IN THE GRAND COURT OF THE CAYMAN ISLAND
FINANCIAL SERVICES DIVISION

FSD CAUSE NO 166 OF 2020 (IKJ)

IN THE MATTER OF SECTION 11A OF THE GRAND COURT LAW (2015 REVISION)

BETWEEN

HUDSON CAPITAL SOLAR INFRASTRUCTURE GP, L.P.
(suing in its capacity as general partner of
HUDSON SOLAR CAYMAN LP)

PLAINTIFF

AND

SKY SOLAR HOLDINGS, LTD.

DEFENDANT

IN CHAMBERS

Appearances:	Mr James Clifford and Ms Victoria King, Ogier, on behalf of the Plaintiff
	Mr Jonathon Milne, Mr Spencer Vickers and Ms Sean-Anna Thompson, Conyers, on behalf of the Defendant
Before:	**The Hon. Justice Kawaley**
Heard:	**13 August 2020**
Date of decision:	**13 August 2020**
Draft Reasons Circulated:	**24 August 2020**
Reasons Delivered:	**27 August 2020**

INDEX

Freezing Order and Receivership Order obtained following ex parte on notice hearing-Defendant expressly granted leave to apply for expedited discharge prior to full inter partes hearing-application for discharge on grounds of material non-disclosure-jurisdiction of Court to summarily discharge Order prior to full inter partes hearing-relief sought in aid of New York proceedings-Grand Court Law (2015 Revision) section 11A

REASONS FOR DECISION

Background

1. On July 22, 2020, the Plaintiff filed an Originating Summons and an Ex Parte Summons seeking a freezing order. In support of the freezing order, unusually, an application was also made to appoint a receiver over the Defendant's shares in its direct British Virgin Islands subsidiary, Sky Solar Power Ltd ("SSP"), the assets of which were said to be at risk of imminent dissipation. Freestanding interlocutory relief was sought pursuant to section 11A of the Grand Court Law (2015 Revision). The Plaintiff's substantive claim against the Defendant, SSP and SSP's subsidiary Sky International Enterprise Group Limited ("SIEG") is being pursued before the New York Supreme Court, County of New York, cause number 652002/2020 (the "New York Proceedings"). The Plaintiff's pending application for summary judgment in the New York Proceeding is hotly contested. It is admitted that certain sums will become due and payable to the Plaintiff under a guarantee, but disputed whether any of the approximately $93 million the Plaintiff seeks is presently due and payable.

2. Because the Plaintiff was unable to allege that the Defendant's management was tainted with fraud[1], or that the risk of dissipation of which it complained could be defeated if the Defendant had prior knowledge of the ex parte application, notice was very properly given to the Defendant. The initial hearing was listed for July 30, 2020 and the Defendant's counsel attended the hearing but elected not to address the Court. At the beginning of the hearing I seriously doubted that I could be persuaded to grant the unusually intrusive form of relief which was sought. At the end of the hearing, not without considerable anxiety, I decided to grant the relief sought in the form of a

[1] Complaints were made about conflicts of interest at the Board level which were not central to the application for ex parte relief.

Freezing Order and the appointment of Receivers to take control of the Defendant's SSP's shares. It was obvious that the Plaintiff had a good arguable case on the merits of the claim it was pursuing in the New York Proceedings. The critical issue was whether solid evidence of a risk of dissipation had been put before the Court, sufficient to justify granting both ex parte and pre-judgment freezing order and receivership relief.

3. The Defendant is in the process of pursuing a privatization transaction which the Plaintiff accepts it cannot impugn. One strand of the proposed acquisition by the Buyer Group's of the minority shareholders' shares involves SSP permitting SSJ to grant security over SSJ's assets in support of a loan to be taken out by the Buyer Group to fund the purchase of the minority's shares. "SSJ" is Sky Solar Japan K.K., the indirectly held Japanese subsidiary of SSP. The central underpinning for the granting of the Freezing Order was the Plaintiff's assertion that SSJ's proposed financial support (which it suggested involved either SSJ itself taking out a loan to finance the share purchase and/or providing its shares as security for such purchase) was (a) commercially irrational and therefore outside of the ordinary course of business, (b) being pursued in circumstances where the Defendant had made no provision for the Plaintiff's claim, (c) put at risk all of the Defendant's most significant assets, and (d) accordingly amounted to impermissible dissipation of the Defendant's assets.

4. The degree of concern which I had about the appropriateness of the relief sought on an ex parte basis may best be demonstrated by the terms of the Order which were finally approved. The Plaintiff's draft Order provided for liberty to apply to discharge or vary on 14 days' notice. The Freezing Order granted (at my insistence) provided as follows:

> **"9. *VARIATION OR DISCHARGE OF THIS ORDER***
>
> *The Defendant (or anyone notified of this Order) may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but anyone wishing to do so must first inform the Plaintiff's attorneys in writing <u>on not less than 48 hours' notice</u>.*" [Emphasis added]

5. The primary explanation that I gave for this short notice right to be heard provision at the July 22, 2020 ex parte hearing was as follows:

> "*I… would seriously reconsider whether the order should be continued, if in fact there is some straightforward explanation…there's a good reason for the transaction.*"[2]

6. Later on in the ex parte hearing, in a passage in the Transcript upon which the Plaintiff's and Defendant's counsel both relied upon, I explained the rationale for allowing the Defendant to be heard on short notice as follows:

> "*…It seems to me that the Defendant should be given the opportunity if it considers it appropriate to do so, to come before the court at very short notice and say, 'Look, there's a slam dunk point here, which is blindingly obvious, that the Court didn't see and the Plaintiff's counsel didn't draw to the attention of the court. This order should be discharged forthwith, because it's extremely deleterious.*"

7. In giving short reasons for granting the Freezing Order, I opened with the following words:

> "*Yes, not without some anxiety, I am persuaded that I should grant the injunction. But I do so, because the Defendant is to be granted an opportunity, on very short notice to come before the Court….*"

[2] Transcript, page 46.

8. The Defendant duly applied for an expedited hearing, which was listed over the Plaintiff's objections that a full *inter partes* hearing was needed. I was quite easily satisfied that there was a "straightforward explanation", which was apparent on the face of the documents placed before the Court at the ex parte hearing. As the Freezing Order had expressly been made on the basis that I would consider summarily discharging it if there was a "*straightforward explanation*" (or a "*slam-dunk point*"), on August 13, 2020, in the exercise of my discretion, I :

(a) discharged the Freezing Order (and the Receivership Order embodied within it);

(b) ordered the Plaintiff to pay the Defendant's costs of the application to discharge the Freezing Order to be taxed if not agreed on the standard basis; and

(c) granted the Plaintiff liberty to renew its application for the Freezing Order on an *inter partes* basis.

9. These are the reasons for that decision.

The material before the Court at the ex parte hearing

<u>The Plaintiff's evidence</u>

10. The Plaintiff relied upon the First Affidavit of Neil Zachary Auerbach. He has been Managing Partner of the General Partner of the Limited Partnership (the Plaintiff) since 2013. The first important averment he made was the following:

> "*4. I wish to make clear at the outset that whilst the Plaintiff had made an offer to purchase assets of SSH [the Defendant] as part of a previous*

settlement proposal, the Plaintiff does not object to the terms of the Offer to Purchase per se, but solely to the fact that the proposal involves the diminution in the value of the assets of SSH to fund the Offer to Purchase, therefore taking assets out of the reach of creditors of SSH and its subsidiaries. The Plaintiff's sole purpose for seeking the assistance of this honourable Court is to prevent the Defendant from dealing with its assets in any manner which makes the enforcement of the Plaintiff's claim impossible by dissipation or removal of those assets, effectively rendering the Defendant judgment-proof, whether that be by the encumbrance under the Offer to Purchase or by some alternative means. If adequate measures are in place to adequately safeguard the Defendant's assets to ensure that there is no dissipation then the Plaintiff has no objection to the Offer to Purchase."

11. The following concerns about the Defendant's solvency were then expressed:

> "*12 The Annual Report is prepared on a consolidated basis and indicates that significant losses in four of the last five years (PAGE 6 [page 16 of the Exhibit]). The annual report also indicates a decline in total equity (PAGE 7 [page 17 of the Exhibit]) from $112.719 million in 2015 to $37.063 million in 2019. Current assets in 2019 are stated to be $56.762 million but when this is broken down further (PAGE F-4 [page 153 of the Exhibit]) the cash position is given as $11.739 million.*"

12. That pessimistic view of the Defendant's real value was in stark contrast to the following disclosure which Mr Auerbach also fairly made:

> "*22 On 20 February 2020, Hudson Sustainable Investment Management, LLC (HSIM), affiliated to Hudson Capital proposed an offer to acquire SSJ for $107.9m, which we believed, if accepted, would have assisted in reaching a settlement of our dispute...*" [Emphasis added]

13. SSJ's assets are intended to serve as security for the loan to fund the Offer to Purchase. The complaint that the transaction would be prejudicial was based on the thesis that the

Defendant's consolidated group value was merely $37 million. It was further deposed as follows:

> "*31. The effect of the Loan Facility appears to be to make the assets of the Defendant's indirectly wholly-owned subsidiary, SSJ, available to secure a loan from Daiwa to enable the Offeror Group to purchase the shares in the Defendant that they do not already own. As referred to above, the Plaintiff is concerned that, by permitting or procuring SSJ to agree to grant Daiwa security over its assets in order to secure the repayment of a loan of $40 million, the Defendant would be putting a substantial part of its assets at risk in circumstances in which the Plaintiff has strong case to be entitled to not less than $93,253,792. Given the Defendant's net equity of $37m from the Defendant, if this liability were properly taken into account by the directors of SSH the Defendant would be treated as both cash flow and balance sheet insolvent and the proposed encumbrance of the assets of SSJ would further impair the ability of each of the Guarantors to procure the cash necessary to meet their obligations under the Guaranty.*"

14. Carefully read, that averment only explicitly complained about the effect of SSJ's support for the share purchase transaction on the Defendant's ability to pay, without also positively asserting that the transaction was not an ordinary course of business one. The deponent thereafter liberally uses the word "dissipation" in a broad layman's sense. However, the implication was given that the transaction was inherently improper because the Defendant's directors were ignoring the potential liability owed in relation to the Plaintiff's claim. Mr Auerbach further complained:

> "*36 Given the willingness to openly dissipate assets despite such a public setting and previous such dissipations by members of management, the Plaintiff is concerned what steps may be taking place in private within other subsidiaries of the Defendant.*"

The Plaintiff's submissions at the ex parte hearing

15. In the Plaintiff's Skeleton Argument for the ex parte hearing, it was submitted that:

"*2.3 On 6 July 2020 the Defendant received notice of an intention to diminish and/or dissipate the assets of the Defendant other than in the normal course of business by way of its indirectly wholly-owned subsidiary, SSJ, granting security over its assets to secure a loan in the JPY equivalent of $40 million (the Proposed Financing) to enable the majority shareholders in the Defendant to purchase the shares of the minority. SSJ is the Defendant's wholly-owned subsidiary because it is wholly owned by Sky International Enterprise Group Ltd. (SIEG), which is wholly owned by Sky Solar Power Ltd. (SSP) which is wholly owned by the Defendant, see Auerbach 1 paragraph 5 and the Structure Chart thereto.*

2.4 Indeed, not only would the Proposed Financing involve a dissipation of the Defendant's indirectly wholly owned assets, resulting in a diminution in the value of its shareholding in SSP, it would involve a dissipation in favour of its shareholders, by what would effectively be a return of capital, in circumstances in which the Defendant would seem to be insolvent if the Plaintiff's claim was taken into account."

16. It was acknowledged in the Skeleton that the legal requirements the Plaintiff had to establish to obtain a *Mareva* injunction included the following:

"*11.2 That there is a real risk that the respondent will engage in activities <u>outside of the usual and ordinary course of its business</u> which will have the effect of dissipating its assets and making it more likely that a judgment in favour of the Plaintiff would go unsatisfied;…*" [Emphasis added]

17. The way the Plaintiff met this key requirement was advanced for the first time in oral argument in the following pivotal way:

"*It's not in the ordinary course of business for a Cayman Islands holding company, to acquiesce in its subsidiary, the only subsidiary that seems to have any wealth, lending money to an offer group, in order for them to buy up the minority…*

The holding company is proposing to encumber its assets to enable the majority to buy the minority. It's essentially a disguised return of capital to the majority. That would be bad enough. But in circumstances in which it's facing a claim that it can't meet. It can't meet if it does this…."[3]

Relevant material not or not adequately referred to

18. There was material before the Court which undermined the following important pillars of the Plaintiff's case on risk of dissipation:

(a) the assertion that there was no arguably *bona fide* commercial rationale for SSJ to financially support the buyout; and

(b) the assertion that the Defendant had made no accounting provision for the Plaintiff's claim so that it was obvious that the impugned transaction would render the Defendant insolvent.

19. In the Defendant's Skeleton Argument, it was submitted:

"*48.In relation to (1) (i.e. the explanation for the Proposed Transaction), the Plaintiff failed to highlight the lengthy explanation and commercial rationale for the Proposed Transaction contained in the Offer to Purchase under the self-explanatory heading 'Purpose and Reasons for the Offer'.*

49. This Court may recall these exchanges at the ex parte hearing:

JUDGE: has any explanation been offered? There must have been, and if so, in a nutshell, what is it? ...

BARRISTER: My recollection is, that there has been no explanation...

50.If the hearing had taken place on an inter partes basis, rather than misleading the Court by saying that "no explanation" had ever been offered, the

[3] Transcript, pages 8, 13.

Defendant would have outlined the rationale and fairness behind the Offer to Purchase and Proposed Transaction. The perceived benefits to the Sky Group and stakeholders as a whole are explained at length in the public document exhibited to Mr Auerbach's First Affidavit.

51.In relation to (2) (i.e. the question of solvency of the Sky Group), the Plaintiff failed to highlight parts of the consolidated accounts which show that the Sky Group:

51.1.has made a substantial provision in its accounts for US$69 million for the Plaintiff's prospective debt as a non-current liability (consistent with the sum agreed as part of settlement negotiations between the parties);

51.2.on a conservative book value, has more than US$405 million in assets in a variety of different forms, including more than US$261 million in solar park assets which, in many cases, are saleable at relatively short notice; or

51.3.as the Plaintiff must know, based on industry knowledge, the fair market value of many of the Sky Group's solar assets is significantly higher than the book value. This is shown by the example of the recent sale of 13 solar parks described at Note 15 in the consolidated accounts."

20. The following explanation found in the Offer to Purchase document as to the commercial rationale for the main transaction was on its face a straightforward one[4]:

"***2. Purpose of and Reasons for the Offer; Plans for SKYS After the Offer and the Merger***

The purpose of the Offer is for Offeror Group, through Parent, to increase its direct and indirect ownership of the outstanding Ordinary Shares (including Ordinary Shares represented by ADSs) from its current level of approximately 77.3% (representing 77.3% of the total voting power of the outstanding Ordinary Shares of SKYS) to 100% and, accordingly, to participate in 100% of the earnings and growth in value of SKYS.

[4]First Auerbach Affidavit, Exhibit "NZA-1" at pages 1060-1061.

If the Offer is completed, Purchaser will cause the Merger to be effected, pursuant to which each then outstanding Ordinary Share/ADS held by the Unaffiliated Security Holders would be converted into and represent the right to receive, as merger consideration, the Offer Price. The cash consideration to be paid in the Merger would be the same as paid in the Offer, less any ADS cancellation fees and other related fees and withholding taxes. Upon the completion of the Merger, Parent would own 100% of the Ordinary Shares.

Offeror Group believes that there would be a number of benefits to SKYS that would follow from SKYS being a privately-held company owned 100% by Parent. These benefits include the following:

- *by ceasing to be a public company, SKYS will benefit from the elimination of the additional burdens on its management, as well as the expenses, associated with being a public company, including the burdens of preparing periodic reports under federal securities laws and the costs of maintaining investor relations staff and resources and complying with the Sarbanes-Oxley Act of 2002, which costs and expenses Parent estimates to be, on an annualized and recurring basis, an aggregate amount of approximately US$2.6 million, enabling management to devote more of their time and energy and more resources of SKYS to core business operations; and*

- *as a privately-held company, SKYS will have greater flexibility to focus on long-term business goals, including pursuing strategic transactions and acquisitions, without the constraint of the public market's emphasis on quarterly earnings, which flexibility is particularly important to SKYS today than in the past given Parent's belief that the operating environment has changed significantly since SKYS' initial public offering, and many new and evolving challenges that SKYS faces in the marketplace ,including, among other things, (i) the dependence of SKYS on global liquidity, relationships with financing and parties and the availability of funding for installation and construction of SKYS' projects and other aspects of operations; (ii) volatility in the supply and prices of other energy products such as oil, coal and natural gas in the relevant jurisdictions in which SKYS operates; (iii) reduction, modification or elimination of government subsidies and economic incentives that have or may reduce the economic benefits of SKYS' existing solar parks and its opportunities to develop or acquire suitable new solar parks; (iv) the substantial indebtedness SKYS has incurred in*

order to maintain capital requirements and fund SKYS' operations, and the financial and other covenants contained in its loan agreements and other financing arrangements relating to such indebtedness; (v)ongoing legal actions and proceedings, and the prospect of potential future lawsuits or allegations by third parties that may adversely affect SKYS' business, financial conditions, results of operations, cash flows and reputation; (vi) increased competition in target markets, such as China, where state-owned and private companies have emerged to take advantage of the significant market opportunity created by attractive financial incentives and favorable regulatory environment provided by the governments and (vii) the current novel coronavirus (COVID-19) pandemic outbreak and its potential negative impact on the operation of SKYS and its business partners."

21. As Mr Milne accurately summarised it, this document suggests (indirectly, rather than explicitly) that it made sense for SSJ to provide financial support for the transaction, because the Defendant would benefit from (a) reduced costs from delisting, and (b) increased flexibility. These are well known commercial advantages which typically underpin "go-private" transactions. They constitute plausibly arguable *prima facie* grounds for viewing SSJ's financial support as being within (rather than outside) the ordinary course of business. This was, admittedly, not an explicit explanation of why SSJ was supporting the transaction. It implicitly explained why such support could not be said to be commercially inexplicable on its face.

22. As this pivotal evidence was placed before the Court, the failure to draw my attention to it (in the absence of any directly misleading evidence) was at most a failure of fair presentation in relation to a matter which the Plaintiff's counsel was perhaps entitled to feel ought to have been obvious to the Court. Had I reflected even briefly on the nature of the transaction that SSJ was financially supporting with a modicum of clarity, I would not have been so easily swayed by the aura of mystery which Mr Clifford skilfully created around, as he put it, the proposed "*financial assistance*". Although I was aware that no prohibition on a company providing financial support for the purchase of its own shares existed, my familiarity with that traditional prohibition cast a subliminal shadow over SSJ's involvement in the transaction.

23. The inadequate way in which the solvency position was dealt with was again a question of fair representation rather than material non-disclosure in the narrow sense. Firstly, Mr Auerbach expressly disclosed the fact that the Plaintiff had offered to buy SSJ for $107.9 million. That suggested that the net equity in the accounts was a conservative

figure and that the financial support SSJ was proposing to give was not an obviously uncommercial transaction. Evidence indicating that provision had been made in the accounts for a substantial portion of the Plaintiff's claim was before the Court in the form of the same Consolidated Accounts (for year 2019) to which reference was made at the ex parte stage. However, no reference was made to Note 32 (b), which discussed the relevant contingent liability provision[5].

24. The Defendant's counsel further complained that other aspects of the Consolidated Accounts, showing the market value of certain solar parks was clearly higher than the book value, ought to have been drawn to my attention. This would not have had a material impact on my decision to grant the Freezing Order at the ex parte stage.

Findings: grounds for discharging the Freezing Order (including the Receivership Order)

Legal grounds

25. Generally, the applicant for interim injunctive relief in the form of a freezing or receivership order must demonstrate (a) a good arguable case on the merits of the claim, (b) a real risk of unjustified dissipation, and (c) that it is just and convenient to grant the relevant relief. In the present case (a) was not in dispute, and the main focus was on limb (b). It was self-evident that if limb (b) was not satisfied, limb (c) could not possibly be met.

26. The Defendant invited the Court to summarily discharge the Freezing Order without considering the merits, taking into account (a) the importance of the facts not disclosed, and (b) whether the non-disclosure was innocent. Reliance was placed on *Microsoft Mobile Oy (Ltd)-v-Sony Europe Limited* [2017] EWHC 374 at paragraph 209 (Marcus Smith J) and *Sloutsker-v-Romanova* [2015] EWHC 545 at paragraph 51(iv) (Warby J). In the latter case, Warby J described the relevant general principles as follows:

> "…*Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See Brinks Mat at pp1357 (6) and (7) and 1358 (Balcombe LJ).*"

[5] Exhibit "NZA-1", pages 201-202.

27. Both cases concerned full *inter partes* hearings to set aside ex parte orders (permission to serve the defendant out of the jurisdiction). I accepted that the general principles applied to ex parte interim injunctions and related orders, but I was not convinced that these cases addressed the approach the Court should follow when invited to discharge an ex parte interim order in circumstances where the defendant has filed evidence to which the plaintiff has not had a chance to respond.

28. That said, it must be right that if serious non-disclosure has occurred, the Court may in its discretion summarily discharge an ex parte order without considering the merits if such a result is clearly justified even if the merits are on the plaintiff's side. Paragraph 4.2 of the Preamble to the Grand Court Rules provides that the Court's duties in applying the Overriding Objective include, *inter alia*:

> "*(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;…*
>
> *(g) considering whether the likely benefits of taking a particular step will justify the cost of taking it…*"

29. Apart from considerations of material non-disclosure, in my judgment I had a more generous ambit of discretion to discharge the Freezing Order on a summary basis before a full *inter partes* hearing because of the unique circumstances in which the Plaintiff obtained ex parte relief. This was not a case where an interim injunction was confidently granted until trial or further order, or until a return date. In this case, as the Transcript makes clear, the Freezing Order was granted on the explicit basis that the Defendant should have an opportunity to persuade me summarily that I should not exercise my discretion in favour of granting "full" interim relief until a "full" *inter partes* application to set aside was heard. The Freezing Order was granted under section 11A of the Grand Court Law, which provides:

> "*(5) The Court may refuse an application for the appointment of a receiver or the grant of interim relief if, in its opinion, it would be unjust or inconvenient to grant the application*".

30. Mr Milne also rightly emphasised the exceptional nature of receivership relief, building on my own observations early on in the ex parte hearing:

> "*I mean, a receiver remedy in this circumstance, would be virtually unprecedented. I have certainly have never come across an application to appoint a Receiver absent in support of fraud claim, something like that…"*[6]

31. The Defendant's counsel aptly relied upon the Eastern Caribbean Court of Appeal decision in *Alexandra Vinogradova-v- (1) Elena Vinogradova, (2) Sergey Vinogradova*, BVIHCMAP 2018/052, Judgment dated July 30, 2019 (unreported). In that case a receiver was appointed in more traditional context of enforcing a judgment (albeit a foreign one). Paul Webster JA opined as follows:

> "[48]…the appointment of a receiver is a draconian remedy that can have far reaching consequences for a company, and if the harm is evenly balanced a court should be very reluctant to appoint a receiver...
>
> [52] Trial judges should be vigilant to ensure that the court's jurisdiction to appoint interim receivers is exercised only when it is truly just and convenient to do so."

32. There are clear and longstanding legal policy objections to interim injunctive relief interfering with the ordinary course of a defendant's business, which have been consistently applied by this Court. They are illustrated more recently by *Crowther-v-Crowther* [2020] EWCA Civ 762. Males LJ summarised the principles governing the grant of freezing order stated in *Lakatamia Shipping Company Limited-v-Morimoto* [2019] EWCA Civ 2203 (Haddon-Cave LJ, at paragraph 34), including :

> "*(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient…*

[6] Transcript, page 7.

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

33. Absent "*solid evidence*" of a risk of "*unjustified dissipation*" it will not generally be just and convenient to grant intrusive interim relief such as a freezing order or (especially) the appointment of a receiver. These principles were all expressly or impliedly accepted by the Plaintiff's counsel at the ex parte hearing[7]. These principles are, it must be admitted, often easier to state in the abstract than they are to apply in an infinite variety of different commercial contexts. The pivotal analysis will generally focus on whether the impugned transaction appears in substantive terms to be either a legitimate or a bogus one.

34. I recently held in *Linden Capital LP et al-v-Luckin Coffee, Inc*, FSD 82/2020 (IKJ), Judgment dated July 22, 2020 (unreported):

> "*38. In my judgment 'ordinary course of business' in this context requires the Court to look primarily at the substantive purpose of an impugned transaction, not its form. A formally correct transaction carried out with no apparent haste would be outside of the ordinary course of business if funds were being siphoned away from the corporate structure for an illicit collateral purpose. The contemporaneous documentation (such as it is) supports the plausible view that the transactions were for ordinary business purposes (funding operating expenses which were likely to increase). The lack of supporting documentation for the decision-making, the timing of the transactions and the accelerated regulatory approval do not support a finding that unjustifiable dissipation occurred. It is more plausible that the transaction was expedited as part of a public sector/private sector drive to reboot business activity in the PRC than it is that the Defendant's agents were primarily seeking to put assets beyond their investors' reach, even though there is no evidential basis for such speculation. The Plaintiffs are*

[7] Plaintiff's Skeleton, paragraphs 11-13. Prominent local authorities which were placed before the Court at the ex parte hearing included *Algosaibi-v-Saad* [2011 (1) CILR 178] (CICA); *Classroom Investments Incorporated v China Hospitals Incorporated (and another)* [2015 (1) CILR 451] (Smellie CJ).

understandably suspicious; but there is no evidential support for those suspicions absent a legal imperative binding on the Defendant to preserve assets to meet contingent claims." [emphasis added]

Grounds for discharging the Freezing Order

35. The pivotal and most substantial evidential factor at the ex parte hearing was whether or not SSJ's proposed financial support for the Buyer Group's bid to purchase all the minority's shares was arguably outside the ordinary course of business. The Plaintiff submitted solely by way of argument that it was not. The Freezing Order could only be supported if, on the face of the documentary record, unsupported by any sworn assertions of *mala fides*, there was no legitimate explanation for SSJ's proposed involvement.

36. The solvency analysis was less significant. It is usually difficult to form a clear view at the ex parte stage of the impact of a transaction on the solvency of a defendant. My approach tends to be to require a higher threshold to be met by an applicant in relation to unjustified dissipation. If solid evidence of unjustified dissipation is adduced, and there are strong allegations of fraud, that may justify a more cynical view being taken of the respondent's solvency position, even if the financial evidence is less than clear on its face.

37. In the present case, I was extremely doubtful as to whether the crucial basis for the Freezing Order had been made out: that the impugned aspects of the transaction were, as was suggested and initially appeared to me, inexplicable. I accordingly insisted on affording the Defendant an opportunity to apply on short notice to proffer a satisfactory explanation. Significantly, there was no affirmative sworn testimony asserting that the proposed SSJ financial support was either uncommercial or for an improper purpose. Assessing whether a clearly arguable case that this proposed support was unjustified required an assessment to be made of the apparent purpose of the transaction on the face of the documentary record.

38. Although evidence was filed by the Defendant to which the Plaintiff wished to respond, I was able to determine quite decisively, based on material placed before the Court at the ex parte hearing, that there was no "solid evidence" of a risk of "unjustified dissipation". It is commercially rational for the majority shareholders seeking to privatize a listed company to cause the company or one of its subsidiaries to provide financial assistance for the proposed purchase of the company's own shares. This is because of the commercial benefits the company and its majority shareholders (who are the best judges

of where their commercial interests lie) expect to receive from going private, which typically motivate the privatization transaction in the first place.

39. Because the commercial benefits of such transactions are so well known, I do not consider that I was seriously misled by not being taken to the portion of the Offer document which set out those benefits. The relevant document did not in any event directly address the question I raised at the ex parte hearing: why was SSJ getting involved? However, a fair presentation by counsel would not have exploited my naiveté and would have drawn my attention to the obvious explanation that the Defendant would likely advance, affording me the opportunity to accept or reject it.

40. A significant ancillary factor was whether the Plaintiff would be prejudiced because the result of SSJ's financial support would be to render the Defendant insolvent. The main buttress for this limb of the ex parte application was the submission (again unsupported by positive explicit evidence to this effect) that no provision was made in the Defendant's Consolidated Financial Statements for the Plaintiff's claim of some US$93 million. I do not consider that I should have, through my own pre-reading, identified this footnote to the accounts. I was misled by the submission to the effect that no provision at all had been made for the Plaintiff's claim in the Defendant's Consolidated Accounts. As was pointed out in the Defendant's Skeleton Argument:

> "*39.3* ***Duty to signpost difficulties in the plaintiff's case***: *'In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case.' Relevant points and competing considerations must be properly signposted in the main affidavit(s) and skeleton argument, mindful of the fact that it will be impossible for a Judge to absorb all the nuances himself or herself without such signposting.*"[8]

41. Here, counsel sailed close to the wind in terms of seriously misleading the Court by failing to point out that provision had been made for the Plaintiff's claim in the Defendant's Consolidated Accounts for the lesser amount of $69 million. A fair presentation would have required drawing this significant aspect of the Consolidated Financial Statements to my attention. However, I would have refused to grant the Freezing Order without considering the solvency position on the grounds that no solid

[8] *Fundo Soberano de Angola-v-Dos Santos* [2018] EWHC 2199 (Comm) at [52] (Popplewell J).

evidence that the impugned transaction was improper had been adduced. So the actual impact of this aspect of the unfair presentation was less significant than it might otherwise have been.

Standard as opposed to indemnity costs

42. Mr Milne made a forceful argument that costs should be awarded on the indemnity basis as I had been satisfied that there was material non-disclosure sufficiently serious to justify summarily discharging the Freezing Order without regard to the merits of the application. I rejected that argument for two main reasons.

43. Firstly, I did not discharge the Freezing Order on the grounds of serious material non-disclosure without regard to the merits at all. I discharged the Order because, when making it, I expressly reserved the right to reconsider whether the Plaintiff had made out a sufficient case for ex parte relief having regard to whether or not the impugned financial support for the privatization transaction was or was not on its face inexplicable. I was not satisfied at the ex parte stage that the duration of the Freezing Order should be as long as until the return date, or "until trial or further order". I did not need to rely on the material non-disclosure complaints in their own right; instead those complaints were used to undermine the merits of the Plaintiff's entitlement to ex parte relief.

44. Secondly, while it is obvious that a fair presentation was not made, I did not consider that the Plaintiff's conduct was sufficiently improper or unreasonable as to warrant the penalty of an indemnity costs award. Not only were the critical submissions not supported by evidence shown to have been false. The crucial material was all placed before the Court. And the pivotal submission was in reality only accepted (with considerable reservations) as much due to my own momentary lapse into a regrettable state of judicial naiveté as it was due to being misled by what was more an unmeritorious submission than a deceptive one.

45. As I observed in the course of the costs application, I also consider it highly material that the Defendant was given notice of the ex parte hearing and attended that hearing through counsel. The Defendant could have (potentially at least), without losing its rights to apply to discharge the Freezing Order on a full *inter partes* basis, have corrected the most important inaccuracies before the ex parte Order was made. There is a material difference, in my judgment, between the degree of trust which the Court places in counsel at a hearing at which the opposing party is absent altogether and a hearing at which the opposing party is present, even if not actively participating. Had the unfair presentation which was given occurred in the context of a fully ex parte hearing, I would probably have awarded costs on the indemnity basis.

Liberty to apply

46. When discharging the Freezing Order, I indicated that the present decision was not intended to shut out the Plaintiff altogether from applying for similar relief on an *inter partes* basis. It ought to be obvious that no useful purpose will be served by the Plaintiff invoking the liberty to apply that I have granted unless some fresh or fortified grounds for seeking substantially similar interim relief can be advanced.

Summary

47. For the above reasons, on August 13, 2020 I discharged the Freezing Order/Receivership Order which I granted on July 30, 2020 and awarded the Defendant the costs of the application to be taxed if not agreed on the standard basis.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT