

I
IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 226 of 2017

BETWEEN

JTrust Asia PTE Ltd

Claimant

and

[1] Mitsuji Konoshita

[2] A.P.F. Group Co. Ltd

Respondents/Defendants

Appearances:

Mr Vernon Flynn QC, Mr Peter Ferrer and Ms Marcia McFarlane of Harneys for the Claimant

Mr Robert Nader and Mr Daniel Mitchell of Forbes Hare for the Respondents

2018: February 13, 19
March 20

JUDGMENT

- [1] **Adderley, J:** This is the *inter parties* return date hearing where the respondents seek to discharge a Worldwide Freezing Order ("WFO") granted *ex parte* to JTrust Asia PTE Ltd ("JTrust"), the claimant, on 24th December 2017. JTrust seeks to have it continue. The burden is on the claimant to persuade the court that the WFO should be continued.

- [2] JTrust is a company incorporated in Singapore, and is a wholly owned subsidiary of JTrust Company Ltd of Japan ("JTrust Japan").
- [3] Mitsuji Konoshita, the first respondent (also called "the respondent"), is a Japanese national and a permanent resident of Singapore. He is a director and 51% shareholder in 'A.P.F. Ltd ("APF"), the second respondent, and at all material times, until 16th October 2017, he was a director and Chief Executive Officer of Group Lease Public Company Limited ("Group Lease") a company listed on the Thai stock exchange.
- [4] APF is a BVI company. It holds the controlling stake in Group Lease. Group Lease which was at all material times involved in the business of an investment company offering for sale to institutions interest bearing bonds which were convertible at the option of the investor into Equity of Group Lease.
- [5] On 24th December 2017 this court granted a WFO *ex parte* against the defendants. Following upon that, two other courts namely Singapore (26th December 2017) and Cyprus (8th January, 2018, district court of Nicosia) granted WFO against Konoshita and institutions associated with him and said to have engaged in a conspiracy with him.
- [6] The Singapore freezing order was discharged on 21st February 2018. The claim in the Singapore action is one of conspiracy; it does not appear to be a proprietary claim and to that extent is different from this claim. One of the considerations among others intimated by the Judge for setting the order aside, appears to have been that the attorneys failed to disclose that at the time of their application there were two extant WFOs against the defendants one in this jurisdiction as well as in Cyprus.

THE CLAIMANT'S CASE

- [7] The claimant claims misrepresentation and fraud against Mr Konoshita, and knowing receipt of misappropriated funds or trust property by the respondents from Group Lease and /or dishonest assistance of Group Lease in the misappropriation of funds belonging to JTrust.
- [8] The funds are estimated at US\$95,865,387.00.

- [9] The allegation is that funds supplied by JTrust to purchase convertible bonds from Group Lease, were used by Group Lease to make sham loans through its subsidiaries to a particular set of companies who in turn fraudulently transferred the funds to APF for the sole benefit of Mr Konoshita.
- [10] The alleged fraudulent borrowers included Aref Holdings Ltd, Adalene Limited, Bellaven Limited, Baguera Limited ("Cyprus borrowers"), and Cougar Pacific Ltd. ("Cougar"), a Singapore registered company.
- [11] Fidescorp Services Ltd acted as nominee shareholder and director of most of the companies and, Mr Savvas Pogiatiis and Andreas Pogiatiis own Fidescope Ltd. They were persons who provided nominee director and shareholder services. SPF Nominees acted as shareholder and director for the other companies.
- [12] The claims are set out in an amended statement of claim filed 16th February 2018 where the claimant's case is that the funds paid over to Group Lease were paid over as a result of misrepresentation of profitability due to falsification of accounts of Group Lease, and other pertinent matters on which it relied, so that in reality its funds were paid over to Group Lease as a result of fraud. It argues that equity has therefore imposed a constructive trust on the funds (per Lord Browne -Wilkinson in **Westdeutsche Landesbank Girozentrale v Islington LBC**¹, or alternatively the funds are subject to a Quistclose resulting trust in favour of the claimant as having been paid over for a specific purpose which has failed. It claims that the respondents are liable for knowing receipt/dishonest assistance.
- [13] Consequently the claimant pleads the right to trace its funds and then to assert a proprietary interest in equity in them or their traceable proceeds in the hands of the respondents, the fraudulent borrowers, or third parties.
- [14] Further, because of the fraud the claimant has purported to rescind the Investment Agreements between the parties under which the monies were paid, and claims entitlement to an equitable proprietary interest in the property it has transferred under the Investment Agreements (see Etherton J in **London Allied Holdings Ltd v Lee**²).
- [15] The claimant foreshadows further amending its statement of claim to add additional claims.

¹[1996] AC 669 at 716

²[2007] EWCH 2061 (Ch) at [276]

[16] The claimant submits that it does not matter that it cannot demonstrate precisely how funds got from Group Lease to the defendants because the court can draw inferences. (per Sales J in **Reflo Ltd (in liquidation) v Varsan**.³

[17] On the above allegations the claimant therefore submits that there is a serious issue to be tried, that the claimant has a good arguable case and on facts disclosed below that there is a real risk of dissipation of assets of the as demonstrated by his history. They say it is just and convenient to continue the freezing order. It is necessary to "shut the gate" to protect the assets from dissipation, they contend.

THE RESPONDENTS' CASE

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

[19] As it relates to the claim of "knowing receipt" the respondents rely on the principles set out in **Arthur v Attorney General of the Turks & Caicos Islands**⁴, **El Ajou v Dollar Land Holdings plc**⁵ and *Lewin on Trusts* 19th edition where the principles were summarized as follows:

- (1) There is property subject to a trust
- (2) The property is transferred
- (3) The transfer is in breach of trust or fiduciary duty
- (4) The property (or its traceable proceeds) is received by the defendant
- (5) The receipt is for the defendant's own benefit.
- (6) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a bona fide purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge.

³ [2012] EWHC 2168 Ch; [2014] EWCA Civ 360 at [56]

⁴ [2012] UKPC

⁵ 1994] 1 BCLC 464 and paragraph 42.023

[20] The respondent then gave arguments as to why the claimant has not demonstrated either in the evidence, or the law that the case came within those principles.

[21] The respondent states that the basis of the claimant's factual case is the fraud alleged by the Thai Securities Commission ("TSEC") but, among other things, there is no claim by the TSEC that the Loan fund or any part of it has been received by the respondents, or that there has been a fraud on the JTrust, that shortly before the announcement by the TSEC JTrust was trying to purchase Group Lease, that there are proceedings in Mauritius against the JTrust relating to the same funds and that, Group Lease is the proper party in this action.

DISCUSSION

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

[23] The evidence on which JTrust relies is summarized in the following paragraphs.

[24] The case is partly based on revelations by the TSEC, an independent regulatory body, which sets out in its 16th October 2017 Report a prima facie case of fraud in Konoshita's dealings in investment matters, such that he has been characterized by them as "*...having untrustworthy characteristics...*" and he has been banned from holding directorships or executive roles in any Thai issuers and listed companies based on allegations that he has committed fraud, falsified Group Lease's assets, and falsified their accounting records.

[25] The TSEC characterized Mr Konoshita's conduct as including "...concealed transactions, asset misappropriation, commission of false accounting transaction, preparation of incorrect accounting records, and [dissemination] of false statements which caused an impact on [Group Lease's] securities price and investment decisions". These matters are being pursued with a view to possible criminal proceedings by the Thai authorities.

- [26] The TSEC statement itself is sufficient evidence that there is a good arguable case. On the authorities if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly, or with unacceptably low standards of morality giving rise to a feeling of uneasiness about the defendant, then it is often unnecessary for there to be any further specific evidence for the court to be entitled to take the view that there is sufficient risk to justify a freezing order (**A H Baldwin & Sons Ltd v Sheikh Saud Al Thani**)⁶.
- [27] On 11th April 2017 Mr Konoshita was fined the largest fine in Japanese history by the JFSA (JPY 4,096,050,000 approximately US\$ 39 million) for price manipulation and releasing false information in connection with subscriptions for convertible debentures. He had violated, the Financial Instrument and Exchange Act by circulating funds within group companies and manipulating the share price of Wedge Holdings of which he was the controlling shareholder.
- [28] On 11th July 2017, APF filed a disclosure with Kanta Local Finance Bureau in Japan asserting that Mr Konoshita held 25,500 shares in APF while the other shareholders held 24,500. The other shareholders were the Cyprus borrowers and Cougar. Mr Konoshita in his 3rd affidavit in an apparent attempt to distance himself from his ownership makeup, as the other shareholders are allegedly a part of the fraud, says he is the sole shareholder.
- [29] Mr Konoshita's disclosure is not commensurate with the known worldwide investments with which he claims to be intimately associated. His disclosed net asset position at US\$2,084,000, including US\$ 733,000 in two cars, does not appear to be correct. Allegedly he owns interests in companies incorporated in the BVI, Japan, Thailand, Cambodia, Cyprus and other jurisdictions.
- [30] He is therefore allegedly in breach of the disclosure order by failing to give proper disclosure of the amount and location of his assets, including his interest in and the value and location of the shares in: Sanwa World Services shares (TBH 45 million- US\$ 1.4 million), Asukano share certificates, and Showa Holding Co. Ltd shares.
- [31] It is also claimed that Mr Konoshita has failed to disclose his beneficial interest in the alleged loans to the Cyprus borrowers and Cougar in Singapore in the total approximate amount of US\$54 million with Mr

⁶[2012] EWCH 3156 (QB) at [31(4)]

Konoshita as "the controller and ultimate benefactor". In context "benefactor" referred to in the Report reasonably appears to mean "beneficial owner".

- [32] On 5th February 2016 he ostensibly defeated the interest of creditors of APF Holdings Limited by transferring a valuable subsidiary from the group four days before it went into liquidation.
- [33] There are also allegations that the addresses which Mr Konoshita has given are not correct. Investigations have revealed that he no longer resides at any of his addresses in Singapore or Thailand and the address which he gave in Cambodia is the Sofitel hotel.
- [34] All of the above are to be viewed in the context of the following allegations set out in the first Affirmation of Nobuyoshi Fujidawa a director of JTrust and President and CEO of JTrust Japan to which Mr Konoshita has not yet entered a defence:
- (a) Mr Konoshita has defrauded the claimant of the sum of US\$95 million concerning these proceedings, and US\$180 million in total.
 - (b) US\$95 million of the claimant's money was transferred to the Cyprus and Singapore borrowers for the purpose of sham loans, never intended to be repaid.
 - (c) The Thai SEC (with the assistance of the Cyprus SEC) confirm that the ultimate beneficial owner of the Fraudulent Borrowers to which the Claimant's investments were transferred was Mr Konoshita.
- [35] Finally, Mr Konoshita is a sophisticated businessman with a network of companies with the ability to move assets quickly. This combined with all of the other evidence demonstrates that there is a serious risk of dissipation of his assets

Conclusion

- [36] Since the granting of the injunction on 24th December, 2017, this court has entertained an *inter partes* application to vary the terms of the WFO. Consequently in a decision rendered on 15th February 2018 it varied the injunction in several material particulars because of material non-disclosure by JTrust.
- [37] On the applicable principles and having regard to all the circumstances it would be extraordinary not to continue the WFO. In my judgment based on Mr Konoshita's history of conduct and what may be called his

low corporate morality there is a real risk that any judgment will go unsatisfied owing to a real risk of disposal or dissipation of his assets unless restrained by the court, and it is just and convenient to continue the WFO. Accordingly, I hereby dismiss the application to discharge and order that the Worldwide Freezing Order against the defendant continue until trial and determination of this action or further order of the court.

[38] There shall be liberty to apply in respect of the value of assets subject to the Worldwide Freezing Order.

[39] Costs to the claimants to be assessed if not agreed.

**Hon. K. Neville Adderley
Commercial Judge**

By the Court

**- P
Registrar**