submitted that the assets involved are not easily moveable and are not liquid assets. It is expected that freezing orders will be imposed in instances of complex worldwide asset structures and fluid moving assets across jurisdictions, which is not the case here. In this case, the assets are long standing interests in Hong Kong, and real estate and share interests that have not moved. Thus, the loan proceeds were accounted for as best they could in the time available. Although, Mr. Holm says there is a big gap which is unaccounted for, this is clearly a case of mortgaging and remortgaging, and money moving from one property to another.
- [49] The appellants submitted that they have consistently remortgaged properties to keep BOA alive and worked their way down the tier of commercial terms available to them, such that they are now paying extremely high rates of interest at a high cost, in order to sustain borrowings for BOA. Although evidence of the money going into BOA is incomplete, on this application, they were not required to explain everything that had ever

been done. It was simply not possible to do so in such a short time, or to go through a dollar-by-dollar accounting over many years.

[50] Counsel for the appellants submitted that having already heard the application for extension of time, the judge would have already seen some of this evidence. He was not satisfied with it then, and on this application, he appeared to have expected to see a full accounting exercise for every dollar that has been taken from any of the appellants' accounts, and to show that it had been used for and paid into BOA. Counsel stated that there was evidence to show why this was not possible and how some of the proceeds had been used. However, it was not a complete picture and did not satisfy the judge. Counsel says in these circumstances the judge should have believed Mr. Wen as there was no justification for disbelieving what he said in his affidavits. He provided what he was able to get in the time available. The relevant records did not belong to him and could not have been obtained on an urgent basis.

[51] Counsel posits that the judge was wrong to take the view that Mr. Wen and Ms. Fung were bad actors and should not be believed about anything they have said. By doing so, he approached the application on the wrong basis. The appellants have been honest about what they have been doing, and it was costing them more and more each time the properties were remortgaged. Further, it was evident that throughout, the borrowings were for the purpose of promoting BOA from which Mr. Holm stood to benefit when his interest is eventually realized. There was no evidence to suggest that this is not what Mr. Wen has been doing. Thus, to suggest that he is not to be believed, because he has not accounted for every dollar that has moved one way or the other over a number of years, within the short period of time allowed for this application, is unreasonable.

- [52] Counsel posits that the judge took into account irrelevant matters in determining whether Mr. Holm had shown solid evidence of a real and imminent risk of dissipation, when in fact there was no such evidence.
- [53] Counsel relied on the case of **Green Elite Limited (In Liquidation) v Fang Ankong and others**³⁵ to support the position that the requirement for solid evidence is well-known. The threshold is solid evidence which points to a real risk of an unjustifiable movement of assets which will result in dissipation. It is insufficient to simply say that assets may be moved. The movement must be an effective one, so as to avoid any subsequent judgment that Mr. Holm may be seeking to enforce. It must also be a current risk in the sense that there is something which is about to happen, that needs to be restrained. Past events may be relevant, but only to the extent that they serve to demonstrate a current risk which is going to happen and which must be restrained.
- [54] Counsel submits that the judge had no real basis for the conclusion that he reached on this limb of the test, having relied on what Adderley J and the Court of Appeal found in the earlier application, which demonstrated a real risk of dissipation when Mr. Wen and Ms. Fung had engaged in one transaction by transferring a property to their son (although they explained that they had done it for stamp duty reasons). Counsel says this finding is wrong because tax planning does not equate to a risk of dissipation.
- [55] Counsel also says that the learned judge erred when he found that there was an imminent risk regarding proceeds of sale of BOA interests, when there was no such evidence before him and past evidence was not suggestive of this. The interest referred to has not been sold, and there are no proceeds of sale. Whilst negotiations were held, the transaction has not occurred. In any event, such proceeds are already subject to restraint under

³⁵ BVIHCP2019/0030 delivered on 11 June 2021 at paragraphs 56 and 57.

the 2019 Undertakings Order and there was nothing to suggest a risk, once they are received. The nature, location and liquidity of the assets was also an important consideration. All that is at stake here is BOA's interests and real estate, which is almost entirely subject to mortgages. If assets are secured and incapable of being dealt with, then restraint will not be justified.

[56] The best example of this, Counsel says, can be found in in **Fundo Soberano de Angola v dos Santos**³⁶ which was cited with approval by Baptiste JA in **Emmerson International Corporation v Renova Holding Limited**³⁷ where this Court helpfully summarised the principles which a court should consider when determining whether an applicant has shown a real risk of unjustified dealings with assets. The examination must be done objectively and there must be solid evidence of the risk of dissipation, as the real purpose of the freezing order is not to provide security, but to prevent a defendant from evading justice by placing assets beyond the reach of the court. Mr Holm was required to show that there was risk of a judgment remaining unsatisfied, as a "*result of unjustified dealing*." There was no evidence that the appellants would deal with BOA, and the shares held by the Sancus Group in an unjustified way, or outside of the ordinary course of business.

[57] The appellants submitted that the application was premised on (i) historic dealings, (ii) dealings in the appellants assets since the 2019 Undertakings Order, (iii) transactions and ordinary course behaviour and (iv) alleged non-disclosure of assets. These matters are irrelevant and have no bearing on whether a freezing order was justified. Further, the judge accepted all of Mr. Holm's arguments on risk of dissipation and failed to consider the appellants' arguments, when there was no conduct which gave any indication that they were acting in a manner to place their assets beyond

³⁶ [2018] EWHC 2199 (Comm).

³⁷ BVHICMAP2019/0018 (delivered 7th February 2023, unreported) at paragraph 86.

reach or enforcement or ordering their affairs in such a manner to achieve that purpose. The appellants submitted that there was and is no evidence, let alone solid evidence, of dissipation of assets or of an ongoing risk of dissipation for the purpose of avoiding enforcement. Thus, the learned judge was wrong to find that a risk existed, in the absence of evidence to justify this, and in so doing he failed to take any, or any proper account of the appellants' evidence.

[58] Counsel further submits that the learned judge relied on historic dealings to say that there was no evidence to show some change in character which would wipe the slate clean and eliminate a risk of dissipation. The appellants contend that this wrongly reversed the burden which was on Mr. Holm, to provide solid evidence of a real and imminent risk, or that he was not adequately protected by the undertakings. It was not the duty of the appellants to provide evidence of a "*change of character*" to "*wipe the slate clean*", and in any event, the position in 2023 had moved on from the time judgment was given in 2019.

[59] Counsel further relied on the case of **Fundo Soberano** to make the point that a freezing order ".... *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*". On the contrary, the earlier judgment noted that the way the appellants had chosen to set up their assets may be legitimate, and they were not threatening to change the existing way they were handling their assets.

[60] Counsel submits that the learned judge focused on how hard fought the litigation was, stating that it was "*resist, resist, resist*", and while such factors can be taken into account, it is only if it shows a risk of dissipation. It is not determinative, and in this case it is irrelevant. Counsel relied on an extract

from **Commercial Injunctions by Gee**³⁸ to make the point *that “It is often the case that in hard fought litigation there will be an absence of cooperation from the defendant in providing information and documents voluntarily to a claimant, and hostility to the bringing of proceedings.”* Counsel posits that resistance to litigation, and challenging decisions by way of appeal is not in itself solid evidence of risk of dissipation and was irrelevant conduct which the learned judge should not have taken into account. The focus should instead have been on whether the manner in which the litigation was being conducted sought to dissipate or place assets beyond reach.

[61] It is said that Mr. Holm relied on the encumbering of the Upton Flat (the appellants' property in Hong Kong where their son resides) five times since the 2019 Undertakings Order, as evidence of real risk of dissipation, which the judge accepted and relied upon in his judgment. However, the appellants submit that the evidence confirmed that these mortgages were taken to secure financing for BOA as well as its Asian services provider BOA Financial Group Limited (“BOAFG”) and its subsidiaries, and to pay for living and legal expenses. These transactions were permitted by the 2019 Undertakings Order and were ordinary purposes. In this regard, Mr. Wen provided copies of cheques and three remittance advice forms as evidence of approximately US\$9 million of loan proceeds invested into BOA and BOAFG. In the time available, on an urgent application, the appellants were unable to find further evidence in respect of remaining loan proceeds going back over many years.

[62] The appellants contend that the judge wrongly dismissed this evidence despite there being no contradictory evidence and refused to accept anything beyond the three remittance advice forms which substantiated payments of around US\$1.5 million. The judge found that the lack of evidence to substantiate payment of all the funds into BOA and BOAFG

³⁸ Chapter 12, section 12(ii) (c).

gave rise to an inference that the appellants had actually dissipated the loan proceeds beyond Mr. Holm's reach for enforcement, when there was no evidence that those sums had in fact been dissipated.

[63] It is said that the learned judge further fell into error in asserting that the burden of proof was on the appellants to prove that they had not dissipated assets when the test required that the applicant (Mr. Holm) must prove this by solid evidence. If in fact the appellants were hiding assets there would be no need to obtain loans with such high interest rates, to their own detriment. This was in fact the only means with which they could keep BOA afloat, until a substantial investor is found. However, the judge failed to deal with this point.

[64] Counsel relied on another extract from **Commercial Injunctions by Gee**³⁹ to advance the position that the appellants were not obliged to provide evidence in response to applications or allegations of this nature, nor obliged to provide any explanation or answer any questions posed, and failure to do so should not be held against them. The onus was on Mr. Holm to provide solid evidential basis from which an inference of dissipation could be drawn, and there must be such an inference, before it can be displaced. No solid evidence of dissipation of the so-called "missing millions" was provided, and the appellants gave a credible explanation of their difficulty in finding more evidence of payment of the loan proceeds into BOA and BOAFG. The burden was not on the appellants to prove that they had not dissipated funds, but rather on Mr. Holm to provide evidence that dissipation was a real risk. The learned judge reversed that burden to the appellants, and by so doing he fell into error.

[65] In concluding this point counsel for the appellants submitted that the principal finding regarding risk of dissipation concerned an imminent sale of

³⁹ Chapter 12, section 12(c)

the appellants interest in BOA and dissipation upon receipt of the proceeds of that sale. There was no evidence of an imminent sale or any evidence which addressed alleged risk of dissipation of sale proceeds. Thus, the learned judge had no reason to suppose that proceeds would be dissipated from a sale of shares in BOA if there was such sale, and he should not have questioned the honesty of the appellants in that regard. Therefore, taken together, the learned judge took account of irrelevant matters, failed to take account of relevant matters, and wrongly concluded that there was imminent risk of dissipation.

The Respondent's Submissions

[66] Counsel for Mr. Holm submitted that at paragraph 52 of Mr. Wen's affidavit filed on 21st August 2023 he deposed that a potential investor, Lucky Oasis had signed a non-legally binding MOU with BOA to purchase 48% of BOA proportionately from all shareholders, and to reinvest US\$1.0 billion in new shares. The funds for the proportionate acquisition of the shares were supposed to be paid partly in June and partly in July 2023, and new capital was to arrive in US\$200 million-dollar parcels in August, October, and December 2023, February, and April 2024. Mr. Wen stated that this has not happened, and the purchaser has requested time to complete the transaction, and that this falls within the ordinary course exception in the 2019 Undertakings Order. Thus, any suggestion that sale of interests in BOA was not imminent, was completely eroded by the appellants' own evidence. It was Mr. Wen who stated that there was a deal in place and monies were supposed to be paid. Hence, it was not misleading for Counsel to say to the judge that a sale was imminent, as these were Mr. Wen's own words in his affidavit.

[67] Counsel says there was factual evidence before the court which showed that Mr. Wen had concluded the deal for a partial sale of BOA and that monies should have been paid even before the application was heard.

[68] Counsel submitted that the judge's decision for imposing the WFO is unassailable, as the application was granted on the reasons set out in the transcript. Counsel posits that these proceedings are post judgment, albeit pre-assessment of damages and the judge has found on a number of occasions that Mr. Holm has a good arguable case for substantial damages and costs. The *ex tempore* judgment clearly showed that the judge considered all that he was required to, he set out what he was going to do, and then did it.⁴⁰

[69] Counsel submitted that the judge first dealt with the requirement of a good arguable case, then risk of dissipation, followed by balance of convenience. The appellants are merely attempting to argue the application again, in the hope that this Court might come to a different decision, and that is insufficient to succeed on appeal. The decision can only be overturned if satisfied that the judge made a decision which was wrong in principle. Counsel equated the present appeal to a repeat of the appeal against the injunction, which was granted in 2019, where this Court found that there was a good arguable case, there was a risk of dissipation, and that the balance of harm favoured Mr. Holm. It was only because of lack of clarity in the terms of the order that the appellant was given the opportunity to provide undertakings in clearer terms, or have the injunction reimposed. Further, in this appeal the appellants merely seek to challenge findings made by the judge and to have parts of his judgment rewritten in their favour. However, to do so the Court must be satisfied that the judge was "plainly wrong and the appellants must show that a critical finding of fact is not supported by the evidence, or the decision is one that no reasonable judge could have reached.

[70] Counsel further submitted that reasons for appellate restraint in relation to (i) findings of fact by first instance judges; and (ii) the exercise of discretion,

⁴⁰ Hearing Bundle A at page A-328.

are well-rehearsed. As was said in **Hadmor Productions Ltd v Hamilton**, this Court is not to exercise independent judgment of its own, but must defer to the judge's exercise of discretion, and must not interfere with it merely upon the ground that it would have exercised that discretion differently. Furthermore, *"the question whether a judge has failed to take something into account is not answered by an overzealous dissection of the language of the judgment"* as was stated in **J F Ming Inc.**

[71] Counsel submitted that the judge cited legal authority on the requirement for satisfying the court that there is a real risk of dissipation. This demonstrates that he considered the relevant legal principles when exercising the discretion. He dealt with the facts that he thought were relevant to risk of dissipation and referred to conduct in 2016 and 2017. He then summarized the findings of Adderley J in the 2019 injunction application which was upheld on appeal and cited findings of fact and law made by this Court.⁴¹ The learned judge then went on to consider the appellants' position and found solid evidence of a real risk of dissipation.⁴² He disagreed with the appellants' position that there was no risk of dissipation and stated why he disagreed in the following extract from the transcript:

"First of all, it is relevant that the two Respondents, two individual Respondents, Mr. Wen and Ms. Fung, were found to have presented a heightened risk of dissipation, in particular, in relation to the way they have organised their asset holding, even if they might not be intending to do dissipation itself. What we have, we still have that set up which they put in place then. We still have this possibility, this risk of dissipation which that presents. And, as Mr. Levy says, there is no evidence to show some kind of change in character which would wipe the slate clean and say that there is no longer such a risk of dissipation. On the contrary, what we have is that we have apparently, for tax avoidance reasons, the flipping of a property, if I can use the word pejoratively, that they live in, that Mr. Wen and Ms. Fung live in into their son's name when they acquired it. In other words, to have the ownership of that property

⁴¹ Hearing Bundle A at pages A333-A336 and A-337.

⁴² Hearing Bundle A at page A-338, lines 4-14.

put in their son's name in order to reduce stamp duty. It basically involves an untruth.⁴³

[72] Counsel for Mr. Holm continued that the judge alluded to the fact that Adderley J and this Court had found that these matters satisfied the test for risk of dissipation in 2019 and went on to consider the conduct of the appellants in the litigation by delays with appeals which had no prospect of success and continuously resisting all decisions of the courts. The learned judge then noted concerning interim costs payment (which had been agreed), that despite promises and firm assurances that they would be able to pay by a certain date, the appellants failed to do so and were pursuing an application to extend the time to pay, without any firm evidence to support this request.

[73] Counsel posits that the judge was pellucid on that occasion that bald statements were unsatisfactory and that full and proper disclosure of the reasons for requesting the extension and why the defendants were unable to pay, was required. The appellants had been ordered to pay US\$1.2 million in costs of which they had paid US\$800,000.00 and stated that they were unable to pay the balance due to lack of funds. The appellants took the position that they did not need to disclose all their assets in support of that application, but on the contrary as they were requesting an extension of time to pay, it was not open to them to provide limited disclosure. It was necessary to disclose all their assets and their true financial position to enable the court to be satisfied that they were unable to pay and required more time. Moreover, that they would be in a position to pay at a future date. The judge merely alluded to what he said on that occasion, that if the appellants wished to secure the extension of time, they would have to file proper evidence.

⁴³ Hearing Bundle A at line 15 to 25 of transcript on page A-338 and line 1 to 10 of transcript on page A-339 of Hearing Bundle A.

- [74] Consequently, the appellants filed Wen 7, which then caused the respondent to inquire into whether they were complying with the 2019 Undertakings Order. This affidavit disclosed encumbrance of assets, which the appellants were prohibited from doing, unless it fell within one of the provisos. The affidavit does not disclose that the monies went into BOA, which means the 2019 Undertakings Order was breached in relation to encumbering the Upton Property outside of the proviso, which only permitted that it may be done in the ordinary course of business, for funding BOA.
- [75] Counsel submitted that when these matters arose on the extension application, the appellants were asked to provide further evidence, and they filed Wen 7 which contained disclosure of five encumbrances of which the last three were unknown to Mr. Holm. The appellants then paid the remaining balance of US\$400,000.00 of the costs order and it was no longer necessary to proceed with the extension application.
- [76] Counsel opined that it was not surprising that the judge was concerned about the fact that the appellants had obtained mortgages, which would be a breach unless they had placed the proceeds into BOA. It was relatively easy to demonstrate that the monies went into the account of BOA, yet the appellants chose not to do so, which was extraordinarily suspicious. They exhibited copies of cheques made payable to the BOA, but these cheques contained no information to confirm that they were ever deposited into BOA's account. In the absence of this information, this conduct clearly amounts to evidence of dissipation. If the appellants are saying that they did not dissipate and that the monies were used to fund BOA, then they ought to have proven this to the satisfaction of the court. Yet they have failed to do so, even in this appeal.

- [77] Counsel argued that there was strong evidence of dissipation, because notwithstanding the undertakings to refrain from certain conduct, except in very limited circumstances, the appellants went ahead and did it and failed to show that it was done within the limited circumstances. The judge found that this fell far short of an explanation and was again dissatisfied with the documentary evidence provided, having previously warned that bald statements were unsatisfactory and that full and proper disclosure was required. The appellants had between July to September 2023 to provide satisfactory evidence of the use of the loan proceeds but failed to do so. It was on that basis that the learned judge concluded that the appellants' conduct had not changed, and this was strong evidence of a pattern which showed a continuing propensity to dissipate. The learned judge then concluded that there was an arguable case of breach of the 2019 Undertakings Order, as assets had moved, which should not have been moved, except in certain circumstances, and the appellants gave no satisfactory explanation to demonstrate that these circumstances were met.
- [78] The appellants have said that in Mr. Wen's 10th affidavit filed on 7th September 2023⁴⁴ he explained where the monies went. However, at paragraph 8 of that affidavit Mr. Wen says that the appellants were attempting to obtain documentary evidence to show how the loan proceeds were spent. He confirmed that they were used to fund BOA and BOAFG and to cover interest on the loans. He further says given the urgency with which the application was being pursued and the lack of prior warning, it was not possible within the time available to obtain complete evidence of all the payments made. He exhibited CW-10 which contained copies of cheques and bank transfer statements showing some of the payments made to BOAFG between May 2019 and February 2022, along with a table summarizing these payments. The appellants agreed it was not a complete picture yet say that the judge was wrong to reject it by equating it to the

⁴⁴ Hearing Bundle B, Tab 11 at para 8.

evidence which he found was not satisfactory on the application for extension of time.

[79] In response to the appellants' contention that the evidence of where the loan proceeds went was presented and simply disregarded by the judge, Counsel for Mr. Holm argued that from the information provided, there was a difference of US\$12 million which was not accounted for. There was a total of 5 weeks between July to September when the application was adjourned, during which the information could have been obtained from BOA, to provide full disclosure. It was not difficult to obtain that information, if it did exist. The failure to do so, despite being warned that it was necessary, was very suspicious. Moreover, this was in circumstances where the court had previously said that it needed to be explained. Further, no application was made for time to obtain the information if it did in fact exist. There is nothing wrong with being suspicious of an unexplained sum of US\$12 million, having given the appellants the opportunity to explain it. Against this backdrop it could not be said that the judge was wrong to be suspicious, even if someone else would not have been. Taken together there was the May Road Property placed in their son's name, promises to pay costs and failing to pay, the absence of an explanation for the missing US\$12 million loan proceeds which presented an arguable breach of the undertakings, and a deliberate decision to give as little information as possible of known assets, in the hope that the court would be satisfied with such scant information.

[80] Counsel argued that the judge was not wrong to reject the appellants' evidence of their use of the loan proceeds and require them to prove it by full documentary evidence. In response to the appellants submission that the judge required that every dollar invested in BOA be proved beyond doubt, rather than determine the issue on a balance of probability, Counsel stated that this concerned accounting for US\$12 million out of the total sum

of US\$26 million obtained by way of loan proceeds after 2019. None of the evidence provided by the appellants satisfactorily addressed this gap. Thus, the learned judge was entitled to take the view that there was risk of dissipation, as this conclusion was based on things which he observed had happened, which caused him to believe that there was a proclivity to dissipate assets. It was based on past conduct, and the failure to properly explain the use of the loan proceeds.

- [81] Counsel posits that even if this Court takes a different view, the judge's decision must stand, as an appellate court must give way to the judge's decision, unless satisfied that the judge was utterly wrong.

Analysis

- [82] I have examined the statements made by the judge, which the appellants say were wrong or irrelevant. In essence they amount to criticisms of statements made by the judge about matters which he generally spoke of along the way. In doing so, the appellants have completely overlooked salient statements and remarks made by the learned judge regarding the test in relation to risk of dissipation and its application to the facts before him. It is not unusual that a judge who has had conduct of a matter over a period of time would be *au fait* with the intricacies of how it has unfolded and may make references to the history of the case for contextual purposes. This is permissible and appears to have been the tenor of the statements which the appellants complain of. Upon review of the transcript, it is evident that these statements did not form the sole basis for the judge's finding of solid evidence of a risk of unjustifiable dissipation. They seem to me to have formed the contextual background against which he considered the law and the facts, as advanced by Mr. Holm and the appellants.
- [83] For instance, in arriving at his conclusion on risk of dissipation the learned judge said the following:

“.....the authorities are fairly clear or they are clear in terms of the test.....the Claimant will satisfy this burden if it can show that: "There is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business ... or That unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes." The real risk of dissipation must be judged objectively.... And: "The Claimant must adduce solid evidence in support of his contention that there is a real risk that the judgment or award will go unsatisfied."...The conduct in question must be unjustifiable, but it is unnecessary to show an intention to dissipate, nor dishonesty or fraud... "A real risk of dissipation may also be inferred from the 'Defendant's behaviour in respect of the claims', including where this reveals 'a pattern of evasiveness' or the raising of thin defences after admitting liability." And also: "The court may infer the necessary risk of the judgment going unsatisfied from the behaviour of the Defendant, if, for example, he keeps promising to pay but persistently defaults with implausible excuses."And also Gee adds in his own commentary that where you have conduct, which might be misconduct or questionable conduct, if it is that the Judge is left with a sense of unease about the respondent's conduct, that can, in certain circumstances, suffice and no further evidence of a risk of dissipation is then needed. It should also be said here in terms of legal principles that it has been recognised that : "The objective of the freezing order, is to provide effective protection for the applicant against dissipation of assets by the respondent, would be undermined if either the restraining provisions or the disclosure provisions were removed from that order; neither can be regarded as severable or discrete from the operative injunctive effect [from] of the freezing order taken as a whole."⁴⁵

- [84] Thereafter the learned judge engaged in extensive analysis of the evidence regarding the conduct of the appellants, which would have amounted to solid evidence of risk of unjustifiable dissipation. This comprised evidence of conduct prior to the 2019 Undertakings Order, which remained in existence at the date of the application, evidence of arguable breach of the 2019 Undertakings Order based on the glaring absence of evidence to

⁴⁵ Hearing Bundle A at pages A-334 to A336.

support the appellants position that use of all the loan proceeds fell within the provisos, and the overall conduct of the appellants throughout the course of the litigation. Each of these matters were identified and addressed in detail by the learned judge.⁴⁶

[85] The law on this issue, as expressed in **Commercial Injunctions by Gee** is as follows:

"Since each case depends on its own facts and the court looks at the totality of the evidence, it is impossible to lay down any general guidelines on satisfying this burden, but some of the factors which may be relevant are as follows including that in response to the claimant's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, or promises to pay and persistent defaults with implausible excuses, or running up liabilities and not paying them, or incurring liabilities beyond his means, or transferring assets or engaging in other conduct which may prevent enforcement. An offer of an undertaking may indicate absence of risk. Failure to give proper disclosure of assets under a court order is indicative of risk."

[86] All the matters complained of by the appellants were before the learned judge in the 11th affidavit of Mr. Holm and were fully considered. It was the appellants (as respondents in the application below) who made reference to the fact that full and frank disclosure had been made in Wen 7 up to July 2023, when they sought to move the court to grant an extension of time to pay the balance of a costs order. Thereafter they relied on the 9th and 10th affidavits of Mr. Wen to say that disclosure has been brought up to date. Concerning the May Road Property, which was purchased from the sale of the shares in BOA and placed the name of Ian Wen, the son of Mr. Wen and Ms. Fung, the learned judge conducted a thorough analysis of the conduct of the appellants in relation to this property. He found that Mr. Wen and Ms. Fung have lived there as their home, and although they say it was

⁴⁶ Hearing Bundle A at pages A-336 to A-338.

placed in their son's name for tax avoidance reasons, this basically involved an untruth. He stated that there was no evidence that the son had earned this money to pay for the property using his money, but rather the money seemed to have come from the parents. Nonetheless, to date the asset has remained in the son's name and he is not a defendant to the proceedings. The judge noted that although there might be nothing wrong in the law, it was nevertheless another instance of organizing the family affairs for convenience, to reduce liability.

[87] In considering the conduct of the appellants throughout the litigation, the learned judge concluded that it showed a very resistant defendant, one who firmly resists having to pay money over to a party who has now been found to have a liability judgment in his favour. In this regard he scrutinized their behaviour in relation to their own application for extension of time to complete payment of an interim cost order, stating that *"the court had indicated repeatedly the quality of the evidence that it required to be satisfied that an extension of time should be granted for that interim payment."*

[88] Concerning breach of the 2019 Undertakings Order the learned judge found that subject to one of the two provisos contained in that order the apartment or flat known as the "Upton Property" could not be encumbered or dealt with or basically disposed of, transported, sold, gifted or encumbered, or otherwise dealt with, and it was mortgaged or dealt with no less than five times, since the undertakings were given. He rejected the appellants (then respondents) response that this was perfectly in order first because of the ordinary course of business carve out, and secondly there was nothing in the undertakings to prevent the appellants or any of the holdings companies from dealing with their assets for the purpose of raising capital for investments in BOA and its related companies. The learned judge was

entitled to do so based on the terms of the 2019 Undertakings Order and the evidence before him.

- [89] The learned judge examined the manner in which the appellants sought to make good on their submission that the loan proceeds were invested in BOA and BOAFG. The first piece of evidence was an accounting extrapolation attempting to show that they had accounted for certain sums of money, but this was found to have fallen short of the acceptable standard of an explanation. It confirmed that approximately US\$1.4 million was paid into BOA through three credit advices. Additionally, the appellants sought to satisfy the court that they came within the exception in the provisos by providing cheques written to BOA. In this regard the learned judge said the following:

“Interestingly, very interestingly, not bank statements, interestingly not cheques which had been endorsed by the Bank or stamped or otherwise confirmed by the Bank, but just written cheques. Now, it beggars belief that anybody, particularly a veteran lawyer such as Mr. Wen who is a banker in terms of trying to get up and running this great Bank of Asia, that he should think that that is sufficient to show a money flow..... And the way to do it, is either to put a bank statement in front of the Court and marry up the cheque number and to show that the money has gone through the bank into the investment project. They didn't do that.....Another way in which it could have been done would have been for the Bank of Asia to come and show documentation, bank statements ideally or some other kind of accounting confirmation or indeed auditing confirmation that these sums had been received. They did not do that. Now one has to ask oneself why not? Mr. Hall Taylor repeatedly said they didn't have to. I am sorry, they did. Because once you are trying to say that you weren't in breach of this undertaking, the burden is on you to satisfy the Court of that. It might be on the balance of probabilities, just on the ordinary civil standard and it doesn't have to be to demonstrate everything, to show everything, but then it is, as Mr. Levy said, it is the simplest thing in the world to show that money has gone from A to B by bank statements, particularly once apparently it has been paid over by cheque, but they didn't do that. So unfortunately, it is inadequate, insufficient to just have shown the Court those cheques. And we are left, therefore, with the specter of a breach of the undertaking. Not only are we left with the specter of the breach of the

undertaking, but we are left with an apparent deliberate decision to give as little information as possible about one's own assets and movements in the hope that the Court is going to be satisfied with that little bit information so you don't have to disclose it, which begs the question why?

And it is odd. What we have here is, on the one hand, a strange averment of impecuniosity on the part of the Respondents, yet they live in a multimillion-dollar property. They appear to have a need to service these loans of about US\$135,000 per month. Mr. Wen appears to get a salary of about US\$800,000 worth a month. They say that they are impecunious and yet, what they have also done is various properties that they directly or indirectly own, they have apparently encumbered as mortgages, obtained large sums of cash on the back of those, and apparently, mortgage goes up to the hilt. So, in other words, there is no equity or very little equity or no equity at all left in those properties. And then, in order to service those loans, they say they have to go and borrow from other people, which they are in the process of doing.

.....

So what we have on the one hand, we have a plea of poverty. We have a plea of tight money, the very poor financial straits circumstances. And that is one song which is being sung on the one hand; and then on the other hand we have a trumpet being blown on LinkedIn or, I think, it was LinkedIn or at least one of these professional networking sites where Mr. Wen is hailed by himself as this chairman of this Bank of Asia and Sincus with investments in various industrial sectors. Where are they? Where is the evidence of what those industrial sectors are worth? Is this mere puffery? It is not. If you say that you have got all these investments, surely there is something there. Well, what is it? We are not being told. And all this conduct, it is manipulative conduct to try and avoid other people, including the Court knowing what is really going on in terms of the assets position. So, yes, it was [encumbered] on them, on the Respondents to put sufficient evidence before the Court that they were not in breach of these undertakings. And arguably, therefore, they are in breach of those undertakings. And it would be the easiest thing in the world to show where the money went, why it was raised, where it went if indeed it was for a legitimate purpose in accordance with the proviso to the undertakings. Why haven't we seen it?"

.....

So what we have in the totality is indeed that people who are, have been found to present a real risk of dissipation, they have conducted themselves even after that, in ways which are at least

arguably and strongly arguably, are in breach of a Court order. They appear to be extremely keen not to disclose their assets, their global assets. They have moved their assets around in ways to decrease their liability. They say on one hand that they are impecunious, but on the other hand they manage to go to other people to raise money at obviously high rates of interest, and have seen the evidence of that, but nonetheless, those lenders must be satisfied that they are going to get their money back one way or the other.

So, where does that leave us? It gives the Court a very uneasy feeling about this conduct and about the matter proceeding to a quantum trial without some measures in place to prevent the Claimant from obtaining a nugatory judgment.

It was argued before me by Mr. Hall Taylor that, well, with the money that the Defendants got from selling some of their Bank of Asia shares, they bought real property and that's not real dissipation because you could see where the property is, it is in Hong Kong. It is real property. That's not dissipation, absolutely correct. I completely accept that submission, but what wasn't there was that when you immediately or soon after encumber that property or those properties right up to their value and get cash for it and then do something with the cash which you have not actually shown the Court, now you have monetised those properties, you have monetized those properties and that is liquid money. It could be anywhere. And it might not be in the Bank of Asia because there is actually nothing to show that most of it is in the Bank of Asia.

.....

So I am satisfied that there is a real risk of dissipation.”

- [90] The above extracts reveal that all the circumstances surrounding dissipation of assets which existed in 2019, which were accepted as solid evidence of risk of dissipation by the court below and upheld by this Court, were still in existence when the application was filed in July 2023 and ventilated in September 2023. The learned judge also found that there were further instances of dissipation by mortgaging and remortgaging other assets presumably for investment in BOA. However, evidence of the bulk of loan proceeds being invested in BOA to bring these transactions within the carve out was found to be severely inadequate. On that basis the

learned judge concluded that the assets had been converted to liquid cash and there was no evidence to show where that money was.

[91] At paragraph 12-014 of **Commercial Injunctions by Gee**, it is said that what constitutes risk of dissipation depends on the totality of the evidence and not viewing it piecemeal. It was therefore open to the learned judge to examine all the evidence, as existed at the date of the application. He was entitled to review all the available evidence, looking back and then coming forward to the present, to fully assess the conduct of the appellants in relation to their propensity to engage in dissipation, and to ascertain whether previous questionable conduct had been corrected, or whether the appellants continued to engage in more of the same conduct. In his view, on the preponderance of the evidence, it was more of the same. These are all matters which a judge is entitled to consider when conducting the evaluative exercise for each limb of the test, as indicated in the authorities such as **Green Elite** and **Multibank FX**, referred to earlier in this judgment.

[92] Quite apart from the historical matters contained in Mr. Holm's 11th affidavit he also relied on current matters concerning breaches of the 2019 Undertakings Order, specifically Undertaking No. 4 which stated that:

"the Defendants will not dispose of, transfer, sell, gift, or encumber or otherwise deal with the property at Flat C, 18/F, Upton, 180, Connaught Road West, Hong Kong (the "**Upton Flat**");..."

[93] At paragraph 26 of his 11th affidavit Mr. Holm stated the following:

"The Defendants have substantially encumbered what they purported to be nearly all their remaining suite of saleable assets and have failed to fully and properly account to over 18 million in loan proceeds."

"In Wen 7, and without any supporting documentation, and in conflict with prior evidence, Mr. Wen repeatedly claims the monies have been spent on 'the Bank'."

"The Defendants have been evasive and selective in their attempts at so-called asset disclosure, which in each instance has raised more questions than it has answered. Through Wen 7, they also failed to properly account for, or even mention, the 26 million in secondary share sale proceeds..."

[94] In response, the appellants say that Undertaking No. 5 created the ordinary course business carve out which allowed the appellants to deal with their assets for the purpose of capitalizing BOA, and Undertaking No. 4 was not breached because they were using the cash raised for a permitted purpose.

[95] Undertaking No. 5 (ii) states the following:

"the ordinary course of the business of each of BOA International and Sancus Financial (the Holding Companies) extends to raising capital for the purposes of investment into Bank of Asia and related companies, and nothing within the undertakings shall prevent the Defendants (or any of the Holding Companies) from dealing with their assets for that purpose."

[96] The transcript reveals the following exchange between the court and counsel for the appellants (then respondents):

"Court: Did the Defendants have the burden of satisfying the Court that they did use the money for that purpose?"

Counsel: I do accept that an explanation needs to be given to the Court to show that it falls within those provisos. There is evidence from Mr. Wen on what was being done and why. There is evidence of the use that the money was being put to. Admittedly, it is not a full picture, and it is not the full evidence of everything that has been done with every last cent, but the explanation is there in Mr. Wen's evidence and some corroborative evidence has been provided. It is not complete, but it is there, and is sufficient."

[97] **Commercial Injunctions by Gee** clearly supports the position that:

"The Defendant is not obliged to put in evidence in response, is not obliged to provide any explanation to answer any questions posed, and nor can a purported failure to do so be held against him. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the defendant will be expected to provide an explanation."

[98] As I understand it, the appellants seem to be saying that there should have been a cut-off point in relation to what existed prior to 2019, which according to them, was dealt with by the 2019 Undertakings Order, and the focus of the learned judge should have been only on what had transpired from 2019 to 2023. This argument is flawed, as it was open to the learned judge to form the view that there was nothing which wiped the slate clean of past conduct which had led to a finding of risk of dissipation in 2019. The May Road property was still held by Ian Wen, and other properties acquired thereafter were being heavily mortgaged at sub-prime rates, in circumstances where Mr. Wen and Ms. Fung were saying that they are impecunious. It means that lenders were considering them riskier than the average borrower and extracting higher than average interest rates for these borrowings. Even if it may be said that such conduct by the appellants was not dishonest, **Gee** lends support to the position that "*.....dishonesty is not essential to the exercise of the jurisdiction ...*"

[99] What clearly emerges from the transcript is that the judge found the appellants conduct to be dishonest when faced with a glaring absence of pertinent information. All of these matters would have formed part of the learned judge's evaluation, on which he found that the risk of unjustifiable dissipation continued to exist. Even if the appellants say that they were attempting to keep BOA viable by heavily investing in it, which would ultimately benefit Mr. Holm, to encumber their assets to the extent of having no equity left was sufficient solid evidence, from which the learned judge could infer a risk of unjustifiable dissipation. Although the appellants could have encumbered certain assets in the ordinary course of business, for use in BOA, once Mr. Holm had established on the material before the court that a real risk of dissipation could be inferred from the appellants conduct, the onus was on the appellants to provide an explanation. In the learned judge's view, they failed woefully to provide a satisfactory explanation of the use of substantial sums from loan proceeds and where this money was.

[100] I accept that it was open to the learned judge to make these findings, and there is no basis for interfering with his decision on this limb of the test. Evidence of a pattern of conduct which signalled a propensity to dissipation was before him from previous judgments and orders in the court below and this Court. He was entitled to take into account the past conduct of the appellants in conjunction with their recent conduct of not providing a satisfactory explanation for the use of substantial sums derived from loan proceeds between 2019 to 2022. Indeed, the learned judge lamented that the evidence to support the explanation that the monies were substantially used for the BOA project was not the best credible evidence for these purposes.

[101] The learned judge was entitled to come to the conclusions that he did as he had a complete grasp of the evidence and the benefit of submissions of counsel (written and oral). His reasoning as borne out in the transcript was sound, methodical and complete in terms of applying the law to the facts as he found them. Accepting the long-standing principles of appellate restraint, there is no basis upon which a finding of solid evidence of a real risk of dissipation can be disturbed, and this ground of appeal is dismissed.

**Ground 2 : Failure to give any consideration to delay
The Appellants' Submission**

[102] On this ground Counsel for the appellants submitted that the dispute between the parties began in mid-2016 and the litigation commenced in 2017. At no stage prior to December 2018 was any suggestion made that injunctive relief was required or appropriate. After the 2019 Undertakings Order Mr. Holm waited a further 4 years before applying again for the WFO, and until a few months before the quantum trial. The application was on an urgent basis and largely rehashed historic matters would have been known to him for some years.

[103] The only recent information which he relied on was the extent to which the appellants' property interests were encumbered, and the heavy burden and cash flow deficit they are operating under, as a consequence of bearing the interest charges which flowed from servicing their loans, as set out in Wen 7. Thus, most of the instances of alleged dissipation occurred long ago and were known to Mr. Holm long before Wen 7 was filed, and he could not seriously have thought that they gave rise to a risk of dissipation. If he had, he would have applied earlier.

[104] Counsel contends that the learned judge completely failed to deal with the issue of delay, or the appellants' arguments that delay undermined any suggestion of an imminent risk of dissipation. Further, delay did not feature at all in the judgment when it was raised and should have been considered.

The Respondent's Submissions

[105] Counsel for Mr. Holm submitted that the application was filed on 19th July 2023, roughly six weeks after becoming aware of the information contained in Wen 7. This was not an exceptionally long time and as such there can be no element of delay. Wen 7 is what triggered an inquiry and led to the application. Prior to this Mr. Holm did not have sufficient information to launch such an application.

[106] Further, Wen 7 provided justification for the application, as it disclosed that the appellants were raising money off their properties and had done so on five separate occasions from October 2019. He was aware of the first two encumbrances but was completely unaware of the last three and he did not know that the monies being raised through these mortgages were not going to BOA. It was not until the affidavit was filed that he became aware of these matters. The real concern is that there was no evidence before the court of what happened to the proceeds or where they went. Although the appellants say that it went to the BOA, there is no real evidence of this.

Analysis

- [107] Delay will usually be considered in relation to risk of dissipation. There is no general rule that delay in applying for a freezing order is necessarily a bar to obtaining injunctive relief. However, in seeking to rely on delay as a factor a respondent must demonstrate that the applicant never really believed that a real risk of dissipation existed, or if an applicant seriously thought so, an application would have been made much earlier.
- [108] Upon examination of the facts, the appellants have not established that delay was an important factor to be considered by the learned judge, when dealing with risk of unjustifiable dissipation.
- [109] I note the learning in **Emmerson International Corporation v Renova Holding Limited**⁴⁷ cited by Counsel for the appellants, where Baptiste JA made the following observation:
- "It is well established that delay is an important factor in determining whether there is a real risk of unjustifiable dissipation, and whether, even if such a risk exists, it is appropriate for the court to exercise its discretion to grant a freezing order. **It is not generally the rule that delay in applying for a freezing injunction is a bar in itself for the obtaining of relief. The relevance of delay is that it may show that the claimant actually never believed that there was a real risk of dissipation and that if the claimant had seriously thought that there was, an application would have been made earlier.** Delay may also mean that the assets sought to be restrained have already moved."
- [110] Baptiste JA went on to reference the following pronouncement by Flaux J **Madoff Securities International Ltd v Raven**⁴⁸, which is apposite to the present case:
- "The mere fact of delay in bringing an application for a freezing injunction ... does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a

⁴⁷ BVIHCMAP2019/0018 (delivered 7th February 2023, unreported) at paragraph 87.

⁴⁸ [2011] EWHC 3102 (Comm).

risk of dissipation, the court should grant the order, despite the delay ...”.

- [111] The record contains no evidence to refute Mr. Holm’s position that he only became aware of the last three encumbrances of the appellants’ properties in June 2023, when Wen 7 was filed. He maintains that this information triggered an inquiry that ultimately led him to file the application, which was filed a mere 5 weeks after the information in Wen’s 7th came to light.
- [112] I therefore conclude that there was no delay in filing the application, and even if it could be said that there was, it would not have been determinative of the application, in relation to risk of dissipation, as the learned judge was satisfied from other significant evidence that there was in fact a risk of dissipation.
- [113] The learned judge was therefore not in error for giving no consideration to delay, and there is no basis for appellate interference. This ground of appeal is dismissed.

Ground 3: Just and convenient (balance of prejudice)
The Appellants’ Submissions

- [114] Counsel for the appellants submitted that the learned judge failed to correctly apply the test of justice and convenience, by not considering the balance of prejudice to either party. The court was required to give careful consideration to the appellants and third parties (such as related companies within the Bank of Asia Group) when deciding whether the relief should be granted against the appellants, as founder and significant shareholder of a company of good reputation, and the attendant risks to their business in doing so.

[115] Counsel relied on an extract from **Commercial Injunctions by Gee**⁴⁹ stating:

"The court should be satisfied before granting the relief that the likely effect of the injunction will be to promote the doing of justice overall, and not to work unfairly or oppressively. This means taking into account the interests of both parties and the likely effects of an injunction on the defendant."

[116] Counsel further referenced **Gee** at Chapter 21- Section 12 10(i) where it states that:

"The Court will ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the claimant from the risk of improper dissipation of assets. Since the claimant is not in the position of a secured creditor, and has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his creditors, even if the effect of such dealing is to render the injunction of no practical value. The freezing order is not intended to provide a claimant with security for its claim or give any proprietary interest in the assets restrained or to confer any preference for repayment from an insolvent party. The position is to be *distinguished from where the claimant has a proprietary claim ...*"

[117] Counsel contends that the likelihood of harm to the appellants and the BOA with which they are inextricably linked, was all the more obvious and relied on **Polly Peck International v Nadir No 2**⁵⁰ in support. There it was said that:

"A bank depends on business confidence to continue in business. Mareva relief may destroy that confidence at a stroke, leaving the Defendant deprived of its business."

[118] Further, **Gee at Chapter 12 Section 12(v)** says that one of the circumstances where the relief may be inappropriate includes where an injunction might destroy the defendant's business and states the following:

"The cross-understanding in damages provides, in such a case, no

⁴⁹ Chapter 12 Section 12(v).

⁵⁰ [1992] 4 All ER 769.

adequate safeguard against the possibility that the injunction was wrongly granted. This is the more so since a Mareva injunction may have the effect of depriving the defendant of the resources necessary to prosecute, in due course, a claim on the cross-undertaking. The same is true of other businesses liable to be destroyed if confidence is undermined or credit is withdrawn."

[119] Further the appellants contend that the injunction would destroy the possibility of any investment being procured for BOA, including acquisition of the existing shares by an investor, because no one will consider investing in BOA, if it is subject to an injunction, thereby resulting in a loss of investor confidence and appetite. Counsel says this evidence was not countered, except that Mr. Holm downplayed without justification the significance of Mr. Wen's central role in BOA. The appellants further submit that the learned judge accepted Mr. Holm's arguments wholesale and failed to consider the impact which the WFO would have on the appellants and by extension BOA.

[120] Counsel says the appellants' evidence was also that the WFO would place them at risk of defaulting on various high value loans, some of which are secured against the property in which they live, and should those lenders take enforcement action, this would only serve to further deplete their assets and render them at risk of insolvency and homelessness. It is said that the learned judge failed to consider or address this point at all. Counsel continued, that the appellants' evidence and submissions indicated that the appellants financial and asset position could not get any worse, to Mr. Holm's detriment, except through ordinary course behaviour, such as ordinary living or legal expenses, or servicing or refinancing existing loans, which should not be the subject of restraint. They have nothing of substance to dissipate other than their interests in BOA and there is no suggestion that there is any risk of such dissipation.

[121] Counsel says, as stated in the affidavits referred to as Wen 7, Wen 8 and Wen 9, the only way Mr. Holm and his litigation funders can hope to have substantial recovery is from the appellants realizing value from the BOA project. The WFO would significantly imperil that prospect and not necessarily preserve it. However, the learned judge failed to consider this point when considering either risk of dissipation or the balance of convenience. Further, when considering the balance of prejudice, he failed to consider the detriment that the WFO would cause to Mr. Wen or Ms. Fung personally. Instead, he focused his analysis solely on BOA, when he ought to have considered the draconian impact, it would have had on Mr. Wen and Ms. Fung as individuals and in their personal capacities. Moreso in respect of Mr. Wen as the founder and principal investment fund raiser for BOA.

[122] Counsel stated that the appellants had submitted in their skeleton arguments that Mr. Wen depends on his reputation as a well-respected lawyer, public servant and businessman to attract investor interest in BOA, and Mr. Holm would not realize any value from his interest in BOA if Mr. Wen is unable to secure investment. Counsel submits that the learned judge failed to consider this position, except to acknowledge in his judgment that "*...an injunction is detrimental to reputation. It is very draconian. It is harmful and people think twice before dealing with somebody who is subject to an injunction.*"

[123] To counterbalance that consideration the learned judge considered that
"*....because the Bank is not a party, intelligent observers would know that an injunction is there to protect, is to protect somebody else from potential conduct which might be feared in circumstances where the Bank of Asia itself is only minority owned by Mr. Wen and/or Mr Holm... And in circumstances where there has been nonrunning [sic] litigation involving the shareholders of the Bank of Asia.*"

[124] Thus, the learned judge failed to take into account the appellants' evidence that Mr. Wen's reputation as founder of BOA and principal means of raising

investment, was inextricably bound with the reputation of BOA and its ability to raise investment, and wrongly downplayed the appellants role when he considered that Sancus was a minority owner, contrary to the evidence before him which confirmed that it held 44.1% of the shareholding and Smart Token, the majority shareholder only holds 45%. In this regard the only prejudice to Mr. Holm which the learned judge relied on was the alleged imminent sale of BOA and the supposed threat of millions of dollars as proceeds of sale being dissipated. No evidence of such risk was before the court, and there was no reason to conclude that it existed, nor was it explained sufficiently to justify granting the WFO. No reason was given for why such risk was not already adequately covered by the protections in the 2019 Undertakings Order. Thus, the appellants contend that the risk of prejudice to Mr. Holm was illusory and unsubstantiated by any evidence, let alone solid evidence, whilst the risk of prejudice to the appellants was real and substantial, and supported by uncontroverted evidence.

- [125] The appellants further say that the learned judge failed to consider Mr. Holm's financial position when weighing the potential prejudice to each party, when it was noted in the appellants' skeleton arguments that he would suffer no prejudice if the order was refused. There were sufficient assets, in particular his interests in BOA which remain available for enforcement, and he is not incurring any legal costs, as those are being paid by a third-party litigation funder. Thus, the learned judge completely failed to acknowledge his position, or the fact that Mr. Holm is supported by litigation funding.

The Respondent's Submissions

- [126] In summary, Counsel for Mr. Holm submitted that the learned judge addressed this matter when he said that the third condition, which the Court has to look at, is whether on a balance of convenience it is just and

appropriate as a matter of the court's discretion to grant the injunction.⁵¹ Thereafter he set out the factors which favoured granting the injunction and the factors which militated against granting it, and stated that it was a tough decision to take and a tough balance to strike. Nonetheless, on balance, the overriding objective is best served by granting the WFO.⁵²

[127] Counsel argued that Mr. Wen's behaviour was unthinkable, as he admitted that he encumbered the properties but was not prepared to explain what he did with the loan proceeds. His explanation was in unsatisfactory terms and there was no evidence that the BOA would be damaged or affected by the WFO. In granting the WFO the learned judge removed the provisos, but did not prevent the appellants from presenting the specific details of any transaction they wished to undertake to Mr. Holm for his consent. If such consent was unreasonably withheld, then an application could be made to the court for permission. The usual position is to allow the appellants to police themselves, but these appellants cannot be trusted to do so. Nonetheless, they have not been denied the ability to undertake transactions in the ordinary course of business, but the court needs to be aware of what is going on, to ensure that they are not in breach of the WFO. Thus, the learned judge was entitled to do as he did, in these circumstances.

[128] Counsel submitted that significant dissipation of assets and breaches of the 2019 Undertakings Order has already occurred. As part of the purported attempt to explain the appellants' financial position (in the context of submissions in relation to the 2019 Undertakings) the evidence demonstrated that large sums of money were unaccounted for, essentially leaving more questions than they purported to answer.

⁵¹ Hearing Bundle A at page A333 to A334.

⁵² Hearing Bundle A at page A350 to A355.

- [129] Counsel posits that having taken these matters into account; the learned judge correctly found that the balance of convenience weighed in favour of Mr. Holm, for granting the WFO.

Analysis

- [130] On this issue, the learned judge said the following:

“The third condition that I have to be worried about then is whether it is convenient, just and convenient to make the injunction order, the freezing order, as a matter of the Court's discretion”

Now, essentially this is a question of balancing prejudice. On the one hand, we have the risk that Mr. Holm will be left with a nugatory judgment because those assets which are out there in the control of the Defendants, they can be put anywhere and we have not been given much transparency over what they have and where they put it and we are being told a number of things which are not being supported by primary evidence. So there is a risk, a very real risk of a nugatory judgment because of eventual dissipation.

I am satisfied that if there is the possibilities of imminent dissipation, in that, as Mr. Levy says, there are potentially very large sums of money flowing in the very near future. At least one of these transactions which have been spoken of, which had been agreed on, that they might come off. In other words, that money would come in on the back of it and that money could be in the region of about 100 million. And when you very people who present a high risk of dissipation, then one has to be afraid that when they get a large amount of liquid money, they can put it beyond the reach of their enemy, Mr. Holm.

So, I am satisfied that there is both imminent risk and a very real risk of one and that Mr. Holm could be left, unless otherwise restrained, with a nugatory judgment. I have to balance that against possible harm.

Now, the potential harm which has been ventilated before me, was that this is bound to have a negative impact upon the Bank of Asia. That is the main harm which has been pressed upon me. And I can see that, of course. But I have to remind myself, that the Bank of Asia is not a party to these proceedings. And as Mr. Levy says, Bank of Asia, as a third party, would not be able to claim on an undertaking and in any event the Bank of Asia has apparently not suffered any prejudice so far from the fact that, as must by now be well known at least in the circles..... And in any event, they do not

and cannot adduce evidence of prejudice to the Bank if the freezing order is made.

Of course, an injunction is detrimental to reputation. It is very draconian. It is harmful and people think twice before dealing with somebody who is subject to an injunction. I understand that. At the same time, I have to balance that with the potential harm to Mr. Holm. And because the Bank is not a party, intelligent observers would know that that an injunction is there to protect, is to protect somebody else from potential conduct which might be feared in circumstances where the Bank of Asia itself is only minority owned by Mr. Wen and/or the Respondent....

I don't see that the fact that as part of that litigation, somebody gets a freezing order to protect their rights, why that should jeopardize the entire future of the Bank of Asia.

So, in my respectful judgment, and it is a difficult judgment, I admit, because I do not want to be responsible for the collapse of the Bank of Asia, for a start, nor do I want to be responsible for the ruination of Mr. Wen and Ms. Fung's reputations. It is a tough decision to take and a balance to strike, but on balance, I think the overriding objective is best served here by the making of a freezing order and that will be the order of the Court.⁵³

[131] I am guided by the learning in **Multibank FX** on this limb of the test, where Webster JA after considering the leading authorities⁵⁴ on the subject stated:

“The starting point is to remind myself that a freezing injunction can have a serious effect on a company's business. The ultimate question is whether it is just and convenient to grant a freezing order, bearing in mind that it has ‘the nuclear effect of prohibiting the affected party from dealing with its assets’.⁵⁶ The Court must therefore be satisfied, even in a case where a good arguable case and a risk of dissipation have been established, that the grant or continuation of an injunction is not automatic. The court must be satisfied that it is just and convenient to grant or continue the injunction.”

⁵³ Hearing Bundle A at page A350 to A355.

⁵⁴ *Ninemias Maritime Corp v Trave Schiffahrtsgesellschaft m.b.H. Und Co K.G. - The Niedersachsen* [1984] 1 All ER 398;
Petroceltic Resources Limited v Archer [2018] EWHC 671 (Comm).

[132] I have considered the competing submissions and conclude from the above extract of the transcript that the learned judge conducted the evaluative exercise required by law and gave succinct and precise reasons for concluding that the balance of convenience and overriding objective favoured granting the WFO. It is the case that the appellants are not precluded from engaging in any transaction for the benefit of investing in BOA, it is simply that these matters would now require the consent of Mr. Holm, or face the scrutiny of the court, with necessary disclosures at the front end, rather than on the back end on an application to restrain. Additionally, apart from bald statements on the issue of reputational risk, there was nothing in the appellants evidence which demonstrated that such risk was bound to flow from imposition of the WFO.

[133] In the circumstances, I conclude that the learned judge was correct to find that it was just and convenient to continue the WFO until trial or further order, and this ground of appeal fails.

Ground 4: Cross Undertaking in Damages

[134] Counsel for the appellants argue that the inadequacy of Mr. Holm's cross undertaking in damages due to lack of personal financial resources is of particular significance. Potential exposure to damage for the appellants, BOA and other related companies is considerable, running into the tens and hundreds of millions. Further, loss of confidence in BOA could lead to its destruction or substantial diminution in value, resulting in Mr. Holm's own interest in BOA becoming insufficient to compensate. The appellants argued that Mr. Holm's cross undertaking was entirely worthless, as he has no assets and as a result no valuable cross undertaking to offer. He has not put forward any evidence on his financial position or ability to satisfy any losses. In such circumstances relief should not be granted, because the risk of prejudice and damage to the appellants is so high that one cannot make an order if the damage caused cannot be compensated at all by Mr. Holm.

[135] In response, counsel for Mr. Holm argued that there is no evidence that there has been or could be any adverse effect on BOA from the WFO. Mr. Holm would not stand in the way of any transaction which secured his position, and if the appellants, wished to sell shares in a legitimate transaction to raise funds, once Mr. Holm is properly apprised of the situation, like any commercial person, he would act swiftly to facilitate this, subject to him being properly protected. Furthermore, the restrictions contained in the WFO are no different to those contained in the 2019 Undertakings Order, and any dealing with or disposal of shares in BOA requires Mr. Holm's consent. There is also no evidence that would justify fortification, as Mr. Holm is owed a substantial sum of money under the liability judgment and is also owed substantial cost awards. Further, the learned judge has expressed the view that the likely damages which could flow from the quantum trial may be in the region of US\$80 million, and it is difficult to envisage that Mr. Holm would not remain a substantial judgment creditor of the appellants. As Mr. Holm is entitled to substantial damages any claim on the undertaking in damages could be offset against those damages.

Analysis

[136] The appellants' main contention is that the judge did not address the issue of the value of Mr. Holm's cross undertaking at all, and therefore it cannot be said that he must have been satisfied as to its value, by reason of the prospect of set-off against any damages to which the appellants might be entitled.

[137] The appellants contend that damages to Mr. Holm from the quantum trial may be nil or minimal because his interest in BOA should be valued at the date of the breach, when the project had limited, if any, value. Further, the appellants' interest in BOA significantly outweighs that of Mr. Holm and any prospect of damage to that interest beyond the value of his potential

damages is significant and includes risk of substantial damages to third parties.

[138] The appellants contend that had the judge considered the value of the undertaking, he would have concluded that it was worthless and declined to grant the WFO, and this issue should have featured heavily in the balancing exercise regarding relative prejudice between the parties. Thus, the judge erred in failing to give any consideration to this issue.

[139] It is not disputed that damages due to Mr. Holm on the liability judgment is still to be determined. It is the case that the learned judge has alluded to the fact that damages to Mr. Holm will be substantial. At trial, a determination will be made on the date at which Mr. Holm's interest in BOA should be valued. This is an issue which is heavily contested between the parties. The appellants would not have been in a position to argue definitively on the value of Mr. Holm's interest in BOA. In any event it appears that the learned judge was satisfied to accept the cross undertaking without more, and the onus would have been on the appellants to make an application for fortification, if they considered strongly, that the cross undertaking was worthless.

[140] This Court is required to give deference to the learned judge on the consideration or weight to be given to these matters. The value of a cross undertaking on its own would not be determinative of the application but must be viewed against the totality of the circumstances before the court.

[141] This is not a basis for interfering with the learned judge's decision to grant the WFO, when one considers that the judge was satisfied of the preponderance of the evidence, the applicable tests, and in furthering the overriding objective, that the WFO should be granted. This ground of appeal fails.

**Ground 5: The Ordinary Course of Business Carve Out/Exception
The Appellants' Submissions**

- [142] Counsel for the appellants submitted that the court could ameliorate against risk of prejudice and damage by allowing the parties affected by an order to carry on their ordinary lives or business without restraint. In this case the judge made a limited exception in the usual way in relation to spending but made no exception for Mr. Wen or Ms. Fung, despite evidence that this was required to support the BOA project. In the 2019 Undertakings Order all the appellants were permitted to act in a manner which allowed them to continue to invest and support the BOA project. The learned judge was asked to refrain from making such provision in the WFO, and he did not. Thus, effectively restraining Mr Wen and Ms Fung from providing the support that they had previously been providing to BOA. This was on the premise that (i) they should not be mortgaging and pumping money into the project; (ii) they should have explained fully what they did with the loan proceeds, and (iii) the restraint ought to be stronger, otherwise what is the point to the undertakings as they allow no restraint for dealing with the shares and dealing with the properties.
- [143] Counsel submitted that as explained by Mr. Wen, Sancus does not have any assets apart from its shareholding in BOA, which it is unable to deal with under the 2019 Undertakings Order. This left only Mr. Wen and Ms. Fung as the defendants with assets available to provide security for loans, or to obtain unsecured funding themselves. They cannot be prevented from being able to seek funding when BOA, most needs it.
- [144] Although the Undertakings contained the exception to allow the appellants to continue to support BOA by providing investment support to the BOA, at Mr. Holm's behest, the learned judge made exceptions but did not allow the exceptions that had been in place previously.

The Respondent's Submissions

- [145] In response, Counsel for Mr. Holm stated that paragraphs 20 and 21 of the WFO deals with carve-outs with respect to the personal expenditure of Mr. Wen and Ms. Fung, and they are allowed to spend a combined sum of up to **US\$100,000.00** per calendar month to service interest on loans for which they are personally liable with a bank or other financial institution. Further, they are also allowed to spend a combined total of **US\$6,000.00** per month for personal and family expenses, and sums on reasonable legal expenses.
- [146] Counsel stated that the WFO was not settled at the hearing on 12th September 2023 and was subject to further submissions at hearings on 13th and 28th September 2023. Moreover, oral submissions were made regarding the ordinary course exception, at the hearing on 28th September 2023. On that day, the court stated inter alia that if Mr. Wen and/or Ms. Fung wants to spend money on BOA (which is not their business and in which the first respondent is a mere minority shareholder), they can apply for a carve out and justify the request with strong evidence such as a business plan. The court further noted that Mr. Wen and Ms. Fung cannot just have a "*slush fund*" and call it "*personal and family expenses*". The learned judge also recognized that the WFO Application was made post liability judgment.
- [147] In conclusion, counsel submitted that the wording settled by the learned judge in paragraphs 20 and 21 of the WFO met the requirement to ensure that the appellants could meet their stated payment obligations which were in the ordinary course of business. Given that Mr. Wen and/or Ms. Fung are currently unable to meet money judgments against them, provision for a constrained and specific carve out instead of a generic ordinary course carve out was appropriate.

Analysis

- [148] I have given due consideration to the submissions of both sides.

[149] In this regard the judge stated the following:

“The other point that I would raise is that it would be entirely standard for a freezing order to be made subject to the ordinary course of business. Therefore, if Mr. Wen and Ms. Fung and Sancus need to conduct ordinary business, then they can do so despite the terms of the fact that there is an injunction, a freezing order.”

[150] The transcript reveals that the learned judge considered all submissions placed before him in arriving at a balanced position on the carve out terms to be included in the WFO.

[151] It is trite that Mr. Wen and Ms. Fung have the ability to apply to the court at any time, with the necessary supporting evidence for revision of the carve outs in relation to their living expenses, should this turn out to be prohibitive.

[152] On this point I found no error in principle, or departure from the generous ambit of reasonable disagreement, by the learned judge, to warrant interference with his decision on this matter. This ground of appeal has no merit and is dismissed.

Order No 2 in the Notice of Appeal

[153] Counsel for Mr. Holm submitted that the notice of appeal sought a peculiar order, namely that the WFO be set aside and that Mr. Holm be ordered to pay damages equivalent to the loss suffered by the appellants, and that an enquiry as to such damages to be conducted before a different Judge of the Commercial Division. Such request is unusual as there is no suggestion of bias or apparent bias by the judge who made the WFO. It is not that the matter is to be remitted for a re-hearing, in which case the obvious order is that it be heard by a different judge. There is no reason why the judge who dealt with the application would not normally deal with the inquiry into damages. Counsel says the appellants appear to be judge shopping, to get this judge out, simply because they do not like his findings.

[154] For completeness, I address this point briefly, only to say that the point was not addressed by Counsel for the appellants. I therefore consider that it was abandoned. In any event, it will fall away, as I have concluded that the appeal should be dismissed.

Disposition

[155] I conclude that the appellants have not demonstrated that the learned judge erred in any of his findings. On the contrary, it was open to the learned judge to make the findings that he did on the evidence before him. He was entitled to revisit the history of the case. He has presided over various aspects of the litigation and would have had the advantage in assessing the evidence, which this Court would not have. It is not open to this Court to hunt through the evidence in the way the learned judge was expected to, when conducting his evaluation to arrive at the respective findings.

[156] Additionally, it is not open to this Court to embark on an overzealous dissection of the language of the judgment, as the appellants have done in relation to the statements labelled as key findings. Most if not all, were statements made by the learned judge, which were taken in isolation, with complete disregard for the full extent of the judgment, in which the learned judge evaluated the evidence against each of the limbs of the test, to arrive at a final position. It has been said that how heavily each factor should be weighed in the balancing exercise is a matter for the judge at first instance and this Court ought to give great deference to the conclusion reached by the judge, short of any error committed by the judge⁵⁵.

[157] There has been no error in principle or otherwise, nor has the learned judge exceeded the generous ambit for possible disagreement, to warrant

⁵⁵ Green Elite Limited (In Liquidation) v Fang Ankong et al BVIHCMAP2019/0030 (delivered 11th June 2021, unreported).

appellate intervention in this case. Accordingly, the appeal will be dismissed.

[158] For the reasons given above I make the following orders:

- (1) The appeal is dismissed.
- (2) The appellants will pay the respondent's costs of the appeal, to be assessed by a Judge of the Commercial Court, if not agreed within 21 days of the date of this judgment.

[159] I am grateful to all counsel for their helpful written and oral submissions and deeply regret the delay in delivery of this judgment.

I concur
Mario Michel
Justice of Appeal

I concur
Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar