

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2021/0006

BETWEEN:

**[1] CHARLES PETERSON
[2] GLOBAL WATER ASSOCIATES LIMITED**

Appellants

and

**[1] DOUGLAS RIEGELS
[2] TREFOR GRANT**

Respondents

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Francis and Ms. Kesha Adonis for the Appellants
Mr. Peter Ferrer and Mr. Richard Parchment for the Respondents

2022: January 11;
2023: February 9.

Interlocutory appeal – Appellate interference with learned judge’s exercise of discretion – Interim freezing injunction – Risk of dissipation of assets – Whether learned judge erred in finding that there was a real risk of dissipation – First appellant’s refusal to give undertaking – Whether first appellant’s behaviour was a relevant factor for the judge’s consideration – Grant of freezing injunction when award to second appellant yet to be determined – Whether a freezing injunction may be granted before a right to payment of a debt has accrued – Delay in applying for interim relief – Whether learned judge failed to give due weight to respondents’ delay in applying for interim relief

In 2006, the second appellant entered into agreements with the Government of the Territory of the Virgin Islands (the “Government”) to design, build and maintain a sewerage treatment plant. The Government breached the contracts, and the appellants approached the first respondent to negotiate with the Government on the appellants’ behalf to honour the agreements or to agree to compensate the appellants. The parties agreed that if the

negotiations failed, the respondents would have funded a claim for breach of contract against the Government.

In 2013, relations between the parties soured and the second appellant, alleging that the first respondent had refused to fund the litigation, proceeded to arbitration with the Government. The second appellant secured an award in its favour at arbitration, but litigation followed which resulted in a judgment in their favour from the Privy Council. In 2020, the respondents instituted proceedings against the appellants for breach of contract claiming, among other things, damages, and an entitlement to 60% of the value of any award by the Government made in their favour. The respondents also requested an undertaking from the appellants in respect of the anticipated damages from the Government (the “requested undertaking”). When the appellants refused, the respondents, by application filed 19th February 2021, sought to compel the appellants to disclose information regarding any settlement discussions with the Government and any payments made to them. The respondents also sought an interim injunction to prevent the second appellant from dealing with or diminishing its assets up to the value of 60% of any settlement it received from the Government.

By order delivered on 6th August 2021, the learned judge granted the freezing injunction against the appellants and compelled them to disclose any information regarding settlement from the Government. The judge found that there was a good arguable case and a real risk of dissipation. As to that risk, the judge regarded the following factors as significant: (1) that the first appellant was not ordinarily resident in the Territory of the Virgin Islands (the “BVI”), (2) that he maintained homes in various countries, (3) that he did not have sufficient assets in the BVI to satisfy the claim and (4) that the second appellant was a shell company whose only asset was its entitlement to the award from the Government. The judge also noted that although the first appellant had been doing business in the BVI for over 23 years, he could easily dispose of his home in the BVI. Furthermore, the judge considered the first appellant’s refusal to give the requested undertaking as an additional factor pointing to the real risk of dissipation.

Being dissatisfied with the judge’s decision, the appellants appealed. The two main issues which fell for determination on appeal were: (i) whether the learned judge erred by finding that there was a real risk of dissipation and (ii) whether the learned judge failed to have regard to the delay by the respondents in applying for the freezing injunction. The appellants contended that, as it pertained to the risk of dissipation, the judge failed to consider relevant factors and instead took into account irrelevant ones and so erred in the exercise of his discretion. As regards the issue of delay, the appellants averred that the judge failed to give sufficient weight to this factor and that it showed that there was no real risk of dissipation.

Held: dismissing the appeal, affirming the order of the learned judge and ordering that the appellants pay the respondents’ costs on the appeal to be assessed by the court below at no more than two-thirds of the costs awarded in the court below, that:

1. An appellate court will be slow to overturn the exercise of discretion by a lower court judge unless it can be shown that the judge failed to consider relevant factors or took into account irrelevant ones. Essentially, the judge’s decision must be one

outside the generous ambit within which reasonable disagreement is possible and thus plainly wrong. An appellate court should therefore avoid an over-zealous dissection of the language of a judgment in seeking to establish that a judge failed to take some factor into account.

Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188 followed; **Ming Siu Hung and others v J. F. Ming Inc and another** [2021] UKPC 1 followed.

2. A defendant's behaviour in respect of the claim is a factor for consideration by a judge when deciding whether or not to grant a freezing order. This behaviour includes the refusal to give an undertaking as possibly being indicative of a real risk. On the facts, the first appellant's refusal to give the requested undertaking was a relevant factor to which the learned judge was entitled to have regard. He therefore did not err by considering this factor as important to there being a real risk of dissipation of assets.

Gee on Commercial Injunctions (5th Edition Sweet and Maxwell 2004) considered.

3. To determine whether there is a real risk of dissipation of assets, the court must have regard to the evidence adduced. Such evidence must objectively demonstrate a risk of unjustified dissipation. A risk which is theoretical, fanciful, or insignificant will not meet this threshold. Furthermore, there must be a danger of default if the assets are removed. Intention on the defendant's part is unnecessary and it would be enough for the evidence adduced to raise the inference of a real and current risk. Factors which may not individually justify the inference of a real risk, may do so cumulatively. On the facts, the evidence before the judge was that the first appellant refused to give the requested undertaking and was not ordinarily resident in the BVI. The second appellant was not an actively trading company and neither appellant had sufficient assets in the jurisdiction to meet any future judgment. These factors were all relevant and the judge did not err in considering the assets of both appellants. Considered cumulatively, the factors provided a sufficient evidential basis upon which the learned judge could find that there was a real risk of dissipation. He therefore did not err in his finding.

Les Ambassadeurs Club Ltd v Yu [2021] EWCA Civ 1310 applied; **Barclay-Johnson v Yuill** [1980] 1 WLR 1259 considered; **Third Chandris Shipping Corporation v Unimarine S.A.; Aggelikai Ptera Compania Maritima S.A. v SAME**; **Western Sealanes Corporation v SAME** [1979] Q.B. 645 considered; **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND Co. K.G.**; **The Niedersachsen** [1983] 1 WLR 1412 applied; **Mobil Cerro Negro Ltd v Petroleos de Venezuela SA** [2008] EWHC 532 (Comm) considered; **Mediterranean Feeders L P v Bernd Meyering Schiffahrts** [1997] Lexis Citation 1111 applied; **Holyoake and another v Candy and others** [2017] EWCA Civ 92 applied.

4. A court with jurisdiction to grant injunctions may grant a freezing order even before a right to payment of a debt has accrued. This is so, provided that the applicant has already been granted or has a good arguable case for being granted an order for the payment of money that will be enforceable through the court's process and the respondent holds assets against which such an order could be enforced. The second appellant's right to an award of damages from the Government, which was confirmed by the Privy Council, is a chose in action and therefore an existing asset against which a judgment can be enforced. The learned judge therefore did not err in granting the freezing order against the as yet unascertained award to which the second appellant was entitled.

Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 followed.

5. The mere fact of a delay in bringing an application for a freezing injunction does not, without more, mean that there is no risk of dissipation. If a court is satisfied on other evidence that there is a real risk, the injunction should be granted. On the facts, the judge, having adverted to the live issue of delay at paragraph 22 of his judgment, evidently placed no weight on this factor. Despite the delay, the judge was satisfied on the evidence before him that there was a real risk of dissipation. He therefore did not err in the exercise of his direction in granting the injunction.

Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm) considered; **JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others** [2015] EWCA Civ 906 applied; **Correia v University Hospital of North Staffordshire NHS Trust** [2017] EWCA Civ 356 applied; **Watt (or Thomas) v Watt** [1947] UKHL J0325-2 applied.

JUDGMENT

- [1] **THEODORE JA [Ag.]**: This is an appeal against a freezing order made by Ramdhani J [Ag.] delivered on 6th August 2021 compelling the appellants to disclose information regarding any settlement agreement made with the Government of the Territory of the Virgin Islands (the "Government") and restraining the appellants from disposing of, dealing with or diminishing their assets up to the value of 60% of any settlement received by the appellants from the Government.

Background

- [2] On 19th September 2006 the second appellant, Global Water Associates Limited ("Global Water") entered into two agreements with the Government to design, build and maintain a sewerage treatment plant. The Government breached the contracts

and the appellants approached the first respondent, Douglas Riegels (“Riegels”), to negotiate with the Government on the appellants’ behalf to honour the agreements or to agree to compensate the appellants. The parties had agreed that if the negotiations failed, the respondents would have funded a claim for breach of contract against the Government.

- [3] In 2013, relations between the parties soured and Global Water, alleging that Riegels had refused to fund the litigation, proceeded to arbitration with the Government. Global Water secured an award in its favour at arbitration, but litigation followed which ultimately resulted in a judgment in Global Water’s favour from the Privy Council ordering that the matter return to arbitration for an assessment of damages.
- [4] On 23rd April 2020 the respondents instituted proceedings in the lower court (“the underlying claim”) against the appellants for breach of contract claiming, among other things, damages and an entitlement to 60% of the value of any award made in favour of Global Water. In the underlying claim it was averred that the first appellant, Charles Peterson (“Peterson”), was the sole voting member, director, beneficial owner and alter ego of Global Water and that “all actions taken, and decisions made by Peterson in relation to Global Water were *de facto* actions taken and made by Global Water.”
- [5] In the appellants’ defence to the underlying claim, Peterson admitted that he was the sole voting member and director of Global Water and that he and his wife were the beneficial owners and that all material decisions made and actions taken by him were taken and made in his capacity as director. However, it was denied that he acted otherwise than as agent for Global Water and as such incurred no personal liability in respect thereof.
- [6] Following the decision of the Privy Council, a request was made that Global Water give to the respondents an undertaking in respect of the anticipated damages.

When Global Water refused, the respondents, by application filed 19th February 2021, sought to compel the appellants to disclose information regarding any settlement discussions with the Government and any payments made to them. They also sought an interim injunction pending the outcome of the underlying claim in order to prevent Global Water from dealing with or diminishing its assets up to the value of 60% of any settlement it received from the Government.

The freezing order

- [7] The learned judge, in considering the application made by the respondents, first satisfied himself that there was a good arguable case. He then went on to consider whether there was a real risk of dissipation. The judge rejected the notion that the suggestion that Riegels was not a man of his word was enough to justify a finding that he was likely to act to thwart any judgment. However, the learned judge regarded as significant the facts that: (1) Peterson was not ordinarily resident in the Territory of the Virgin Islands (the “BVI”), (2) he maintained homes in several jurisdictions, (3) he did not own sufficient assets in the jurisdiction to satisfy the claim and (4) Global Water was a shell company whose only asset was its entitlement to the award of damages from the Government.
- [8] The learned judge formed the view that although Peterson had been doing business in the BVI for the last 23 years he could easily dispose of his home in the BVI. In the estimation of the judge Peterson’s refusal to give the requested undertaking when considered with the other factors which the judge regarded as significant were enough to give rise to a real risk of dissipation.
- [9] It was common ground that the respondents had been required to show a good arguable case that there was a real risk that a judgment in their favour would go unsatisfied owing to the appellants’ improper dissipation of their assets. The parties were also agreed that the court ought to have been satisfied that there was solid evidence of a real risk of dissipation before the freezing order could have been granted. By order delivered on 6th August 2021, the learned judge granted the

respondents' application. Being dissatisfied with the learned judge's decision, the appellants appealed.

Grounds of Appeal

[10] The appellants have filed numerous grounds of appeal which I have taken the liberty of summarizing as follows:

The learned trial judge:

(1) **Ground 1** - erred in law in finding that there was a real risk of dissipation in the absence of cogent evidence to support such a finding;

(2) **Ground 2** - failed to have regard to the substantial and unjustified delay by the respondents before applying for interim relief;

(3) **Ground 3** - took into account certain irrelevant considerations, including:

- (i) the failure to give an undertaking;
- (ii) that Global Water is a special purpose vehicle which was not actively trading;
- (iii) that Peterson also owned a home in the United States; and
- (iv) that inquiries had been received from the Government.

(4) **Ground 4** - failed to take into account certain relevant considerations including:

- (i) delay;
- (ii) that there were no assets capable of dissipation; and
- (iii) that there was no cogent evidence to support a finding of a real risk of improper dissipation.

[11] As a matter of convenience, I will consider Ground 1, Ground 3 and the second and third limbs of Ground 4 together since they all relate to the issue of the real risk of dissipation of assets.

The risk of dissipation of assets – Grounds 1, 3 and Ground 4 (ii) and (iii)

Appellants' Submissions

- [12] The appellants submitted that the learned judge ought to have considered that there was no evidence adduced upon which a finding of a real risk of an unjustified dissipation could have been made. Counsel for the appellants, Mr. Adrian Francis, contended that at the time of the hearing of the application, Global Water had held no significant assets and was unlikely to own such an asset for some considerable period of time. Counsel averred that even if Global Water eventually acquired an asset, that asset may not be in cash and may not be capable of dissipation.
- [13] Mr. Francis also urged that the learned judge erred in law by treating as cogent: (1) the appellant's failure, upon request, to give an undertaking, (2) the fact that Global Water was a special purpose vehicle which was not actively trading, and (3) the fact that Peterson and his wife also owned a home in Florida in the United States of America and were ordinarily resident there.
- [14] Learned counsel contended that the objective of a freezing order was to focus on wrongdoing by a defendant in the form of unjustifiable conduct in relation to its assets that impaired the ability of a claimant to enforce a judgment that it may secure. Counsel relied on a decision of the Court of Appeal of Ontario, **Chitel v V. Rothbart**¹ where it was said that an applicant for a freezing order must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction or otherwise dissipate them. Mr. Francis maintained that neither the application nor the evidence addressed the essential elements of a freezing order of whether or not there was a risk of unjustified dissipation.
- [15] Mr. Francis also relied on **Third Chandris Shipping Corporation v Unimarine S.A.; Aggelikai Ptera Compania Maritima S.A. v SAME; Western Sealanes**

¹ [1982] 39 O.R. (2d) 513 at 532-533.

Corporation v SAME² for the submission that the mere fact that a defendant who holds assets within the jurisdiction is a foreigner cannot by itself justify the granting of a freezing order.

- [16] Counsel further argued that if a refusal to give an undertaking gave rise to a real risk of dissipation, freezing relief would be automatic rather than the exception that it ought to be. He submitted that the facts relied on by the learned judge were insufficient in law to give rise to an inference of unjustified dissipation as, at most, they only showed that assets could be dissipated.

Respondents' Submissions

- [17] In response, Mr. Peter Ferrer for the respondents pointed out that the factors considered by the learned judge were those pointed out to him by the appellants themselves. What is more, Mr. Ferrer submitted, those were the very factors set out in **Gee on Commercial Injunctions**³ and in the case law as generally being relevant factors to take into account.
- [18] Counsel also argued that in order for the appellants to succeed on the ground that the judge had misapplied the real risks test, the appellants had to show that there had been some form of irrationality in relation to the learned judge's assessment of the weight of the various factors. He urged that the mere fact that an appellate court may have a different view of the weight to be given to a factor is not a good reason to interfere.
- [19] He contended that the judge was entitled to accept the respondents' evidence that an approach had been made to them to settle the matter and the judge was entitled to take the view that a settlement may be forthcoming. He posited that the judge had properly taken into account the fact of the appellants' refusal to provide an undertaking. Mr. Ferrer contended that this refusal, when considered together with

² [1979] Q.B. 645 at page 671 at para. G.

³ (5th Edition Sweet and Maxwell 2004).

the other factors identified by the learned judge, meant that it was appropriate to grant the freezing order.

Discussion

- [20] The parameters within which an appellate court operates when asked to critique an exercise of judicial discretion are well known but bear repeating:

“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 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.”⁴

- [21] However, the Privy Council in **Ming Siu Hung and others v J. F. Ming Inc and another**⁵ warned against what the court described as “an over-zealous dissection of the language of a judgment” in seeking to establish that a judge has failed to take something into account.

- [22] Mr. Steven Gee QC, in **Gee on Commercial Injunctions**⁶ included the defendant’s behaviour in respect of the claims as one of the factors that may be taken into account by a judge when deciding whether or not to grant a freezing order. In particular, he referred to the offer of an undertaking being possibly indicative of the absence of risk.

- [23] The question whether a freezing order can be granted before a right to payment of a debt has accrued was considered by the Privy Council in **Convoy Collateral Ltd v Broad Idea International Ltd**.⁷ In that case the Privy Council summarised the position as follows:

“101. In summary, a court with equitable and/or statutory jurisdiction to grant injunctions where it is just and convenient to do so has power—and it

⁴ Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188 at pages 190 and 191.

⁵ [2021] UKPC 1 at para. [22].

⁶ Supra n. 3 at para. 12-039.

⁷ [2021] UKPC 24.

accords with principle and good practice—to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:

(i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;

(ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

(iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.”

[24] Global Water’s right to an award of damages, which was confirmed by the Privy Council, is a chose in action and therefore an existing asset against which a judgment can be enforced. The test is not whether there is a real risk of dissipation of “significant” assets and Mr. Francis has not satisfied me that the judge was wrong in principle to grant a freezing order in respect of the as yet unascertained award to which Global Water was entitled.

[25] I will now pass on to consider the appellant’s criticism of the judge’s application of the real risk test.

[26] In **Les Ambassadeurs Club Ltd v Yu**,⁸ the English Court of Appeal explained that the term “real risk” in relation to the dissipation of assets did not invite an analysis as to whether dissipation was either likely or more likely than not, but that instead:

“The focus should be on whether, on the facts and circumstances of the particular case, the evidence adduced before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction.

⁸ [2021] EWCA Civ 1310.

Plainly a risk which is theoretical, fanciful or insignificant will not meet that threshold; but the judge should be addressing the question whether he or she is satisfied that the alleged risk is real, and that does not require any comparative exercise to be carried out, or the attaching of some other label to a risk which falls short of the threshold.”⁹

[27] In **Barclay-Johnson v Yuill**¹⁰ Sir Robert Megarry V.-C. stated:

“In addition to establishing the existence of a sufficient risk of removal of the defendant’s assets, the plaintiff must satisfy certain other requirements. I shall not attempt any comprehensive survey, particularly in view of the guidelines laid down by Lord Denning M.R. in *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] Q.B. 645, 668. But I may refer to three of them. One is that it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.”¹¹

[28] In **Third Chandris Shipping Corporation v Unimarine S.A.** Lawton LJ remarked:

“There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction... These facts should enable a commercial judge to infer whether there is likely to be any real risk of default.”¹²

[29] However, it is now settled law that there is no need for a claimant to show an intention by the defendant to dissipate assets¹³ and that the “real risk” test is lower than a test of likelihood, or proof on a preponderance of the evidence.¹⁴ It is enough for him to adduce solid evidence that raises the inference of a real and current risk that a future judgment in his favour will go unsatisfied.¹⁵ Every case must be decided on its own facts and the court must consider the evidence as a whole.

[30] To succeed on this ground, the appellants must show that the learned judge was plainly wrong in his application of the real risk test and that on the evidence before

⁹ Ibid at para. 36.

¹⁰ [1980] 1 WLR 1259.

¹¹ Ibid at page 1265.

¹² Supra n. 2 at pages 671 – 672.

¹³ See *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND Co. K.G.*; *The Niedersachsen* [1983] 1 WLR 1412 at page 1422.

¹⁴ See *Les Ambassadeurs Club Ltd v Yu* [2022] 2 All ER 443 at paras. [24] and [27].

¹⁵ Ibid at para. [26].

him, it was not open to the judge to consider that the test had been satisfied. The judge in coming to his decision had regard to the assets held by both appellants although Global Water was the only party entitled to the arbitral award.

Freezing order against a third party

- [31] In **JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others**¹⁶ it was held:

“In *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 a freezing order was granted against a company where there was a good arguable case that it was under the Defendant's control: the company was joined as a Defendant to the claim. Such an order is ancillary to the main freezing injunction and is granted to make that order more effective. An order under what is now often called the Chabra jurisdiction will not be made if there is no real risk that the Chabra Defendant will deal with assets in such a way as to prevent the Claimant from obtaining recourse to them to enforce any judgment given against the Defendant. But if such a real risk does exist, a Chabra order should be made against the third party on a without notice basis. Once the assets held by the third party are frozen, the case can be returned to court on notice so that any disputed questions of ownership or control can be resolved.”

- [32] It was averred in the amended statement of claim that the first appellant was the sole voting member, director, beneficial owner and alter ego of Global Water. In the amended defence it was admitted that the first appellant was the sole voting member and director of Global Water and that the first appellant and his wife were its beneficial owners.

- [33] As was clear from **T.S.B. Private Bank International S.A. v Chabra and another**¹⁷ and reiterated in **Convoy Collateral Ltd v Broad Idea International Ltd**¹⁸ there is no requirement that the judgment that might be left unsatisfied should be one against the cause-of-action defendant. On the facts of the case at bar it cannot be said that the judge was plainly wrong to have had regard to the assets of both appellants in arriving at his order.

¹⁶ [2015] EWCA Civ 906 at para. [29].

¹⁷ [1992] 1 WLR 231.

¹⁸ *Supra* n. 7 at para. [102](ii).

[34] The judge was persuaded by the fact that the first appellant was not ordinarily resident in the BVI, maintained homes in several jurisdictions, did not own sufficient assets in the BVI to satisfy the claim and the second appellant was a shell company whose only asset was its entitlement to the award of damages. Those factors, when taken along with the refusal to give the undertaking, were enough in the judge's mind to give rise to a real risk of dissipation even though the learned judge was mindful of the fact that the first appellant had been doing business in the BVI for over 23 years.

[35] It is certainly the case that the nature of the assets in question and the ease with which they can be moved are relevant considerations in assessing the risk of dissipation. However, those factors cannot, by themselves, give rise to a real risk of dissipation.

[36] In **Mobil Cerro Negro Ltd v Petroleos de Venezuela SA**¹⁹ at paragraph 35 it is made clear that the phrase "dissipation of assets" directs an inquiry into the question whether a particular course of conduct by the respondent, whether actual or feared, is conduct which should or may lead the court to conclude that it is just and convenient to grant a freezing order.

[37] A court when determining an application for a freezing order must consider whether there is any evidence that the asset will be dissipated. Absent such evidence, it would be wrong in principle to grant the freezing order.²⁰

[38] In **Les Ambassadeurs Club Ltd v Yu**, at paragraph 42 Andrews LJ considered ease of movement of assets and stated:

"I accept that the authorities demonstrate that the nature of the identified assets and the ease with which they can be moved, as well as the use of offshore or corporate structures, are factors that are relevant to consideration of the risk of dissipation; but the fact that Mr. Yu has the

¹⁹ [2008] EWHC 532 (Comm).

²⁰ Per Evans LJ in *Mediterranean Feeders L P v Bernd Meyering Schiffahrts* [1997] Lexis Citation 1111 at page 3.

wherewithal to move his assets out of reach of his creditors, and the ease with which he might be able to do so, are not matters which in and of themselves indicate that there is a real risk that he would do so. The factors which were directly relevant to how he might behave were those which Mr. Olliff-Cooper termed the 'propensity' factors.”

- [39] In that case the propensity factors were described by Andrews LJ as behaviour which demonstrated a temperament or character indicative of a willingness to put assets beyond the reach of creditors.
- [40] In the case at bar, the judge considered the evidence to the effect that the first appellant was prone to not keeping his word and had refused to settle at mediation. The judge concluded at paragraph 44 that none of that evidence could be used to justify a finding that the first appellant was likely to take actions to thwart enforcement. However, the judge placed great reliance on the first appellant's refusal to give the requested undertaking to pay 60% of the settlement proceeds into a segregated fund and not diminish the fund pending the hearing and determination of the claim.
- [41] The judge considered that, given the fact that the second appellant was not an actively trading company and the appellants had not asserted that they held sufficient assets in the jurisdiction to meet any possible judgment, reasonable commercial men in their position would have been willing to give a suitable undertaking.
- [42] The judge determined that those factors, taken together, constituted solid evidence of a real risk of dissipation of any judgment. The judge evidently regarded the refusal to give an undertaking as behaviour which evinced a willingness to put assets beyond the reach of Global Water's creditors.

[43] In **Holyoake and another v Candy and others**²¹ at paragraph 64, the English Court of Appeal acknowledged that factors which might not individually justify the inference that a real risk existed might do so collectively. Unless it can be said that no reasonable judge could have come to that conclusion, the weight that the judge placed on those factors is not a matter which is open to review on appeal.

[44] There was some criticism by Mr. Francis of the fact that the factors relied on by the judge were not derived from evidence adduced by the respondents, but were gleaned instead from the evidence of the appellants. This is of course, without merit as the judge was entitled to consider all of the evidence in the round when exercising his discretion.

Delay – Ground 2 and Ground 4 (i)

[45] It is appropriate to consider Ground 2 and the first limb of Ground 4 together since they both concern the issue of delay.

Appellants' Submissions

[46] Counsel for the appellants submitted that the cause of action arose in 2013 and the claim was issued in April 2019 but that it was not until February 2020 that the application was made for the freezing order. Mr. Francis urged that the length of the delay was itself a good indication that there was no perceived risk of dissipation.

[47] Learned counsel submitted that the learned judge ought to have concluded that the only credible explanation for the delay was the absence of any real risk of dissipation but that the learned judge instead failed altogether to apply his mind to the delay.

[48] Under Ground 4, the appellants posited that the substantial delay was an issue which the learned judge failed to take into account thereby warranting this court's interference.

²¹ [2017] EWCA Civ 92.

Respondents' Submissions

- [49] Mr. Ferrer for the respondents submitted that the judge's reference to delay in paragraph 22 of his judgment was a clear indication that he had taken delay into account.

Discussion

- [50] At paragraph 22 of his judgment the judge reminded himself:
- “In the exercise of the discretion to grant a freezing order, the court should have regard to the relevance of any delay in making the application.”

- [51] However, the learned judge made no further reference to delay in his judgment.

- [52] In **Madoff Securities International Ltd v Raven**²² Flaux J held:

“The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it.”²³

- [53] Bean LJ in the English Court of Appeal expressed his agreement with this statement of principle in **JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others** stating:

“[34] In any event it is not generally the rule that delay in applying for a freezing injunction or an extension of a freezing injunction is a bar in itself to the obtaining of relief. It may mean in some cases that there is no real risk of dissipation and that if the Claimant had seriously thought that there was, an application would have been made earlier. But that cannot possibly be said in the present case. I agree with the observations on this topic made by Flaux J in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm), [2012] 2 All ER (Comm) 634, [2012] Bus LR D125. If the court is satisfied on the evidence that there remains a real risk of dissipation it should grant an order, notwithstanding delay, even if only limited assets are ultimately frozen by it.”

²² [2011] EWHC 3102 (Comm).

²³ *Ibid* at para. [156].

- [54] The judge was satisfied that there was a real risk of dissipation because: (1) Global Water was a special purpose vehicle which had been formed for the sole purpose of receiving the Government contracts, was not trading and had no assets, (2) the first appellant was ordinarily resident outside of the BVI and could easily dispose of his residence in the BVI, and (3) Global Water had refused to undertake to pay 60% of the proceeds of any settlement into a segregated fund.
- [55] I am of the view that the judge, having adverted to the live issue of delay at paragraph 22 had evidently not placed any weight on it.
- [56] In **Correia v University Hospital of North Staffordshire NHS Trust**,²⁴ Simon LJ cited with obvious approval the following passage from the speech of Lord Simonds delivered in the oft-quoted case of **Watt (or Thomas) v Watt**:²⁵
- “The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration.”
- [57] Simon LJ identified the wider principle to be that there is no requirement for the judge to refer to or discuss every point in the evidence.
- [58] The fact is that the judge in the case at bar expressly directed himself that he should have regard to the delay. This Court is obliged to assume that he did take it into account even though he did not go on to discuss why he did not consider the delay to be a bar on the facts of the case. Of course, it would have been preferable for the judge to have done so, since delay was one of the factors to be placed in the balance and weighed by him.
- [59] In the English Court of Appeal case of In **Re B (A Child) (Care Proceedings: Threshold Criteria)**²⁶ at paragraph 40 Lord Wilson held:

²⁴ [2017] EWCA Civ 356.

²⁵ [1947] UKHL J0325-2.

²⁶ [2013] 1 WLR 1911.

“...an error in the balancing exercise justifies intervention only if it gives rise to a conclusion that the judge’s determination was outside the generous ambit of reasonable disagreement.”

[60] However, since delay was not an automatic bar to the granting of a freezing order, I do not consider that the judge’s decision to accord little or no weight to the delay rendered his exercise of discretion to grant the order outside the generous ambit within which reasonable disagreement is possible.

Conclusion

[61] For the reasons given above, I would make the following orders:

1. The appeal is dismissed and the order of the learned judge is affirmed.
2. The appellants shall pay the respondents’ costs on this appeal to be assessed by the court below at no more than two-thirds of the costs awarded in the court below.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]



By the Court

Chief Registrar