THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

INTERLOCUTORY APPEAL UNDER ECSC CPR 62.10

BVIHCMAP2016/0009

BETWEEN:

[1] RUSTAM YUSUFOVICH GILFANOV
[2] SERGEY ALEKSANDROVICH TOKAREV

Appellants

and

[1] MAXIM VALERIOVICH POLYAKOV
[2] VALERIY OLEKSANDROVICH POLYAKOV
[3] PHOENIX HOLDINGS LIMITED

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Matthew Hardwick, QC with Mr. David Welford for the Appellants
Mr. Paul Chaisty, QC with Mr. Richard Evans and Mr. Adam Hinks for the Respondents

---

2016: July 19;
2017: February 3.

Interlocutory appeal – Worldwide freezing injunction - Rescission of commercial contract – Restitution in integrum – Monetary award where full restitution not possible - Damages for fraudulent misrepresentation – Freezing injunction against non-cause of action respondent

The appellants, Rustam Gilfanov and Sergey Tokarev, operated various internet gaming businesses in Ukraine. They were joined in the businesses by the 1st respondent, Dr. Maxim Polyakov ("Dr. Polyakov") and a Mr. Maxim Krippa. The parties decided to go their separate ways and entered into a Framework Agreement by which they divided the assets of the gaming businesses among themselves. The Framework Agreement resulted in Dr. Polyakov having an $11 million obligation to the appellants.

Dr. Polyakov was also involved in other businesses involving casual dating which he grouped under the name Together Networks. Together Networks was owned by the 3rd respondent, Phoenix Holdings Limited, a BVI company. The appellants claim that they were induced by representations made to them by Dr. Polakov to sign a Share Transfer Agreement for purchasing shares in Phoenix. The representations were incorporated into the Share Transfer Agreement. The appellants allege that the representations were made fraudulently and claimed rescission of the Share Transfer Agreement and payment of $12 million.

Shortly after filing the claim, the appellants discovered that Dr. Polyakov's father, Mr. Valeriy Polyakov, had transferred his shares in Phoenix to a Mr. Sergei Spodin for no consideration. The appellants applied for a worldwide freezing injunction against the respondents. Leon J granted the ex parte injunction and reserved his decision on the application to continue the injunction thereby effectively continuing the injunction. In the absence of a decision from Leon J, the respondents applied to another judge of the Commercial Court to discharge the worldwide freezing injunction. Bannister J heard the discharge application. He found that the gift of the shares to Mr. Spodin was done to frustrate any attempts by the appellants to execute on the shares but there was no general risk of dissipation. Bannister J also found that the appellants had a good arguable case in fraud but he discharged the injunction because he found, inter alia, that there was no reliable evidence of the value of the appellants' shares and that the appellants had no prospects of recovering $12 million or any amount remotely approaching that sum. He discharged the worldwide freezing order and granted a fresh injunction pending the hearing of this appeal.

At the conclusion of the hearing of the appeal, we made an order discharging the temporary worldwide freezing order made by Bannister J, in effect upholding his main order on the discharge application discharging Leon J's worldwide freezing order. We reserved our decision on the discharge of the domestic freezing order.

Held: allowing the appeal to the extent that the domestic freezing order that this Court made on 19th July 2016 is affirmed except that the expression "US$12 million" is deleted where it appears in paragraphs 1, 4, 5(3) and 14 and replaced by "US$10 million"; dismissing the appeal against the discharge of the worldwide freezing order; and ordering the respondents to pay 50% of the appellants' costs here and in the court below, that:

1. On an interlocutory application for a freezing injunction where there is a good arguable case of fraud, and the fraud is a central issue in the case, the judge should consider whether that finding by itself or with other relevant evidence could lead to an inference of a general risk of dissipation.

Dicta of Lloyd, LJ in **VTB Capital plc v Nutritek International** [2012] EWCA Civ 808 and Flaux, J. in **Madoff Securities International Ltd and another v Raven and others** [2011] EWHC 3102 (Comm) applied.

2. Based on the evidence and the finding of a specific act of dissipation, the learned judge erred in not finding a general risk of dissipation.

3. In assessing damages where the claimant has been induced to purchase property by the defendant's fraudulent misrepresentation, the claimant is entitled to receive by way of damages the full price paid for the property less any benefits received as a result of the transaction. As a general rule, the value of the benefit received is assessed as at the date of the acquisition of the benefit. However, the rule is not inflexible and is subject to exceptions where the fraud is continuing or the defendant is locked into continuing to hold the shares. Both exceptions apply in this case.

   Smith New Court Securities Ltd. v Citibank NA [1997] AC 254 applied.

4. The remedy of rescission usually results in the setting aside of a contract and restoring the parties as far as possible to the position they were in before the contract, or restitutio in integrum. In this case rescission would normally result in the setting aside of the Share Transfer Agreement and restoring the Framework Agreement. However, the Framework Agreement was a part of a process that involved separating the interests of various persons including the appellants and Dr. Polyakov, and it was not possible to restore the parties to the position under the Framework Agreement. The Court has the power to rescind a contract and restore the claimant to the nearest position possible, if necessary by a payment of money. In this case, the judge at trial could order rescission and a monetary award based on the court's assessment of the facts of the case and the circumstances of the parties.

   Halsbury's Laws of England (5th edn., 2013) vol. 76, para 829; **Compagnie Chemin de fer Paris-Orleans v Leeston Shipping Co.** (1919) 36 TLR 68 at 69 applied.

5. Alternatively, the judge at trial could award damages for fraudulent misrepresentation in an amount up to the claim of $12 million less the value of the shares.

6. The court can order a freezing order against a non-cause of action defendant. The appellants do not have a cause of action against Phoenix but the injunction against the company is justified because the appellants have an interest in preserving the value of the assets of Phoenix so as to maintain the value of the shares in the company if it becomes necessary to enforce a judgment against the shares.

JUDGMENT

[1] **WEBSTER JA [AG.]**: On 24th June 2015 Leon J granted an ex parte worldwide freezing injunction freezing the assets of the respondents. The inter partes application to continue the injunction was heard in July 2015. Leon J reserved his decision thereby effectively continuing the order. In the absence of a decision by Leon J the respondents applied to another judge of the Commercial Court in February 2016 to discharge the ex parte injunction. Bannister J heard the application and discharged the injunction made by Leon J. This is the decision on the appellants' appeal against the order of Bannister J discharging the worldwide freezing injunction.

Background

[2] The appellants, Rustam Gilfanov and Sergey Tokarev, were involved in various internet gaming businesses in Russia which they transferred to Ukraine in 2011. By April 2013, they were joined in the businesses by Mr. Maxim Krippa and the 1st respondent, Dr. Maxim Polyakov ("Dr. Polyakov").

[3] In or about July 2013, Dr. Polyakov became involved in other businesses involving casual dating which he grouped under the name "Together Networks". The Together Networks business was owned by the 3rd respondent, Phoenix Holdings Ltd., a British Virgin Islands company ("Phoenix" or "the Company"). The capital of Phoenix was owned by the 2nd respondent, Valeriy Polyakov, the father of Dr. Polyakov ("Mr. Polyakov Senior").

[4] Mr. Gilfanov contends that Dr. Polyakov invited the appellants and Mr. Krippa to join him in the Together Networks business by acquiring a 10% stake at a price of US$12 million. As 10% stakeholders they would receive monthly profits of approximately US$250,000.00 based on the business' current performance.

[5] By September 2013 the parties in the gaming businesses decided to go their separate ways. On 29th September 2013, the appellants and Dr. Polyakov entered into an agreement for the separation and distribution of the assets of the gaming businesses ("the Framework Agreement"). The essential terms of the Framework Agreement were that Dr. Polyakov would pay a total of US$15 million in value to the appellants and the appellants would make a balancing payment of US$4 million. The net amount due to the appellants was therefore US$11 million.

[6] One month later, on 28th October 2013, Mr. Polyakov Senior entered into an agreement with the appellants for the sale of shares in Phoenix ("the Share Transfer Agreement"). Phoenix owns Grendall Investments Limited ("Grendall"), another BVI company. Grendall owns substantial interests in the Together Networks business.

[7] The Share Transfer Agreement was signed by the appellants as buyers and by Dr. Polyakov as the representative of the seller, Mr. Polyakov Senior. The parties agreed in the recital to the Share Transfer Agreement that Dr. Polyakov's liabilities under the Framework Agreement amounted to $7,333,333.00 and that he owed obligations to the appellants in respect to certain shares (in Phoenix) to the extent of $4,666,667.00 and that such liabilities and obligations amounted to $12 million which was described in the recital of the Share Transfer Agreement as "the Framework Obligations". It is not clear how Dr. Polyakov's liabilities under the Framework Agreement increased from US$11 million to US$12 million in the Share Transfer Agreement. What is clear is that the parties acknowledged in the Share Transfer Agreement that Dr. Polyakov owed the appellants a net amount of US$12 million in value.

[8] The Share Transfer Agreement further provided:

(a) **Clause 1.1** – Mr. Polyakov Senior is the sole owner of 1,000,000 shares in Phoenix which constitute the total number of issued common shares of the company. He would transfer 100,000 (10%) of his shares to the appellants in discharge of the Framework Obligations of Dr. Polyakov.

(b) **Clause 1.1.3** – The 100,000 shares (are) in the aggregate amount of $12 million.

(c) **Clause 1.3** – The value of the shares shall be $12 million payable by the appellants by offsetting against the Framework Obligations.

(d) **Clause 4.2** – The appellants shall "Receive a share in the operating profits of the Company in proportion to their Shareholdings in the Company from the effective date of this Agreement, which shall be 1 September 2013".

(e) **Clause 5.3** – The seller's (2nd respondent's) rights to dispose of his shares by way of sale is subject to the pre-emption rights in favour of the appellants.

(f) **Schedule 1** – The Company's estimated value is $120 million and the shareholders of the Company are Mr. Polyakov Senior 900,000 shares or 90%; Mr. Tokarev 50,000 shares or 5%; and Mr. Gilfanov 50,000 shares or 5%.

[9] Mr. Gilfanov's evidence is that the respondents did not inform the appellants that the articles of association of Phoenix allowed the Company to issue profit interest shares, and represented that apart from the appellants and Mr. Polyakov Senior there were no other shareholders in the Company.

[10] Mr. Gilfanov also deposed that during the negotiations leading to the Share Transfer Agreement the respondents presented information to the appellants

in the form of a spreadsheet showing Phoenix's monthly average profits of $2.5 million. Based on this information the price of the shares being acquired was calculated at $12 million applying a four year profit spread. This evidence was not disputed. Mr. Gilfanov then decided to swap Dr. Polyakov's debt under the Framework Agreement for a 10% share of Phoenix.

[11] The financial report of the Company for the second quarter of 2014 showed that the Company's profits were on par with the forecast by Dr. Polyakov. The appellants received the report in August 2014. On receipt of the report, Mr. Gilfanov requested payment of a dividend to July 2014 but this was refused.

[12] In September 2014, the appellants received a certificate of incumbency from the Company showing that apart from the 1,000,000 common shares there were also 481,000 issued profit interest shares divided between Dr. Polyakov and a Mr. James Watt.

[13] During a meeting of the shareholders of Phoenix on 31st January 2015, the appellants received the Company's financial reports for the second half of 2014 in the form of an Excel table showing that the after tax profit of the Company for the period was $5,848,794.00 instead of the projected $35,202,838.00. The minutes of the meeting record that Mr. Polyakov Senior by his majority shares voted that $8,550,000.00 be distributed as dividends to be divided equally among the shareholders and paid on 15th May 2015.

[14] The appellants say that it was also at this meeting that they were given full details of the profit interest shares owned by Dr. Polyakov and Mr. Watt. They say that it was only then that they appreciated that they owned only 6.75% of the shares of Phoenix and not 10% as promised, and were entitled to only 6.75% of the Company's profits.

[15] Mr. Gilfanov and one his business associates, Mr. Igor Mazepa, met with Dr. Polyakov in London in February 2015. Their evidence is that Dr. Polyakov apologised for the inclusion of the profit interest shareholders in the list of persons entitled to share in the Company's profits. He promised to amend the minutes of the meeting held on 31st January 2015 to reflect the correct position.

[16] On 11th June 2015, Mr. Polyakov Senior executed a gratuitous transfer of his 900,000 shares in Phoenix to Mr. Sergei Spodin who the appellants believe is the brother of the lawyer Victor Spodin who represented Mr. Polyakov Senior at the January 2015 shareholders meeting. As an aside it is interesting to note that the Polyakovs would have lost the legal right to carry out the unfulfilled promise to amend the minutes of the January 2015 shareholders minutes (see the previous paragraph) when the senior Polyakov transferred the legal and beneficial interests in his shares in Phoenix to Mr. Spodin unless they still controlled the voting of those shares notwithstanding the gratuitous transfer.

Proceedings in the Commercial Court

[17] On 17th June 2015 the appellants filed a claim in the Commercial Court claiming rescission of the Share Transfer Agreement, repayment of the $12 million or alternatively damages of $12 million, interest and costs.

[18] The statement of claim alleges that the appellants were induced to invest in Phoenix by the express and implied oral and written representations by Dr. Polyakov that:

(i) the appellants would be purchasing 10% of the issued capital of Phoenix;

(ii) following that purchase, the sole shareholders of Phoenix would be the appellants and Dr. Polyakov (subsequently Mr. Polyakov Senior as nominee for Dr. Polyakov);

(iii) the only shares in issue or authorised to be issued by Phoenix were common shares; and

(iv) the appellants would be entitled to 10% of the distributable profits of Phoenix being reflective of their 10% shareholding.

Induced by the said representations the appellants agreed to invest $12 million in Phoenix and signed the Share Transfer Agreement. The oral representations by Dr. Polyakov were incorporated into the Share Transfer Agreement.

[19] The appellants pleaded that contrary to the oral representations of Dr. Polyakov and the terms of the Share Transfer Agreement:

(a) Phoenix had two classes of shares – common shares and profit interest non-voting shares, both classes of shares having the right to participate in the profits of the Company.

(b) 371,000 and 111,0000 profit shares were issued to Dr. Polyakov and Mr. Watt respectively on 10th July 2013; and

(c) the appellants' interest in Phoenix was not and had never been 10%, but 6.75%.

The appellants also alleged that the representations were made fraudulently and claimed rescission of the Share Transfer Agreement and/or damages for fraudulent misrepresentations. The claim was accompanied by an application for permission to serve the personal defendants outside the jurisdiction.

[20] On 18th June 2015, the appellants informed Mr. Ivan Lishchyna, a legal advisor of the appellants, that they had received a notice of a meeting of the shareholders of Phoenix to be held on 26th June 2015 to advise the other shareholders that Mr. Polyakov Senior had transferred his 900,000 shares in

Phoenix to Mr. Sergei Spodin, and that Mr. Spodin (as the new majority shareholder) wished to determine the terms of payment of the dividend that the shareholders had declared in January 2015.

[21] The appellants immediately filed a certificate of urgency for an urgent hearing of an ex parte application for freezing injunction that they intended to file on 22nd June 2015. The application was duly filed and on 24th June 2015 Leon J granted a worldwide freezing order restraining the respondents from disposing of their assets up to the value of $12 million. Leon J heard the inter partes application to continue the ex parte worldwide freezing order in late July 2015. He reserved his decision, effectively continuing the worldwide freezing order. In the absence of a decision from Leon J, the respondents applied to another judge of the Commercial Court to discharge or vary the freezing order. Bannister J heard the application and discharged the order but granted a fresh injunction pending the outcome of the appeal which the appellants had filed against his order discharging the ex parte injunction.

[22] The issues that arise from the notice of appeal are:

(a) The risk of dissipation of the respondents' assets.

(b) The value of the Framework Obligations.

(c) The value of the appellants' shares in Phoenix.

(d) The relief sought by the appellants – rescission and damages.

[23] The respondents filed a respondents' notice. The issues that arise from the notice that are not covered by the issues in the grounds of appeal and require separate treatment are:

(i) The learned judge's finding that the appellants have a good arguable case.

(ii) The freezing injunction against Phoenix, a non-cause of action defendant.

(iii) Fortification of worldwide freezing order.

(iv) $36 million in value frozen by the worldwide freezing order.

Approach to Findings of Fact and Exercise of Discretion by a Trial Judge

[24] The notice of appeal and the respondents' notice invite this Court to upset findings of fact and law made by Bannister J and also to set aside the exercise of his discretion in discharging the worldwide freezing order granted by Leon J. The approach of the Court of Appeal to upsetting findings of fact by a trial judge are so well known that they hardly need repetition in this judgment. In relation to findings of fact based on inferences drawn from the evidence, as opposed to findings based on the judge's assessment of the credibility of witnesses, the approach was repeated by Rawlins JA who said in **Golfview Development Ltd v St. Kitts Development Corporation and Michael Simanac**[1] –

> "[23] … [A]n appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Section 33(1)(b) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act empowers this Court to draw factual inferences.
>
> "[24] Where therefore there is an appeal against the fact-finding of a court of first instance, the burden upon the appellant is a very heavy one. The appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes elegantly stated, exceeded the generous ambit within which reasonable agreement is possible."

[1] SKBHCVAP2004/0017 (delivered 20th June 2007, unreported) at para. 23.

I will follow this approach to the findings of fact made by the learned judge that are challenged.

Good arguable case

[25] The learned judge found at paragraph 16 of his judgment that the appellants have "a good arguable case in the sense explained by Mustill J in **Ninemia Corp. v Trave**." The full text of Mustill J's test for the court to consider on an application for a freezing order is –

> "The test to be applied by the court when deciding to exercise its statutory discretion to grant a Mareva injunction to a plaintiff pursuant s 37 of the Supreme Court Act 1981 whenever it 'appears to the court to be just and convenient to do so' is whether, after the plaintiff has shown that he has at least **a good arguable case** and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction."[2]

[26] The respondents complain in their respondents' notice that the judge erred in coming to the conclusion that the appellants have a good arguable case. The judge applied the correct test and there is no reason to upset his finding on this issue. There was ample evidence before the judge on which he could have found that the appellants have a good arguable case. The appellants allege that Dr. Polyakov represented to them that for an investment of $12 million they would receive 10% of the shares of Phoenix and 10% of the distributable profits, and that they and Mr. Polyakov Senior would be the only shareholders of the Company. These representations were incorporated in the Share Transfer Agreement. As it turned out there were other shareholders in the Company and the appellants received only 6.75% of the shares and were therefore entitled to only 6.75% of the distributable profits. It is eminently

[2] Ninemia Maritime Corp. v Trave Schiffahrtsgesellschaft mbH & Co. KG (The "Niedersachsen") [1984] 1 All ER 398.

arguable that the respondents were aware of the true position when the representations were allegedly made, and, a fortiori, when the Share Transfer Agreement was prepared and signed. It is also eminently arguable that the representations were not made innocently. Further, the respondents did not take any steps either before or since the filing of the claim to correct the situation. To the contrary Mr. Polyakov Senior transferred his 90% of the voting shares to Mr. Spodin making the passage of any resolution to correct the situation legally impossible without the cooperation of Mr. Spodin.[3]

[27] In the circumstances I agree with the learned judge's finding, applying the test in the **Ninemia case**, that the appellants have a good arguable case. Since the claim is based on fraud, the effect of the finding is that the appellants have a good arguable case of fraudulent misrepresentation.

Risk of Dissipation

[28] Having found that the appellants have a good arguable case the learned judge went on to find–

> "I also accept that there is some evidence of dissipation arising out of the fact Valeriy Polyakov has transferred his shares to Mr. Sbodin [sic] for no consideration. Mr. Paul Chaisty QC, who appeared together with Mr Adam Hinks for the Defendants, submitted that that was done openly and disclosed to the Claimants by the Defendants themselves. It seems to me, however, that the only possible explanation for that transfer is that it was done to frustrate any attempts by the Claimants to execute on the shares." [4]

Remarkably, the judge went on to find in the following sentence that "there is, however, no evidence, so far as I can detect, of any general risk of dissipation."

[29] I confess a little difficulty reconciling the learned judge's finding of a specific act of dissipation with his later finding that there is no evidence of a general

[3] See para. 16 above.
[4] BVIHCM(COM)2015/0073 Note of judgment (delivered 11th March 2016, unreported) at para. 16.

risk of dissipation. An application for a freezing injunction is usually based on the applicant's fear that the defendant will dissipate his assets to avoid judgment being executed against them, combined with reliable evidence on which the applicant bases his fear. In this case, the appellant's case rises above the level of fear of dissipation because Mr. Polyakov Senior has actually transferred his 900,000 voting shares in Phoenix to Mr. Spodin for no consideration, and the judge found that the transfer was done to frustrate any attempts by the appellants to execute on the shares. This is a case of actual dissipation of a specific asset. I think this Court can and should rely on these facts to find that there was a good arguable case for a general risk of dissipation.

[30] The transfer of the shares to Mr. Spodin was not the only evidence of dissipation. Mr. Igor Mazepa, a resident and citizen of Ukraine and a business associate of the appellants, deposed that he was invited by Dr. Polyakov, who he found to be unfair and dishonest in respect of the appellants' shareholdings in Phoenix, to join him in the fraudulent activities. This is relevant evidence pointing to the possible risk of dissipation by the respondents. The judge did not refer to this evidence. If he found it unreliable he did not give any reasons for so doing.

[31] The appellants also submitted that the judge's finding that the transfer of the shares to Mr. Spodin was an act of dissipation suggests that he must have rejected the respondents' evidence that the transfer was genuine. This should have weighed heavily against the respondents' credibility and is another factor that suggests that there was a real risk of general dissipation. To quote from paragraph 27 of the appellants' skeleton argument "Evidence about dissipation of assets coupled with lying about the same is a powerful cocktail from which to infer a general risk of dissipation."

[32] Finally, the appellants submitted that the judge erred in failing to infer that the finding of a good arguable case of fraud by itself or with other factors was sufficient to infer a risk of dissipation. They submitted that he applied the wrong test at paragraph 16 of the judgment when he said that a case of fraud 'does not, without more, establish that a defendant is of a fraudulent disposition. It establishes only that a claimant is prepared to plead that he is.'[5]

[33] The appellants relied on the decision of the Court of Appeal in **VTB Capital plc v Nutritek International**[6] where Lloyd, LJ said –

> "We agree with Peter Gibson LJ that the court should be careful in its treatment of dishonesty. However where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation…"

[34] The point is also made in **Madoff Securities International Ltd and another v Raven and others**[7] where Flaux, J said –

> "It seems to me that what emerges is a sufficiently arguable case of deliberate wrong doing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars to the Kohn defendants over many years. This demonstrates in itself a serious risk of dissipation."

[35] I agree with the appellants' submissions on this issue. Having found that the appellants have a good arguable case in a claim where fraud is the central issue, the judge should have considered whether that finding of itself could have led to an inference of a risk of dissipation. It may not have, but he should have considered the possibility. Instead he treated it as a case where the allegation of fraud was immaterial.[8]

---

[5] BVIHCM(COM)2015/0073 Note of judgment (delivered 11th March 2016, unreported).
[6] [2012] EWCA Civ. 808 at para. 177.
[7] [2011] EWHC 3102 (Comm) at para.169.
[8] BVIHCM(COM)2015/0073 Note of judgment (delivered 11th March 2016, unreported), at para. 16.

[36] To sum up on the issue of dissipation, I find it difficult to reconcile the judge's finding of a specific act of dissipation with the further finding of no general risk of dissipation. It appears that he did not deal with the other evidence of dissipation, applied the wrong test and did not treat the finding of a good arguable case of fraud as a basis for inferring a general risk of dissipation. I conclude with respect to the learned judge that based on the finding of a good arguable case of fraud together with his own finding as to the consequent motive for the gratuitous transfer and other relevant evidence, he ought to have concluded that there was a general risk of dissipation. His failure to do so exceeds the generous ambit within which reasonable disagreement is possible.

The Framework Obligations and the Value of the Shares

[37] The judge found at paragraph 20 of his judgment that the loss that the appellants suffered was the value of the Framework Obligations less the value of the shares acquired under the share transfer agreement. I agree with this finding. The judge then proceeded to analyse the components of the Framework Obligations and found in paragraph 21 that 'whether as a matter of fact the Framework Obligations have any realisable value at all seems to me entirely speculative'. Speculative or not, the fact is that the Framework Obligations had value which the parties agreed in the recital to the Share Transfer Agreement was $12 million and decided to exchange that value for 10% of the shares of Phoenix.[9] This is what Mr. Gilfanov described in his evidence as "the swap".

[38] In assessing damages where the claimant has been induced to purchase property by the defendant's fraudulent misrepresentation, the claimant is entitled to receive by way of damages the full price paid for the property less any benefits received as a result of the transaction. As a general rule, the value of the benefit received is assessed as at the date of the acquisition of

[9] See para. 1.3 of the Share Transfer Agreement and para. 8 above.

the benefit. However, the rule is not inflexible and is subject to exceptions. In **Smith New Court Securities Ltd. v Citibank NA**,[10] a decision of the House of Lords, Lord Browne Wilkinson dealt with the exceptions to the general rule at page 266 of the judgment as follows:

> "It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired."

[39] And at pages 266-267:

> "…as a general rule, the benefits received by him (the claimant) include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property."

[40] Applied to this case, the agreed value of the shares on the transaction date of 28th October 2013 was $12 million but on the only available evidence this value had dropped to $2.3 million by January 2015 based on the poor financial performance of the Company in the second half of 2014 and the lower percentage of shares held by the appellants in the Company. The alleged fraud was continuing up to that time and the appellants were locked into continuing to hold the shares.

[41] In the absence of evidence from the respondents regarding the value of the appellants' shares, the court can rely on the appellants' estimated value of the

[10] [1997] AC 254.

shares in early 2015 of $2.3 million to estimate the potential damages claim of the appellants for the purpose of granting interim relief in the form of a freezing order.

Rescission or Damages

[42] The judge having found that the appellants have a good arguable case for fraudulent misrepresentation, and this Court having confirmed that finding, it remains to be decided what relief the appellants could receive on the claim, and if that relief is suitable for protection by a domestic or worldwide freezing order.

[43] The relief sought by the appellants is rescission and payment of $12 million or damages of $12 million for fraudulent misrepresentation. The judge treated the claim for rescission and payment as it reads in the statement of claim – rescission of the Share Transfer Agreement and payment of $12 million. However, the appellants' submission both before the judge and in this Court is that the primary relief sought is rescission of the Share Transfer Agreement and payment of the $12 million against the return of the shares in Phoenix.

[44] A successful claim for rescission usually results in the setting aside of a contract and restoring the parties as far as possible to the position they were in before the contract, or restitutio in integrum. In this case, rescission would normally result in the setting aside of the Share Transfer Agreement and restoring the Framework Agreement. However, the appellants submitted that the Framework Agreement was a part of a process that involved separating the interests of various persons including the appellants and Dr. Polyakov. As such the Framework Agreement cannot be restored, but the equitable remedy of rescission is sufficiently flexible to do justice by restoring the parties to the nearest position possible which, in this case, is the payment of $12 million to the appellants against the return of the shares in Phoenix to Mr. Polyakov Senior. The appellants relied on the following dicta to support their position:

> "The principle of restitutio integrum did not require that a person be put back in the same position as before; it meant that he should be put into as good a position as before"[11]
>
> "And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."[12]

The learned editors of **Halsbury's Laws of England** make the same point that:

> "There are cases which suggest that a broader approach may be taken if justice so requires in situations where, although specific restitution is no longer possible, effective restoration is possible by the payment of money."[13]

[45] I accept that the court has the power to rescind a contract and restore the claimant to the nearest position possible, if necessary by a payment of money. In this case, the trial judge could order rescission and a monetary award based on the court's assessment of the facts of the case and the circumstances of the parties. This is a matter for the trial that I do not need to resolve at this stage. Suffice it to say that I think that the Court has the power to rescind the Share Transfer Agreement and make an award, including a monetary award, to do what is practically just.

[46] The alternative relief sought of damages for fraudulent misrepresentation is less controversial. The Court can award damages and the amount will be a matter for the trial. The appellants' claim is for the value of the Framework Obligations less the value of the 6.75% shares in Phoenix. In numbers that is $12 million less $2.3 million, or $9.7 million.

[47] The judge found that the appellants have no prospects of recovering $12 million or any amount remotely approaching that sum, and that the value of

---

[11] Compagnie Chemin de fer Paris-Orleans v Leeston Shipping Co (1919) 36 TLR 68 at 69, per Roche J.
[12] Erlanger v New Sombrero Phosphate Company and others (1878) 3 App. Cas. 1218, 1278-1279, per Lord Blackburn.
[13] (5th edn., 2013) vol. 76, para 829.

the shares may exceed the current value of the Framework Obligations. In my opinion, the value of the Framework Obligations is set out in the Share Transfer Agreement at $12 million and the only evidence of the value of the shares when the alleged fraud was discovered in early 2015 is provided by the appellants. The respondents, who have access to the financial information of the Company, have not provided any evidence of another value of the shares. In the circumstances, the appellants have a good arguable case that they can recover damages for fraudulent misrepresentation of up to $9.7 million, being the value of the Framework Obligations less the value of the shares, plus interest and costs.

Value of Assets to be Frozen

[48] The object of a freezing injunction is to preserve an amount of the defendant's assets that will be sufficient to satisfy any judgment that the claimant obtains. The learned editors of **Gee on Commercial Injunctions** set out the principle as follows:

> "In determining the limit of Mareva relief the court will consider for how much the claimant has a good arguable case. If the claimant has alternative claims, the court will assess the maximum sum by reference to the claim for the highest amount in respect of which the claimant has a good arguable case."[14]

The appellants have a good arguable case for damages of up to $9.7 million. I would set the amount of the freezing order at $10 million to take account of interest and costs.

[49] I will now deal with three issues in the respondent's notice which the respondents submit are additional reasons why the worldwide freezing order should be discharged.

[14] Steven Gee, Gee on Commercial Injunctions (5th edn., Sweet & Maxwell 2004) p. 31, para. 4-009.

Fortification of the Appellants' Undertaking in Damages

[50] It is the almost invariable practice for a person applying for a freezing injunction to give the court an undertaking to compensate the respondent for any losses suffered as a result of the injunction that the court orders the applicant to pay. The court has discretion to order the applicant to fortify his undertaking by putting up security in a form suitable to the court. The order for fortification is usually made on the application by the defendant at the hearing of the application to continue the freezing order. In this case Leon J did not see fit to exercise his discretion to order fortification at the continuation hearing, nor did Bannister J when he discharged the worldwide freezing order granted by Leon J and ordered a fresh worldwide freezing order pending the determination of the appeal from his decision.

[51] The respondents now rely on the same material that was before Bannister J to say that since no order for fortification was made that that is sufficient reason to set aside the temporary worldwide freezing order that he made. The respondents have not shown any basis for saying that the judge erred in not ordering fortification of the appellants' undertaking and this ground of the respondents' notice is rejected.

Injunction against Phoenix

[52] The appellants have not made any claim against Phoenix. The Company is joined as a defendant because the appellants claim that it is necessary to preserve the Company's assets. The authorities established that the Court can order a freezing order against a non-cause of action defendant. In **TSB Private Bank SA v Chabra**,[15] the non-cause of action defendant held assets beneficially owned by the cause of action defendant. The court held that that was a sufficient connection between the claimant and the assets held by the cause of action defendant to make the order sought. The appellants submit

[15] [1992] 1 WLR 231.

that the **Chabra case** involved a claim to the assets of the non-cause of action defendant but such a proprietary connection is not the outer limit of the test to be applied. Further, that the test propounded by Sir John Chadwick, President of the Court of Appeal of the Cayman Islands in **Algosaibi v Saad Investments Co. Ltd**,[16] should be applied in this case. Sir John Chadwick said -

> 'It is necessary that the court be satisfied that there is a good reason to suppose either (i) that the CAD defendant can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets of the NCAD"

[53] In this case the appellants have claims against the Polyakovs who were, until the gratuitous transfer of the 90% of the voting common shares in Phoenix to Mr. Spodin, the persons who owned and controlled those shares. Bannister J found that the transfer of the shares was done to frustrate any attempts by the appellants to execute on the shares. As such it is at least arguable that the appellants may be compelled by process of enforcement to reverse the gift of the shares to Mr. Spodin and use them to satisfy a judgment obtained by the appellants. Therefore, the appellants have an interest in preserving the value of the assets of Phoenix to maintain the value of the shares if it becomes necessary to enforce a judgment against them.

[54] The Court has jurisdiction over Phoenix and this is an appropriate case for making an order to preserve the value of its assets. This would be achieved by ordering Phoenix not to dispose of its assets pending the outcome of the trial.

[55] This is also a proper case for ordering Phoenix not to register any transfers of its shares or declaring any dividends.

---

[16] [2011] 1 CILR 178 at para. 43.

[56] Neither Leon J nor Bannister J saw fit to refuse the freezing order on this ground and I adopt the same position.

This Court's Previous Order

[57] At the conclusion of the hearing of this appeal on 19th July 2016, we made an order discharging the temporary worldwide freezing order made by Bannister J, in effect upholding his main order on the discharge application discharging Leon J's worldwide freezing order. We reserved our decision on the discharge of the domestic freezing order. We discharged the worldwide freezing order because we felt that the respondents have, or have the right to, sufficient assets in the jurisdiction to satisfy any judgment that the appellants may recover against the 1st and 2nd respondents and it was not essential for the protection of the appellants to maintain the extreme measure of freezing the respondents' worldwide assets. The respondents' local assets include Dr. Polyakov's 370,000 non-voting profit shares in Phoenix and the chose in action in respect of the 900,000 voting shares that were gratuitously transferred to Mr. Spodin.

Disposal of the Appeal

[58] I am satisfied that the learned judge erred in his treatment of the issue of dissipation of assets by the respondent, the valuation of the Framework Obligations and the appellants' shares, and his assessment of the amount that the appellants can recover at the trial. The appellants have a good arguable case that the respondents defrauded them and this Court should do what it can to ensure that any judgment that they recover at trial can be enforced on the assets of the respondents. The judge exceeded the generous ambit within which reasonable disagreement is possible in discharging completely the freezing order that afforded them some protection.

Order

[59] In the circumstances I would make the following orders:

(1) The appeal is allowed to the extent that the domestic freezing order that this Court made on 19th July 2016 is affirmed except that the expression "US$12 million" is deleted where it appears in paragraphs 1, 4, 5(3) and 14 and replaced by "US$10 million".

(2) The appeal against the discharge of the worldwide freezing order is dismissed.

(3) The appellants will have their costs of the appeal and in the court below discounted by 50% to reflect their level of success.

I concur.

Dame Janice M. Pereira, DBE

Chief Justice

I concur.

Douglas Mendes, SC

Justice of Appeal [Ag.]

By the Court

Chief Registrar