Neutral Citation Number: [2021] EWCA Civ 1310

Case No: A1/2021/1036

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR PETER MARQUAND (sitting as a Deputy High Court Judge)
[2021] EWHC 1443 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/08/2021

Before :

LADY JUSTICE NICOLA DAVIES
LADY JUSTICE ANDREWS
and
LORD JUSTICE BIRSS

- -

Between :

LES AMBASSADEURS CLUB LIMITED	**Appellant**
- and -	
MR SONGBO YU	**Respondent**

- -
- -

Guy Olliff-Cooper (instructed by **CANDEY**) for the **Appellant**
The Respondent did not appear and was unrepresented.

Hearing date: 17 August 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30 am on Tuesday 24 August 2021.

Lady Justice Andrews:

1. This is an appeal by Les Ambassadeurs Club Limited against the refusal by Mr Peter Marquand, sitting as a Deputy High Court Judge ("the Judge"), to grant it a post-judgment freezing injunction against the Respondent ("Mr Yu"), a Chinese businessman. Mr Yu is said to be the controller of the Herun Group, a substantial real estate development services business, operating out of Zhoushan, China. The issue at the heart of the appeal is what is meant by "a real risk of dissipation" and whether the Judge misunderstood the test and consequently applied too high a threshold.

2. The appellant, as its name suggests, is the owner of a club which operates a casino in Mayfair. Mr Yu gambled at the casino. In 2014, when Mr Yu first became a member of the club, he and his family were ranked by Forbes as number 149 on China's Rich List, with a net worth of US$1.3 billion. Between 27 April and 1 May 2018, Mr Yu made use of a cheque cashing facility granted to him by the appellant to purchase £19 million worth of chips from the appellant using a series of cheques, all of which were subsequently dishonoured.

3. In November 2018, the parties entered into a settlement agreement under which Mr Yu agreed to pay the appellant a sum of £16.54 million in instalments; however, he failed to meet the first instalment when it fell due, and by the terms of the agreement the full amount became due and payable immediately.

4. On 21 December 2018, the appellant issued the underlying proceedings against Mr Yu in the Queen's Bench Division. On the same date, Master Eastman made an order granting permission to serve the claim form and particulars of claim on Mr Yu in China by alternative methods, namely, by first class airmail or text to Mr Yu's WeChat account. After the proceedings were served on him, Mr Yu made a number of payments to the appellant which, by the end of December 2019, had reduced the principal amount outstanding to just under £6.54 million.

5. In August 2020, since it had heard nothing more from Mr Yu apart from a Lunar New Year greeting sent by him in January, the appellant decided to pursue the proceedings. Its solicitors provided Mr Yu with a draft amended claim form and particulars of claim, which took into account the payments he had made and corrected other errors. Both the English version and a Chinese translation were sent to Mr Yu's WeChat account. Despite this, on 19 August 2020, Mr Yu used a voice message on the WeChat account to request that the appellant send him a translation. A response was sent pointing out that the translation had already been sent to him. Since then, there have been no further communications from Mr Yu.

6. On 18 September 2020, the appellant issued an application for permission to amend the Claim Form and Particulars of Claim and for summary judgment. The application was served on Mr Yu in accordance with the original order of Master Eastman, and the appellant's solicitors also wrote to him to seek his dates to avoid for the hearing, but there was no response.

7. Permission to amend was granted and on 19 November 2020, Master Thornett gave summary judgment for the principal sum outstanding, plus interest and costs. The judgment debt is just over £10 million. The order of Master Thornett was served on Mr

Yu both in its original form (on 25 November 2020) and in translation (on 1 December 2020).

8. Over four months later, on 20 April 2021, the Club applied for a post-judgment worldwide freezing order. The application and evidence in support were served on Mr Yu, together with translations, by WeChat on 26 April 2021. The application was considered by the Judge at a remote oral hearing using Microsoft Teams, on 4 May 2021. He refused to grant the injunction and refused permission to appeal. Permission to appeal was granted by Singh LJ on 24 June 2021.

9. Mr Yu has taken no part in the appeal. Mr Olliff-Cooper, who appeared on behalf of the appellant, as he did in the Court below, has taken this Court carefully through the evidence which demonstrates that Mr Yu was given sufficient notice of the appeal and the date of the hearing, and supplied with translations of all relevant documents, including the appellant's notice and skeleton argument and the order granting permission to appeal. There has been nothing to indicate that the WeChat account is no longer operative or that messages sent through that medium are no longer getting through to Mr Yu. I am satisfied that he has been afforded the fair opportunity to attend and make submissions, but has deliberately chosen not to. Of course, that is his prerogative.

10. The Judge identified the four requirements which the applicant for a freezing order must demonstrate, namely (1) that he has a good arguable case on the merits; (2) that there is a real risk of dissipation; (3) that there are assets held by or on behalf of the respondent within the (geographical) scope of the proposed injunction, and (4) that in all the circumstances it is just and convenient to grant the order sought. As the appellant had already obtained summary judgment, the first requirement was met. As to the third, the Judge was satisfied on the evidence adduced by the appellant, including a report by Kikkar Advisory described as a "Worldwide Asset Review", ("the Kikkar Report") that it was likely that Mr Yu has assets in this jurisdiction and in other parts of the world, including Hong Kong, that would be covered by a worldwide freezing order.

11. Therefore, as the Judge said at [21], the real issue in this case was whether or not there was a real risk of dissipation of those assets. He addressed each of the nine factors relied upon by the appellant as demonstrating that risk, before concluding that he was not satisfied on the evidence when viewed as a whole and looking at all the features cumulatively, that a real risk of dissipation had been established. He said that even the features he had identified in favour of a real risk of dissipation were "not very convincing". There was no more than a suspicion or a fear that there is a risk that Mr Yu would dissipate his assets.

12. The Grounds of Appeal are:

    (1) That the Judge misinterpreted the phrase "real risk of dissipation" and thereby erred in law. Had he interpreted the phrase correctly he would (or should) have found that Mr Yu did present a real risk of dissipation, and therefore would (or should) have granted the injunction sought;

    (2) Even if the Judge did not misinterpret the phrase "real risk of dissipation" he erred in finding that Mr Yu did not present a real risk of dissipation on the basis of the

evidence before him. But for that error he would (or should) have granted the injunction sought.

13. Before turning to consider the submissions made by Mr Olliff-Cooper in support of those grounds, it is useful to consider the reasons underlying the requirement to show a real risk of dissipation.

14. The purpose of a freezing injunction is to ensure that a judgment in the applicant's favour will not go unsatisfied by reason of assets that would otherwise be available to satisfy it being dealt with in a manner that will make them unavailable by the time the judgment comes to be enforced. It is designed to protect against the frustration of the process of the court by depriving the claimant of the fruits of any judgment obtained in his favour. It is not intended as a safeguard against insolvency, nor as a means of providing security for a claim, however strong that claim may be and however large a sum of money may be involved. Nor is it just another standard means of securing enforcement of a judgment in favour of the applicant, like a charging order or third party debt order. It is a potent weapon in the armoury available for dealing with those individuals and companies who may seek to make themselves judgment-proof.

15. All these points emerge clearly from the seminal judgment of the Court of Appeal, delivered by Kerr LJ, in *Ninemia Maritime Corp v Trave Schiffahrstgesellschaft mbH & Co KG* ("*The Niedersachsen*") [1983] 1 WLR 1412. At p.1422, addressing the requirement to show a real risk of dissipation, Kerr LJ rejected the suggestion that the claimant needed to show "nefarious intent", in the sense that the defendant would deal with his assets with the object, and not just the effect, of putting them out of the claimant's reach. He said:

> "In our view the test is whether … the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied."

16. In view of the drastic interference with a person's right to do as they please with their own property that a freezing injunction entails, (quite apart from the reputational damage that it may cause), the courts must remain vigilant to ensure that such orders will only be granted in cases in which the evidence suffices to establish that there is a real risk of the judgment going unsatisfied by reason of what Gloster LJ in *Holyoake* v *Candy* [2017] EWCA Civ 92, [2018] Ch. 331 ("*Holyoake*") elegantly termed "unjustified dissipation," and where it is just and convenient to make the order.

17. It makes no difference in terms of the *risk* that must be established whether the freezing injunction is sought before or after judgment, though post-judgment injunctions may be easier in practice to obtain. The policy of the law is to enforce judgments, and for that reason it may be right that when a judgment creditor has satisfied the court there is a real risk of dissipation, it would require particularly strong grounds for refusing to grant him a freezing order on the basis of justice and convenience, as Teare J suggested in *Great Station Properties SA and another v UMS Holding Ltd and others* [2017] EWHC 3330 (Comm) at [63].

18. However, I respectfully disagree with the suggestion made by Leggatt J in *Distributori Automatici Italia v Holford General Trading* [1985] 1 WLR 1066 at 1073, and cited

with apparent approval by Teare J in that same paragraph, that it may be easier to infer a risk of dissipation in a post-judgment case. An adverse judgment may provide more of an incentive to the defendant to put his assets beyond the reach of the claimant than a mere claim, but that tells one nothing about whether the evidence establishes a real risk that he may do it.

19. In this context, there is an important distinction to be drawn between a defendant who can pay but refuses to pay his debts until he is forced to do so, and a defendant who is so determined not to pay that he would take active steps to frustrate the recovery of sums due to his creditors by transferring or concealing assets or by some other form of unjustified dissipation. In order to avoid the undesirable situation in which, as Gloster LJ put it in *Holyoake* at [58] "the nuclear remedy of a freezing order would .. become a commonplace threat", there must be cogent evidence from which it can at least be inferred that the defendant falls into the latter category. The distinction is one which the Judge had at the forefront of his mind when he refused to make the freezing order in the present case.

Did the Judge misunderstand the test?

20. Mr Olliff-Cooper candidly accepted that the question of what was meant by a "real risk of dissipation" was not expressly canvassed before the Judge. He said that it was only after judgment was delivered that it became apparent that the evidential threshold applied by the Judge was too high. His first submission was that a real risk of dissipation is one which is more than merely fanciful, and that sets what he described as "a relatively low threshold".

21. Mr Olliff-Cooper referred to three first instance judgments concerning freezing injunctions in which the judges had contrasted a real risk of dissipation with a fanciful risk. However none of these was particularly helpful. In two of those cases, *Charles Russell LLP v Rehman* [2010] EWHC 202 (Ch) and *FM Capital Partners Ltd v Marino* [2018] the observations (at [23] and [32] respectively) appear to be no more than throwaway remarks.

22. In the third case, *Dinglis Properties Ltd v Dinglis Management Ltd* [2016] 4 WLR 72 Mr David Halpern QC, sitting as a Deputy Judge of the High Court, was merely quoting at [12] what the parties to the litigation had agreed about the meaning of Peter Gibson LJ's observation in *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 that "[i]t is important that there should be solid evidence adduced to the court of *the likelihood of dissipation*" (emphasis supplied). That sentence in Peter Gibson LJ's judgment immediately followed a classic exposition of what must be established in order to obtain a freezing injunction, including "a real risk that judgment would go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by the court from disposing of them". Mr Halpern QC said this:

> "It was agreed between the parties that the "likelihood" of dissipation means the risk, not the probability, and that the risk must be real, rather than fanciful, but if it is not much above the level of fanciful, that will be relevant to the exercise of the court's discretion."

23. It is understandable that the parties in that case wished to clarify that the use of the word "likelihood" in the context of addressing what the "solid evidence" must show, should not be taken as an indication that the claimant had to show that it was more likely than not that the risk would materialise. However, that is not the way in which the expression "real risk of dissipation" has ever been interpreted. As Gleeson CJ pointed out in the leading Australian case of *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, the test of likelihood had been considered and rejected in England for reasons which are convincing. It was rejected expressly by Mustill J in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at 652, and at least by implication by the Court of Appeal in *The Niedersachsen*. Agreeing that this was not the right test, Gleeson CJ observed that:

> "it is not difficult to imagine situations in which justice and equity would require the granting of an injunction to prevent dissipation of assets pending the hearing of an action even though the risk of such dissipation may be assessed as being somewhat less probable than not."

24. The fact that the "real risk" test is lower than a test of likelihood is further demonstrated by the decision of the Court of Appeal in *Bestfort Developments LLP & Others v Ras Al Khaimah Investment Authority & Others* [2016] EWCA Civ 1099. The issue on appeal in that case was whether an applicant for an order for security for costs had to show that it was more likely than not that there would be serious obstacles to enforcement of a costs order in the foreign state in which the claimant resided, or whether it sufficed to show that there was a real risk that it would not be in a position to enforce a costs order against the claimant. It was held that the latter test was the correct one.

25. The leading judgment was given by Gloster LJ, with whom Briggs LJ and Black LJ agreed. Gloster LJ said at [77]:

> "In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively justified grounds relating to obstacles to or the burden of enforcement', there is a *real risk* that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden', but whether the evidence is sufficient in any particular case to satisfy the judge that there is a *real risk* of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master's approach that the appropriate test was one of likelihood, which involved demonstrating that it was 'more likely than not' (i.e. an over 50% likelihood) or 'likely on the balance of probabilities' that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility." [Emphasis in the original].

26. At [82], Gloster LJ accepted the submission by counsel for the defendants that an analogy could be drawn with the test applied by the court in the context of freezing injunctions. After quoting the passage in *The Niedersachsen* to which I have already referred, and referring to the requirement for "solid evidence" to support the contention that there is a real risk that the judgment will go unsatisfied, she said this:

> "The analogy with the freezing order jurisdiction is particularly apt, in my view, because it reflects the test which a claimant has to satisfy in order to obtain in order to obtain protection for satisfaction of any judgment which it might obtain against a defendant. An application by a defendant for an order for security for his costs is the converse side of the coin. There should, it seems to me, be an appropriate symmetry between the two tests that respectively entitle a claimant to a freezing order to satisfy any judgment, and a defendant (or appellant) to security for its costs. There are further similarities. On the making of a freezing order, the court makes an interim finding on the merits (the existence of a good arguable case) which is later tested at trial; on the issue of risk of dissipation, however, it makes a determination on an issue that is never tested at trial, namely, is there, on the whole of the evidence then before the court, a real risk of dissipation? As [counsel] submitted, that approach reflects the perceived justice of protecting the applicant against the risk of his being unable to enforce any judgment he may later obtain because of unjustified dissipation, when a trial on the risk of dissipation is not practicable or proportionate. It is directly comparable to the security for costs jurisdiction which protects against the risk of being unable to enforce any costs order they may later obtain. It follows that the tests should be similar."

27. Therefore the "real risk" that a costs order will go unsatisfied (by reason of obstacles to enforcement) means the same as the "real risk" that a judgment will go unsatisfied (by reason of dissipation of assets), and that expression is not to be equated with "likely" or "more likely than not". It sets a lower standard.

28. In *In re RBS Rights Issue Litigation* [2017] 1 WLR 4635 at [29], Hildyard J equated a "real risk" (in the security for costs context) with a non-fanciful risk. Both that case and *Bestfort* were followed by Butcher J in *PJSC Tatneft v Bogolynkov* [2019] Costs LR 977 at [20] and at [28], where the judge said that the risk of non-enforcement of the costs order in that case, though not high, was more than fanciful.

29. There is also a decision of the Supreme Court of Western Australia, *Commissioner of State Taxation (WA) v Mechold Pty Ltd and another* [1995] 30 ATR 69 ("*Mechold*") in which Parker J said that references in his judgment to "a risk" of dissipation of assets were to "a real and not fanciful risk," and were intended to reflect the various formulations of that element of the test in earlier Australian authorities including *Patterson*.

30. This brings me to the decision in *Holyoake*. The injunction in that case was a "notification injunction", a less intrusive variation on the standard freezing order, which

prohibited the defendant from disposing of his assets without first notifying the claimant's solicitors in writing of his intention to do so. Nugee J had said at [47] that the less intrusive nature of the injunction was relevant to the degree of risk of dissipation which needs to be shown before the court can be persuaded to intervene. That approach was firmly rejected by the Court of Appeal, which held that the threshold required in order to obtain a notification injunction was the same as that required to obtain a conventional freezing order, and that the evidence in that case did not support a finding of a real risk of dissipation.

31. At [34], Gloster LJ referred to the fact that there had been some debate as to what was the correct test to establish that there was a risk of dissipation such as to make it just and convenient to grant a conventional freezing injunction. She said:

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

32. Gloster LJ went on to explain why the same considerations should apply to notification injunctions. The first reason was the need for close regulation of the availability of injunctions which have the "nuclear effect" of prohibiting the affected party from dealing with his assets. One of the important safeguards for the defendant is a binary threshold as to the risk of dissipation.

33. The second reason was that the claimant's case suggested that there was a spectrum of the level of risk of dissipation which could be matched with a sufficiently diluted version of a conventional freezing order. As Gloster LJ pointed out at [41], that approach led to the danger of a proliferation of less intrusive variants, which would undermine the close regulation of potent injunctions of this kind. She said that the solution is to have a binary threshold, not a sliding scale, and for a risk of dissipation which does not satisfy that test to be inadequate to obtain a freezing order (of any kind). She added, "of course, the extent to which the applicant exceeds the threshold may be relevant to the ultimate question of justice and convenience". The third reason was the absence of any clear exposition of the alternative test and the difficulty in formulating it into any workable form.

34. It seems to me that Gloster LJ's formulation of the threshold test needs no further exposition. Whilst she envisaged that there may be a risk of dissipation that does not satisfy the test because it is too low (or too nebulous) to be described as "real", she avoided attaching any label to it such as "negligible" or "fanciful". In the context of a judgment which eschewed the concept of a sliding scale, and which was seeking to convey the clear message that injunctions of this nature should only be granted when the evidence shows that they are justified, that is understandable.

35. Whilst I find no difficulty in accepting the proposition that "real" in this context does mean something which is "more than fanciful", and lawyers are used to those concepts

being treated as two sides of the same coin in other contexts (such as applications for permission to appeal), there is an obvious danger that putting such a gloss on the well-established test will create an impression that the threshold is lower than it actually is. That is why I have considerable sympathy with the response of John Kimbell QC, who, when sitting as a Deputy High Court Judge in *Gulf International Bank BSC v Aldwood* [2020] 1 All ER (Comm) 334, was invited to accept that the meaning of "real risk" could helpfully be illustrated by contrasting it with a risk which was fanciful or insignificant (referring to the Australian case of *Mechold*, though he was not shown that authority). He said at [173]:

> "I am not persuaded that this is a helpful gloss in any event. I consider it is preferable to ask whether I am satisfied that I have been presented with "solid evidence" of a "real risk" of dissipation. It is, as the Court of Appeal put it in *Holyoake*, a "binary threshold" for the court to apply in each case."

36. Mr Olliff-Cooper submitted that he was wrong to take that approach, but I respectfully disagree. I share Mr Kimbell QC's reservations. The focus should be on whether, on the facts and circumstances of the particular case, the evidence adduced before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction. Plainly a risk which is theoretical, fanciful or insignificant will not meet that threshold; but the judge should be addressing the question whether he or she is satisfied that the alleged risk is real, and that does not require any comparative exercise to be carried out, or the attaching of some other label to a risk which falls short of the threshold. Judges and practitioners have been addressing the test for many years without the need for such a gloss. I would not wish it to be suggested that henceforth, in every case in which a freezing order is sought, in order to avoid being criticized for making an error of law, the Judge must specifically turn his or her mind to the question whether the risk of dissipation is real "rather than fanciful".

37. The question that we have to determine is whether the Judge fell into error in the way in which he approached the test. It is not suggested that he applied a "more likely than not" test. On the contrary, it is clear that he addressed the formulation of the test in *Holyoake* and the other key principles applicable to the risk of dissipation adumbrated in *Lakatamia Shipping Company Ltd v Morimoto* [2019] EWCA Civ 2203 at [34], and that he was well aware that the risk did not have to be established on the balance of probabilities.

38. Mr Olliff-Cooper did not take issue with the exposition of the principles in that paragraph of *Lakatamia Shipping*. He also accepted that the Judge acknowledged that the test was whether there was a "real risk" but submitted that it was clear from the way in which he applied it, that he did not understand that this meant more than fanciful, and therefore set the threshold too high. I cannot accept that criticism. The Judge was not satisfied that the evidence demonstrated that Mr Yu fell into a different category from any other debtor who does not want to pay his debts. He held that there was no more than a suspicion or a fear that there was a risk that Mr Yu would dissipate his assets. That is another way of saying that, on his assessment, the evidence established no more than a fanciful or insignificant risk. He plainly understood the test. I would therefore dismiss the appeal on Ground 1.

Did the Judge err in his application of the test?

39. Before the Judge, and again before us, Mr Olliff-Cooper relied on nine factors in support of the proposition that there was a real risk of dissipation. The Judge addressed each in turn, but reminded himself that he should consider them cumulatively. That was the correct approach. The question for us is whether, on the proper application of the test, the Judge was bound to find that it was satisfied, leading to a decision that was "plainly wrong"; or whether he reached a conclusion that was open to him on the evidence.

40. Mr Olliff-Cooper divided the factors into those which he said were indicative of "propensity" and those which indicated "opportunity". I consider "propensity" to be a misnomer. A propensity generally connotes a tendency to behave in a particular way, and whilst there was undoubtedly evidence that Mr Yu was disinclined to pay his gambling debts voluntarily, there was no evidence that Mr Yu had ever taken any steps to put his assets out of the reach of creditors or tried to do so in the past. What Mr Olliff-Cooper really meant by "propensity" was that Mr Yu had behaved in a way which demonstrated a temperament or character indicative of a willingness to put assets beyond the reach of his creditors.

41. The two final factors, namely, Mr Yu's use of offshore and corporate structures and the fact that he and the Herun Group are based in China, where it is said that judgments on gambling debts are not enforceable, fell within the "opportunity" category. Mr Olliff-Cooper explained that these factors were relied on to demonstrate that it would be open to Mr Yu to use the offshore and corporate structures with which he was familiar, to keep his assets out of the reach of his creditors, or that he could easily move his assets (particularly the cash in bank accounts) to China, in order to defeat a judgment.

42. I accept that the authorities demonstrate that the nature of the identified assets and the ease with which they can be moved, as well as the use of offshore or corporate structures, are factors that are relevant to consideration of the risk of dissipation; but the fact that Mr Yu has the wherewithal to move his assets out of reach of his creditors, and the ease with which he might be able to do so, are not matters which in and of themselves indicate that there is a real risk that he would do so. The factors which were directly relevant to how he might behave were those which Mr Olliff-Cooper termed the "propensity" factors.

43. Several of the factors identified under this heading, the lack of engagement with the proceedings, the lengthy period of lack of contact with the appellant, and the repeated and continuing acts of non-payment were, as the Judge accepted, examples of behaviour indicative of a risk of dissipation, but could also be the behaviour of someone who does not want to pay until he is made to pay (by the process of enforcement).

44. Mr Olliff-Cooper submitted that the evidence pointed in one direction, namely, that Mr Yu can pay but will not. I am not satisfied that is the only inference to be drawn, since there could be other explanations for the fact that after paying off a substantial amount of the debt in 2019 he then suddenly stopped (for example, it may have had something to do with the fact that another creditor had obtained a freezing order against him in Hong Kong in November 2019 for a very significant sum). However, even if that were right, it does not necessarily follow from the fact that someone is able but unwilling to pay voluntarily that they will take steps to frustrate the enforcement of a judgment in

favour of the creditor. Nevertheless, an unwillingness to pay an undisputed debt when you have the means to pay is a relevant factor, and the Judge treated it as such.

45. Mr Olliff-Cooper's answer to the question posed by the Judge, "how is this case different from any other debtor who does not want to pay his debt?" was that it was the degree of determination not to pay, evinced over a long period, which made this case one in which it was possible to infer that there was a real risk of unjustified dissipation. However, as the Judge pointed out at [34], Mr Yu had money in bank accounts in England and Hong Kong, he had used those accounts to make payments to the appellant in the past, and there was no evidence that he has tried to move any of his money in response to the summary judgment. Yet over four months elapsed between the service of the translation of the order for summary judgment and the application for the freezing order. He had ample opportunity to seek to frustrate the execution of the judgment by the appellant and yet he did not take it.

46. That was a legitimate matter for the Judge to take into account. Whilst an applicant does not have to prove that there has been previous dissipation or dishonesty in order to obtain a freezing order, if a person has not availed himself of the opportunity to remove the assets once he knows the creditor has obtained judgment against him, and it would be really easy for him to move them – as it would be with money in a bank account – it is much harder to draw the inference that there is a real risk that he would remove them unless prevented from doing so by an injunction.

47. The fact that freezing orders had been made against Mr Yu at the behest of other casino owners in England and Hong Kong tells one no more than that on evidence that was not before the Judge in this case, two other judges were satisfied of a risk of dissipation. Without knowing what that evidence was, that did not significantly advance the appellant's case, though the Judge did take the injunctions into account as factors pointing towards a risk. The Judge was plainly entitled to approach the evidence relating to proceedings in China with more caution, for the reasons he explained at [30].

48. That just left two matters, the dishonoured cheques and the evidence relating to Brocket Hall, a 540 acre estate in Hertfordshire on which there is a conference and golf centre. As to Brocket Hall, Mr Olliff-Cooper submitted that the evidence in the Kikkar Report was sufficient to give rise to the inference that Mr Yu was involved in the abuse of corporate structures. The appellant's case was that the evidence showed that the company which operated the business at Brocket Hall, Brocket Hall UK Ltd, which it was alleged Mr Yu beneficially owned, owed in the order of £6 million to its creditors (chiefly HMRC whose debt was around £1.5 million). When the company was threatened with compulsory liquidation, it was alleged that Mr Yu had instigated arrangements whereby the company was put into "pre-pack" administration and its business was then sold to another company within the same group, Brocket Hall Holdings, for £100,000. Although it was accepted that this was perfectly lawful behaviour at the time, Mr Olliff-Cooper relied on the practical effect that this had of leaving the creditors of the original company without any means of enforcing their debts.

49. However, when one examines the proposals for the administration it will be seen that the objective of the administration was to achieve a *better* result for the company's creditors than would be likely if the company were wound up, and that the administrators anticipated that there would be sufficient assets to enable a small

distribution to be made to unsecured creditors. In any event, the Judge was not satisfied on the evidence that he had seen that Mr Yu was the person who instigated the transfer, and even on the assumption that he was, it was a legitimate business transaction.

50. The Judge was entitled to take that view. Indeed he was generous to the appellant in making any assumption about Mr Yu's involvement. The Kikkar Report is full of caveats and is couched in vague and cautious terms. Whilst a BVI corporation named International Leisure Investment Ltd was the sole shareholder of Brocket Hall (UK) Ltd and the Administrators' Report stated that the purchaser was in the same group of companies as International Leisure, there was no better evidence than assertions in two newspaper reports that Mr Yu had any interest in, let alone control over the company which went into administration, and there was no evidence at all that he had anything to do with the pre-pack administration scheme nor with the company which bought out the business (other than the fact that it was associated with International Leisure).

51. The most the two newspaper reports claimed was that Mr Yu had purchased the leasehold of the Brocket Hall estate for £10 million in 2016. That aspect of the history appears to be supported by inquiries made by Kikkar in Jersey which revealed that the Jersey company which owns the lease to Brocket Hall was registered at the offices of the JTC Group, which "appeared to be a wealth management company", whose representative office in Hong Kong had "indicated" that Mr Yu held general client accounts through JTC in Jersey and Hong Kong.

52. An investment interest in the lease of real estate does not prove ownership of, let alone control over, the company which ran a business on the estate, and even if that inference could have been drawn, the most that the history demonstrated was that those behind the operating company were unwilling to put more of their money into it in order to stop it becoming insolvent, but they were possibly willing to spend something to rescue the business and the jobs of its employees.

53. In short, the evidence connecting Mr Yu with Brocket Hall was thin, and there was nothing at all to indicate that he had anything to do with the legitimate sale of the business to the associated company. The Judge was entitled to conclude that there was nothing in the evidence relating to Brocket Hall that supported the contention that Mr Yu was someone who was prepared to take steps that would put assets beyond the reach of creditors.

54. That just leaves the dishonoured cheques. As Mr Olliff-Cooper accepted, the fact that the cheques were dishonoured could have been the result of a cashflow problem, but he pointed out that if that were the case, Mr Yu did not give that explanation, and then pay or offer to pay. He submitted that the fact that Mr Yu paid nothing until the appellant instigated legal proceedings, coupled with the rest of his behaviour, gave rise to the impression that he was not paying because he did not want to. Mr Yu's behaviour in respect of the cheques, in particular, was at the very least unmeritorious conduct, if not outright dishonesty. If he was prepared to violate moral norms in one way, it made it more likely that he would be willing to do so in another way, e.g. by attempting to frustrate a judgment.

55. The Judge was prepared to draw the inference that when Mr Yu presented the cheques he knew or suspected that, or was reckless as to whether they would not be honoured. He rightly regarded this as a factor in favour of a risk of dissipation. However, and

unlike many cases in which freezing orders have been made, this was not a case in which the defendant pretended that he was prepared to pay a pre-existing debt, tendered cheques in purported satisfaction of the debt, and they were then dishonoured. The dishonoured cheques were drawn as security for the original loans, and there was both a settlement agreement and substantial partial repayment of the indebtedness after they were dishonoured.

56. The Judge was obliged to consider the specific facts and circumstances of this case, and look at the factors cumulatively, balancing them against any factors that pointed against the risk. Whereas presenting cheques in the knowledge or suspecting that they will be dishonoured, or not caring whether they will be dishonoured, may well be powerful evidence of a real risk of dissipation in many cases, I am not persuaded that the Judge was obliged to treat the dishonoured cheques as the key factor which made *this* case different from any other in which a debtor simply does not wish to pay until he has to. Nor am I persuaded that his failure to do so gave rise to a decision that no reasonable Judge could have reached on the evidence before him.

57. Mr Olliff-Cooper submitted that the Judge accepted that most of the factors identified by his client supported an inference of a risk of dissipation and that he only identified a handful against, most of which were essentially that there was no evidence of actual dissipation, which (a) is not unusual and (b) does not have to be shown. A proper analysis was that there was a risk of dissipation that was more than fanciful, and the Judge should have found that the "real risk" element of the test was satisfied. Since this was a post-judgment application, there were no strong countervailing reasons to deny the appellant the injunction it sought.

58. In this regard it seems to me that the manner in which the Judge expressed himself at [34] is capable of misinterpretation, because he appears to characterise the absence of evidence of fraud in Mr Yu's business dealings or evasion or fraudulent use of corporate structures, as factors weighing against the inference of a real risk of dissipation, whereas they are more properly to be characterised as factors which would have strengthened the appellant's case had they been present. The two factors which did weigh against the inference were the voluntary repayment of a large amount of the debt in 2019, and, for reasons which I have already explained, the failure by Mr Yu to avail himself of the opportunity to move his money in response to knowledge that judgment had been entered against him.

59. However, when one reads the judgment as a whole, and particularly the conclusion at [35] and [36], it is readily apparent that what the Judge was really saying was that on the evidence taken as a whole, the factors he had identified in favour of a risk of dissipation were insufficient to satisfy him that there was a real risk of dissipation in this case, and there were none of the other sorts of factors that one sometimes sees in other cases that would have carried this case across the threshold. That is why he describes the factors that he had identified in favour of a real risk as "not very convincing". In this case, the Judge took the view after carrying out a meticulous balancing exercise that the evidence relied on was not strong enough to establish that the risk was a real one. It was a view that he was entitled to reach and for that reason, the appeal cannot succeed on Ground 2.

60. It follows that this appeal should be dismissed on both grounds.

Lord Justice Birss:

61. I agree.

Lady Justice Nicola Davies:

62. I also agree.