In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION

2015: Nos. 21, 49 & 77 (Conjoined)

BETWEEN:-

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiffs

-and-

(1) PAR-LA-VILLE HOTEL AND RESIDENCES, LTD
(2) MICHAEL MACLEAN
(3) YASMIN MACLEAN
(4) SHANE MORA (as Trustee of the Skyline Trust)
(5) MATTHEW HOLLIS (as Trustee of the Skyline Trust)

Defendants

RULING

(In Chambers)

Date of hearing: 26th May 2015
Date of ruling: 18th June 2015

Mr Narinder Hargun and Ms Robin J Mayor, Conyers Dill & Pearman, for the Plaintiff

Mr Mark Daniels, Charter Chambers Ltd, for the First Defendant
Mr Eugene L Johnston, J2 Chambers, for the Second through Fifth Defendants

Introduction

1. The Plaintiff is a company registered in Delaware, USA ("**MIF**"). The First Defendant is a company registered in Bermuda ("**PLV**"). The Second and Third Defendants, who are husband and wife, are directors of PLV ("**the Directors**"). The Fourth and Fifth Defendants are trustees ("**the Trustees**") of a trust known as the Skyline Trust ("**the Trust**"). The Trust was established by a written instrument dated 19th October 2014. The settlor was the Second Defendant and the beneficiaries are the Directors and, after their deaths, their children and remoter issue.

2. This is a ruling on an application by the Directors and the Trustees to discharge as against them ex parte injunctions made by this Court against PLV and the Directors on 10th February 2015 and against the Trustees on 20th February 2015. The injunctions prohibited the Defendants from dealing with their assets up to the value of $15,449,858, with exceptions permitting them to spend reasonable sums on legal advice and representation in relation to these proceedings and to cover their reasonable costs of living and the ordinary costs of business. PLV was represented at the hearing of the application but did not apply to discharge the injunction against it and played no active role.

Facts

3. The background to the injunctions was a loan of US$ 18 million made by MIF to PLV in order to help fund a hotel development by MIF in Hamilton. The purpose of the loan was not to fund the project but to put PLV in funds to discharge certain debts and to enable it to secure the equity and senior lending that would fund the project ("**the Permanent Loan**").

4. The loan was made pursuant to a credit agreement ("**the Credit Agreement**") between MIF and PLV dated 9th July 2014. This provided that upon satisfaction of all the funding conditions contained in the Credit Agreement, the net proceeds of the loan, after deduction of interest, loan costs and various fees payable to MIF, would be disbursed by MIF to The Bank of New York Mellon ("**the Bank**") to hold as escrow agent in escrow pursuant to an escrow agreement ("**the Escrow Agreement**") between MIF, PLV, the Corporation of Hamilton ("**the Corporation**"), which was the guarantor of the loan, and the Bank. The amount of the net proceeds was US$ 15,449,858, ie the sum mentioned in the injunctions.

5. The Escrow Agreement was to provide that the escrowed funds would be disbursed by the Bank as directed by PLV so long as the conditions set forth in the Escrow Agreement were satisfied.

6. The maturity date for the loan was 30th December 2014. Failure to repay it in full by that date was an event of default, whereupon MIF could serve notice on PLV which would have the effect that the loan, including all interest and other payments due under it, would become immediately due and payable to MIF.

7. The Credit Agreement was governed by the law of the State of New York in the USA. It contained a jurisdiction clause which provided that the courts of the State of New York had exclusive jurisdiction over any action brought by PLV in relation to the Credit Agreement and non-exclusive jurisdiction in relation to any such action brought by MIF.

8. The Escrow Agreement was also dated 9th July 2014. Recitals to the Escrow Agreement recorded that MIF had deposited US$ 15,449,858 into escrow ("**the Escrow Property**"); that pursuant to a security agreement of even date PLV had granted MIF a lien and security interest over the escrowed funds; and that the purpose of the escrow was to (a) establish a controlled account for the escrowed funds; and (b) restrict the disbursement of the escrow until the satisfaction of certain conditions, specified in the Escrow Agreement, relating to the Permanent Loan.

9. Section 3 of the Escrow Agreement dealt with the distribution of the Escrow Property.

(1) Section 3.1 contained a mechanism for PLV to draw down from the Escrow Property in one or more tranches an initial aggregate sum of up to US$ 1.2 million to pay expenses associated with the Permanent Loan.

(2) Section 3.3 contained a mechanism for the payment of the balance of the Escrow Property into the "*Senior Escrow*" ("**the Senior Escrow Account**"):

"*In order to obtain a distribution of the Escrow Property into the Senior Escrow", the parties shall, subject to section (d) below, comply with the following:*

(a) PLV shall deliver to the Corporation (with copies to [MIF] for information purposes only): (i) a certification, signed by an officer of PLV, certifying that all conditions precedent have been satisfied for the funding of a loan of $225 million and an equity investment of $100 million or for such ***substantially similar*** *financing structure from the Permanent Lender in substance* ***reasonably acceptable*** *to the Corporation .... To PLV...; and (ii) copies of the Permanent Loan Funding Agreement, the Senior Escrow Agreement and all ancillary documents, duly executed by the parties thereto, and in form and substance reasonably acceptable to the Corporation; and*

(b) No sooner than three (3) Business Days after receipt by the Corporation (and receipt of copies for information purposes only by the [Plaintiff] of the items in subsection 3.3(a) above, the Corporation and PLV shall provide joint written notice to the [Bank] (i) stating that the documents delivered pursuant to subsection 3.3(a)(i) and (ii) above are approved by the Corporation (such approval not to be unreasonably withheld, delayed or conditioned), and (ii) authorizing disbursement to the Senior Escrow.

(c) [PLV's] obligation to provide [Plaintiff] with copies of the Permanent Loan Funding Agreement in accordance with subsection 3.3(a)(i) above will apply insofar as PLV is permitted to release same without being in breach of any confidentiality owed to the permanent Lender, provided that the [First Defendant] hereby undertakes to apply its best endeavors to have the [Plaintiff] included in a

permitted category in the Permanent Loan Funding Agreement as it relates to confidentiality or non-disclosure."

[Emphasis added.]

(3) Section 3.3 also provided that a minimum of US$ 500,000 was to remain in escrow until the loan was repaid in full.

(4) Section 3.4 provided that upon satisfaction of the above conditions, the Bank shall, within three business days of receiving notice in accordance with sections 3.3(a) and (b), transfer the balance of the Escrow Property, less US$ 500,000, to the Senior Escrow.

(5) Section 3.8 provided, inter alia:

"*the Senior Escrow" is an escrow established by PLV, the Permanent Lender, and [the Bank] (or another escrow agent reasonably acceptable to the Corporation) for the purpose of paying expenses associated with the Permanent Loan; and … "the Senior Escrow Agreement" is the agreement among PLV, the Permanent Lender and [the Bank] (or another escrow agent reasonably acceptable to the Corporation) governing the Senior Escrow*."

[Emphasis added.]

10. Section 4 of the Escrow Agreement provided that while the Escrow Property remained in Escrow, the Bank would permit withdrawals of the Escrow Property only as permitted in section 3 of the Escrow Agreement.

11. In summary:

(1) The Bank was to make an initial payment of up to US$ 1.2 million to PLV from the Escrow Amount for the purpose of paying expenses associated with the Permanent Loan. It was to pay the balance of the Escrow Amount into the Senior Escrow Account, to be used for the same purpose.

(2) As a condition of releasing the balance, the Bank was required to receive a joint written notice from PLV and the Corporation certifying *inter alia* that the Corporation had received and approved a copy of

the Permanent Loan Funding Agreement, ie an agreement for borrowing the Permanent Loan.

(3) The Permanent Loan was to be a loan of $225 million and an equity investment of $100 million, or a substantially similar financing structure from the Permanent Lender that was reasonably acceptable to the Corporation.

(4) The Senior Escrow Account was to be governed by an agreement made between PLV, the Permanent Lender, and either the Bank or an alternative escrow agent that was reasonably acceptable to the Corporation.

(5) PLV was to supply copies to MIF of the Permanent Loan Funding Agreement and the Senior Escrow Agreement. The duty to supply a copy of the Permanent Loan Funding Agreement was contingent on the terms of its duty of confidentiality to the Permanent Lender, but the duty to supply a copy of the Senior Escrow Agreement was unqualified.

12. Section 12 of the Escrow Agreement provided that the Escrow Agreement would be governed by the internal substantive laws (and not the choice of law rules) of the State of New York. It further provided that the parties to the Escrow Agreement (i) submitted to the personal jurisdiction of, and (ii) agreed that all proceedings relating to the Escrow Agreement should be brought in, courts located within the City and State of New York or elsewhere as the Bank might select.

13. On 20th October 2014 the Trustees entered into a Trade and Profit Share Agreement ("**The Trade and Profit Share Agreement**") with a company known as Argyle Limited ("**Argyle**") which appears from that Agreement to have an address in Gibraltar. The Directors and the Trustees submit that the Trade and Profit Share Agreement is the Permanent Loan Agreement under the Escrow Agreement.

14. Under the Trade and Profit Share Agreement the Trustees agreed to pay Argyle a non-refundable fee of US$ 12.5 million. In exchange, Argyle would for a period of one year from the date of the Agreement utilise a credit facility in the sum of US$ 125 million to buy and sell financial instruments for commission. Argyle would pay the first US$ 18 million commission earned to the Trustees, net of settlement fees and bank charges, and split any further net commission earned with 80 per cent going to the Trustees and Argyle retaining the remaining 20 per cent.

15. The Trade and Profit Share Agreement included confidentiality provisions as follows:

> "*18. It is essential for the success of this venture that, wherever possible, the names and activities of the Parties of this Agreement, the amount of each transaction, and specific details of each transaction be kept proprietary and confidential.*
>
> *19. The names, identities, bank coordinates and other identifying information of persons or entities that are a Party to this transaction, contained herein, or learned hereafter, shall be considered as Corporate Trade Secrets and shall not be disseminated or circumvented other than as provided for herein, or as allowed under applicable law. Any unauthorised circumvention or disclosure of this transaction, parties to, or other material fact of, shall subject the violator to legal prosecution.*"

16. On 20th October 2014 the Directors wrote a Letter of Acknowledgment and Agreement ("**the Letter of Acknowledgment and Agreement**") to themselves and the Trustees. The letter noted that the confidentiality and non-disclosure provisions of paragraphs 18 and 19 of the Trade and Profit Share Agreement applied to the letter. It confirmed and requested the written acknowledgment and agreement of the Directors and the Trustees to the following:

    (1) The appointment of the Trust (which had been established the previous day) as PLV's "*agent, representative and nominee*" for the purposes of entering into the Trade and Profit Share Agreement and receiving any payments due to PLV under the Agreement. Its

appointment was approved by a resolution of the Directors dated 20th October 2014.

(2) The appointment of the Directors as escrow agents to receive and hold on trust for PLV all or part of the Escrow Property.

(3) The Directors' agreement to release the monies they received to Argyle pursuant to the Trade and Profit Share Agreement.

17. The letter was signed by the Trustees and by the Directors as "*Escrow Agents*".

18. By two separate letters dated 24th October 2014 headed "*Notice of approval of disbursement from escrow account*", the Directors and the Corporation respectively wrote to the Bank pursuant to subsection 3.3(b) of the Escrow Agreement stating that PLV had delivered to the Corporation the documents referred to in subsection 3.3(a) of the Escrow Agreement and that the Corporation had received and approved them not less than three business days previously. The letters stated that accordingly the senders authorised and directed the Bank to pay the full balance of the Escrow Property into a Senior Escrow Account at Clarien Bank in the joint names of the Directors ("**the Joint Account**"). This was in fact their personal account. It is the Second Defendant's evidence, which I accept on this point, that (surprisingly) PLV did not have a bank account.

19. PLV had not delivered copies of the documents referred to in subsection 3.3(a) of the Escrow Agreement to MIF.

20. On 31st October 2014, the Bank transferred US$13,749,858 to the Joint Account ("**the Senior Escrow Amount**"). (Ie US$ 15,449,858 less (i) the US$ 1.2 million initial payment, which was made to PLV and is not the subject of any complaint; and (ii) the retention monies of US$ 500,000.)

21. The following monies were subsequently transferred out of the Joint Account:

(1) On 31st October 2014, US$ 499,999.99 to Rational Foreign Exchange Limited ("Rational") in London. The Directors say that this was Argyle's trading platform. If I understand the affidavit evidence of the Second Defendant correctly, the money was returned to the Joint Account because it was sent in the wrong currency.

(2) On 5th November 2014, US$ 11,500,000 to Argyle UAE Limited ("Argyle UAE"), an affiliate of Argyle, at its account at EFG Bank. This payment was made pursuant to the Trade and Profit Share Agreement.

(3) On 7th November 2014, US$ 500,000 to Rational. This payment was made pursuant to the Trade and Profit Share Agreement.

(4) On 4th December 2014, US$ 340,000 to the Cahow Trust. It is the Second Defendant's evidence that the payment was made to repay a loan from the Cahow Trust to PLV. I have no evidence that this was an expense associated with the Permanent Loan.

(5) On 31st December 2014, US$ 869,748 to PLV's attorneys (although not in this action) Wakefield Quin Limited ("Wakefield Quin"). It is the Second Defendant's evidence, which for purposes of this application I accept, that the monies were paid to the attorneys to hold on trust for PLV so that the Directors would no longer hold any monies belonging to PLV in the Joint Account.

22. To recap, PLV borrowed US$ 18 million from MIF. MIF paid the net proceeds of the loan, ie US$ 15,449,858 ("the Escrow Property") to the Bank. The Bank transferred US$13,749,858 to the Joint Account ("the Senior Escrow Amount"). The disbursements from the Joint Account included US$ 12 million paid pursuant to the Trade and Profit Share Agreement ("the Argyle Monies').

23. On 15th December 2014 MIF's United States attorneys, Shutts & Bowen LLP, wrote to the Second Defendant on behalf of PLV and to the

Corporation stating that for various reasons the loan was in default under the Credit Agreement and requiring the default to be cured within 15 days.

24. On 29th December 2014 Wakefield Quin replied on behalf of PLV that the loan was not in default under the Credit Agreement.

25. On 31st December 2014 Shutts & Bowen LLP wrote to the Second Defendant on behalf of PLV and to the Corporation stating that the loan was due and payable on 30th December 2014 and had not been paid, and that as a result PLV and the Corporation were in default. MIF demanded repayment of the entire outstanding balance of US$ 18 million plus interest.

26. As no such payment was forthcoming, MIF commenced these proceedings, and separate proceedings against the Corporation. I take judicial notice of the fact that on 27th May 2015 (ie after close of argument on the application before me) MIF obtained summary judgment by consent against the Corporation in the sum of US$ 18 million and summary judgment against PLV after a contested hearing in the sum of US$ 19,397,819 (ie US 18 million plus interest and expenses, less US$ 500,000). The summary judgment against PLV was based on its failure to repay the loan by 30th December 2014 as required by the Credit Agreement and not on any breach of the Escrow Agreement.

27. As to the whereabouts of the US$ 12 million paid to Argyle UAE and Rational ("the Argyle Monies"), the Second Defendant has this to say in his affidavit evidence.

> "*After the freezing orders were obtained, I understood that the trades being made pursuant to [the Trade and Profit Share Agreement] were stopped. The last I spoke to Robert McKellar of Argyle, he told me that he was attempting to send $18,000,000.00 back into this jurisdiction (and there was express mention of Germany), but was finding it exceedingly difficult to do so because of the obvious problems created in that respect by the various orders already made by this court. His indications were that various banks were erring on the side of caution and, therefore, refusing to be used as conduits to send any money back to Bermuda. In that telephone conversation he would not disclose the precise whereabouts of those monies.*

To my knowledge neither[the Trust] nor PLV, and surely not any of [the Directors or Trustees] have received any monies pursuant to … [the Trade and Profit Share Agreement]. Instead, I understand that Argyle was allowed to reinvest those monies …"

Principles re grant of injunction

28. The injunctions were made pursuant to (i) the Court's Mareva jurisdiction and (ii) its jurisdiction under Order 29, rule 2(1) of the Rules of the Supreme Court 1985 ("RSC") to make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, eg to which a proprietary claim is made. Both jurisdictions derive from the Supreme Court Act 1905, which provides that: "*an injunction may be granted in all cases in which it appears to the Court to be just or convenient that such order should be made.*"

29. A Mareva injunction is an interlocutory order granted either before judgment or in aid of execution of judgment which restrains the defendant from disposing of or dealing with his own assets. See Gee, Commercial Injunctions, Fifth Edition (2004) at 77. It is not a free standing remedy, but must be brought in aid of execution of an actual or prospective judgment in proceedings that have been or are about to be brought. See Fourie v Le Roux [2007] 1 WLR 320, HL, *per* Lord Bingham at para 3.

30. The applicant must show a good arguable case against the defendant. He must also show that there is a real risk that unless the injunction is granted judgment will go unsatisfied. See Locabil International Finance Limited v Manios and Transways Chartering SA [1988] Bda LR 26, CA, *per* da Costa J at 10. He must do this by adducing "*solid evidence*". See Locabil at 13. Thus the test is not whether the defendant will deal with his assets with the object or effect of putting them out of the plaintiff's reach. On the other hand, a Mareva injunction will not be granted merely for the purpose of providing a creditor with security for a claim. See "*The Niedersachsen*" [1983] WLR 1412, CA, per Kerr LJ at 1422 A – H, cited with approval in Locabil at 11 – 12. Thus, *per* da Costa in Locabil at 12, it is not necessary

for the plaintiff to show nefarious intent on the part of the defendant, though in circumstances where it can be shown the court will be more disposed to grant Mareva relief than in other cases.

31. It was formerly the case that the court would only grant a Mareva injunction if the defendant had assets in the jurisdiction. See Locabil at 10. But that is no longer the case. See Derby & Co Ltd v Weldon (Nos 3 and 4) [1990] 1 Ch 65, EWCA, *per* Lord Donaldson MR at 79 G – H and Butler-Sloss LJ at 96E. In Utilicorp United Inc and Another v Renfro and Others [1994] Bda LR 79, SC at 26, Ground J (as he then was) acknowledged that in appropriate cases the Court had jurisdiction to make worldwide Mareva injunctions.

32. The Court may in an appropriate case make a Mareva injunction against a co-defendant against whom the Plaintiff has no cause of action where such injunction is ancillary and incidental to the claim against the "main" defendant. Eg where there is evidence that assets vested in the co-defendant may in fact belong to the main defendant. See TSB Bank International v Chabra [1992] 1 WLR 231 Ch D at 241H – 242E.

33. A Mareva injunction is a personal remedy. However, where there is a proprietary claim to the assets, the courts will use the strongest interlocutory powers to protect and preserve the trust fund. This is because, if the trust fund disappears by the time that the action comes to trial, equity will have been invoked in vain. See Mediterrania Raffineria Siciliana Petroli Spa v Mabanaft GmbH, unreported, 1st December 1978, EWCA, *per* Templeman LJ (as he then was), cited by Robert Goff J (as he then was) in A v C [1981] QB 956, QB, at 959 B – C.

34. The onus is on the applicant to justify the making of an injunction, whether Mareva or proprietary. Where, as in the instant case, there is no return date, the onus remains on the applicant – certainly at the first application to vary or discharge the injunction. Otherwise the onus of proof to justify the making of the injunction would in effect be reversed.

MIF's case

35. The most recent iteration of MIF's case against the Directors and the Trustees is set out in a Statement of Claim dated 31st March 2015 ("the Statement of Claim").

36. By way of background, PLV, acting through the Directors, procured the payment by the Bank of the Senior Escrow Amount into the Joint Account by making an allegedly fraudulent misrepresentation. Namely, that PLV had delivered to the Corporation the documents referred to in subsection 3.3(a) of the Escrow Agreement, and that the Corporation had received and approved them.

37. MIF contends that PLV had not in fact done so as the Trade and Profit Share Agreement was not a substantially similar financing structure to the funding of a loan of $225 million and an equity investment of $100 million, and that it was therefore not a Permanent Loan Funding Agreement within the meaning of the Escrow Agreement. In the circumstances, it is submitted, it is immaterial that the Trade and Profit Share Agreement was acceptable to the Corporation, and further that it was not *reasonably* acceptable to them.

38. Alternatively, it is alleged that the Senior Escrow Amount was paid pursuant to a mistaken belief by PLV that the requirements of subsection 3.3(a) had been met.

39. MIF alleges that the Directors:

    (1) Received the Senior Escrow Amount into the Joint Account as fiduciaries of PLV and/or MIF;

    (2) Knew or ought to have known that the Senior Escrow Amount had been transferred to the Joint Account pursuant to a fraudulent misrepresentation or alternatively a mistake;

    (3) Knew or ought to have known that the Senior Escrow Amount belonged to PLV and/or MIF;

(4) Therefore held the Senior Escrow Amount on a constructive or resulting trust for PLV and/or MIF and knew or ought to have known that they held the monies in this capacity; and

(5) Have by reason of (i) using the Joint Account to hold the Senior Escrow Amount, and (ii) making the various disbursements from the Senior Escrow Amount, provided dishonest assistance to a breach of trust and committed the torts of unlawful conspiracy and/or conversion.

40. The relief sought by MIF in the Statement of Claim against the Directors includes *inter alia* a declaration that any rights or interests which they have in the Senior Escrow Amount, whether personally or as beneficiaries of the Trust, are held by them on constructive (or presumably resulting) trust for MIF; an order that they account to MIF for their use of the Senior Escrow Amount; and damages for dishonest assistance and unlawful conspiracy and/or conversion.

41. MIF alleges that the Directors:

(1) Knew or ought to have known that PLV had no right to invest the Argyle Monies, and that those monies had been wrongfully procured and were subject to a constructive (or, presumably, resulting) trust.

(2) Have in the premises provided dishonest assistance to a breach of trust.

42. The relief sought by MIF in the Statement of Claim against the Directors includes *inter alia* a declaration that any rights or interests which they have in the Senior Escrow Amount are held by them on trust for MIF; an order that they account to MIF for their use of the Senior Escrow Amount; and damages for dishonest assistance.

Good arguable case

43. MIF asserts that it is beneficially entitled to the Senior Escrow Amount. It relies upon that entitlement as the gateway to its claims against the Directors and the Trustees. To establish its beneficial entitlement, MIF will have to show that the Escrow Property was not at the free disposal of PLV but subject to the terms of the Escrow Agreement; that in concluding the Escrow Agreement MIF intended to enter into an arrangement with PLV which, viewed objectively, gave rise to a trust; that PLV dealt with the monies in breach of the Escrow Agreement; and that consequently the beneficial interest in the Escrow Property or property into which it can be traced or followed remains vested in MIF. This is what is known as a Quistclose trust following the decision of the House of Lords in Barclays Bank v Quistclose Investments Limited [1970] AC 567. See Bellis v Challinor [2015] EWCA Civ 59 at paras 53 – 65 for a summary of the relevant principles.

44. I am satisfied from the detailed provisions of the Escrow Agreement that there is a good arguable case that the Escrow Property was transferred to PLV subject to a Quistclose trust. I am also satisfied that there is a good arguable case that: (i) the provision of a credit facility under the Trade and Profit Share Agreement to buy and sell financial instruments for commission was not a substantially similar financing structure within the meaning of section 3.3(a) of the Escrow Agreement; and (ii) that although the Trade and Profit Share Agreement was acceptable to the Corporation it was not *reasonably* acceptable to them.

45. On the limited material before me I am not in a position to say whether the Trade and Profit Share Agreement was a genuine arms' length commercial transaction between two independent parties. Assuming, for the sake of argument, that it was, and that there are no grounds on which to set aside the contract, then MIF has most likely lost any beneficial interest which it would otherwise have had in the Argyle Monies. But there is a good arguable case that in those circumstances the Trustees' contractual rights to payment of a share of any commission earned under the Trade and Profit Share

Agreement are a chose in action which is held on trust for MIF, and that accordingly the Trustees would hold any such payment on trust for MIF.

46. In addition to asserting a claim to the Senior Escrow Amount, MIF claims damages against the Directors and the Trustees. Much of the argument focused on whether there was a good arguable case that those Defendants had acted dishonestly and hence whether the allegation of dishonest assistance had been made out. The leading case – and one binding on this Court – is the decision of the Privy Council in Royal Brunei Airlines v Tan [1995] 2 AC 378. Lord Nicholls, giving the judgment of the Board, stated at 389 C that in this context dishonesty: "*means simply not acting as an honest person would in the circumstances. This is an objective standard*". However it is implicit in his judgment at 391 A that the transgressor must appreciate that he is acting contrary to ordinary standards of honest behaviour. This requirement was stated in express terms by a majority of the House of Lords in Twinsectra Ltd v Yardley [2002] 2 AC 164. Eg *per* Lord Steyn at para 7, Lord Hoffmann at para 20, and Lord Hutton at para 36.

47. As to what might amount to dishonest conduct, Lord Nicholls stated at 389 F – G:

> "*In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.*"

48. It is important to appreciate that whether conduct is dishonest will depend upon the particular facts of the case. Conduct that might be dishonest in one set of circumstances might not be dishonest in another. Eg there is no inflexible rule that deliberately failing to make enquiries will inevitably be dishonest. Indeed in Twinsectra Ltd v Yardley a majority of the House of

Lords found that on the facts of that case a solicitor who had not done so had not been dishonest.

49. However I am satisfied that on the particular facts of this case there is a good arguable case that the Directors and the Trustees have acted dishonestly.

50. As to the Directors, there is a good arguable case that they dishonestly tried to conceal the intended use of the Senior Escrow Amount from MIF. Specifically, that they:

(1) Acted as escrow agents and caused the Senior Escrow Amount to be paid into the Joint Account when there is a good arguable case that their appointment as escrow agents and the use of the Joint Account as the Senior Escrow Account was in breach of section 3.8 of the Escrow Agreement. Ie that these measures defeated and were intended by the Directors to defeat the contractual purpose of requiring the Bank or another escrow agent reasonably acceptable to the Corporation to be a party to the Senior Escrow Agreement, namely to provide independent oversight of the release of the Senior Escrow Amount. In the premises there is a good arguable case that the Corporation's acceptance of their appointment as escrow agents was not reasonable.

(2) Represented to the Bank that PLV had delivered to the Corporation the documents referred to in subsection 3.3(a) of the Escrow Agreement, and that the Corporation had received and approved them, when there is a good arguable case that the documents delivered by PLV and approved by the Corporation did not comply with the requirements of subsection 3.3(a).

(3) Made no real attempt to have MIF included in a permitted category in the Trade and Profit Share Agreement as it relates to confidentiality or non-disclosure. On the material before the Court it is a reasonable inference that MIF was not included in any such category because the First through Third Defendants didn't want MIF to find out about the Trade and Profit Share Agreement.

(4) Caused PLV to fail to supply a copy of the Senior Escrow Agreement to MIF. There is a good arguable case that PLV was required to do so by section 3.3(a) of the Escrow Agreement irrespective of the terms of the Trade and Profit Share Agreement.

(5) Caused PLV to enter into the Trade and Profit Share Agreement in the name of the Trustees as its agent rather than in its own name. This arrangement served no discernible commercial purpose, and no purpose that any of the Defendants have thus far seen fit to share with the Court. In the circumstances there is a good arguable case that its true purpose was to "muddy the waters" and make it more difficult for MIF to trace the Senior Escrow Amount.

51. The Directors invited the Court to infer that, as at all material times PLV was apparently represented by local attorneys in relation to these transactions, they were acting on legal advice as its Directors and therefore cannot have been acting dishonestly. However I decline to speculate on the content of any such legal advice when I have not seen it, or their attorneys' instructions, or any evidence of the circumstances in which any such advice was given. The advice is of course subject to legal professional privilege.

52. Moreover, there is a good arguable case that the mere fact that an attorney advises that a transaction is legally permissible does not necessarily mean that it is not objectively dishonest or that the party seeking the advice would not have appreciated that it is dishonest.

53. As to the Trustees, there is no evidence before me that they have exercised any independent thought about the Trade and Profit Share Agreement; made any enquiries about the provenance of the monies; or indeed acted throughout as anything other than ciphers for PLV. In the circumstances there is a good arguable case that they have acted dishonestly.

54. I am satisfied that, with respect to both its proprietary and its personal claims, MIF has a good arguable case based on solid evidence against the Directors and the Trustees. This is notwithstanding their vigorous

submissions to the contrary. When the injunctions were obtained there appeared to be a good arguable case that the Directors had misappropriated the loan monies for their personal use. However in light of the court ordered disclosure subsequently provided by the various Defendants it appears more probable that at all material times they acted for the benefit of PLV rather than their personal benefit or the benefit of the Directors.

55. At this stage I am of course making no final determination as to the merits of MIF's case and have not had the benefit of a detailed explanation of their actions from the various Defendants. There are at least two sides to every story and the facts may assume a different complexion at trial.

Further considerations

56. The injunctions are drafted in broad terms, albeit with broad exceptions. However they were obtained on the express basis that they were targeted at the Senior Escrow Amount and not at the Defendants' assets generally. MIF did not resile from that position on the instant application.

57. As noted above, the evidence before the Court is indicative that at all material times the Directors and the Trustees acted in relation to the Senior Escrow Amount as agents of PLV. They have no personal claim to a beneficial interest in the Senior Escrow Amount, which would therefore be unavailable to satisfy MIF's claims to personal remedies against them.

58. The bases on which injunctions in relation to the Senior Escrow Amount can in principle be maintained against the Directors and the Trustees are therefore:

(1) *In aid of MIF's proprietary claim to the Senior Escrow Amount*.

(a) As to the Argyle Monies, the Trustees are contractually entitled to be paid a share of any commission earned by Argyle under the Trade and Profit Share Agreement. Under the Letter of

Acknowledgment and Agreement they would receive any such payment as agents for PLV. PLV acts through the agency of the Directors, who would therefore have authority to give instructions to the Trustees as to the disposition of the payment. As noted above, I am satisfied that MIF has a good arguable case that PLV, through its agents the Directors and the Trustees, would hold any such payment on trust for MIF.

(b) The Court has very little information or documentation about the loan which is said to have justified the payment of monies to the Cahow Trust. In the circumstances there is a good arguable case that MIF's beneficial interest, if any, in those monies has not been extinguished by the payment and that PLV, through the agency of the Directors, retains a power of disposition over them.

(c) The monies paid to Wakefield Quin, insofar as they have not been spent, are held on trust for PLV, albeit subject to the proprietary claim of MIF, and consequently the Directors have authority to give instructions as to their disposition.

(d) In the premises MIF is in principle justified in seeking an injunction against each of the Directors and the Trustees restraining them from dealing with the Senior Escrow Amount, which for ease of reference I shall interpret as including the Trustees' contractual right to payment of a share of any commission earned under the Trade and Profit Share Agreement.

(2) *In aid of MIF's personal claim against PLV.*

(a) If MIF's proprietary claim to the Senior Escrow Amount fails, any commission paid to the Trustees under the Trade and Profit Share Agreement would belong to PLV and would therefore be

available to satisfy the monies that it owes to PLV under the judgment debt.

(b) As noted above, on the limited material before the Court there is a good arguable case that the monies paid to the Cahow Trust are still owned beneficially by MIF.

(c) As the Directors and the Trustees have notice of the injunction against PLV, and as on the evidence before the Court they have at all material times acted in relation to the Senior Escrow Amount as agents for PLV, they are by reason of that injunction restrained from dealing with the Senior Escrow Amount in any event. Were it not for MIF's proprietary claim to the Senior Escrow Amount, therefore, separate injunctions against them would be unnecessary. (Although if the Directors and Trustees were not subject to separate injunctions, and for the avoidance of doubt, it would be prudent to name them individually in the injunction against PLV as third parties who were prohibited from dealing with PLV's assets.)

59. However the Directors and the Trustees submit that there are nonetheless two reasons why they should not be injuncted from dealing with the Senior Escrow Amount. First, they submit that the Senior Escrow Amount (apart from the monies held by Wakefield Quin) are not within their possession or control. As noted above, I am unable to draw that conclusion in relation to the monies paid to the Cahow Trust. As to the Argyle Monies, the Trustees have a contractual right to payment of a share of any commission earned under the Trade and Profit Share Agreement; they will receive any such payment as agents for PLV; and MIF asserts a proprietary claim to any such payment the Trustees may receive. In those circumstances I see no difficulty about making an injunction, whether Mareva or proprietary, restraining the Directors and the Trustees from dealing with future receipts. Were the position otherwise there is a real risk that injunctive relief would prove ineffective as (had they not been caught by the injunction against PLV) the

Directors and the Trustees could disburse the monies before the requisite injunctions were obtained.

60. Secondly, the Directors and the Trustees submit that that there is no real risk that, unless the injunctions remain in force, judgment against PLV will go unsatisfied as PLV's debt to MIF has been guaranteed by the Corporation. (It is not suggested that, without taking into account either the guarantee or the Senior Escrow Amount PLV would have sufficient resources to satisfy judgment.)

61. There are three difficulties with this submission. First, it is in principle no answer to MIF's proprietary claim to the Senior Escrow Amount, subject always to the fact that MIF cannot effect double recovery of the amount that it claims. Second, the guarantee is capped at US$ 18 million, whereas the amount of the judgment entered against PLV is US$ 19,397,819. Interest on that figure continues to accrue. Third, there is no inflexible rule that a creditor will be refused Mareva relief in an action against a principal debtor merely because he has the option to pursue a separate action against a guarantor. On the contrary, if he chooses to pursue the principal debtor he can reasonably expect that the Court will assist him.

62. In the premises, I am satisfied that there is a real risk that, unless the Directors and the Trustees are restrained from dealing with the Senior Escrow Amount:

    (1) Any judgment that MIF obtains against them in relation to its proprietary claim to the Senior Escrow Amount will go unsatisfied.

    (2) The judgment that MIF has obtained against PLV will go unsatisfied.

63. Specifically, I am satisfied that unless restrained from doing so there is a real risk that these Defendants would, insofar as they have access to it, seek to place the Senior Escrow Amount beyond the reach of MIF. In so finding, I take into account the history of their activities in relation to the Senior Escrow Amount, as to which I have found that there is a good arguable case

that they have acted dishonestly, and the fact that they only complied with the Court ordered disclosure in relation to the ex parte injunctions once MIF had issued committal proceedings against them.

64. I appreciate, of course, that the Directors and the Trustees are already prohibited by the injunction against PLV from dealing with or disposing of the Senior Escrow Amount on its behalf. However, as it is in the actions against the Directors and the Trustees that MIF has brought a proprietary claim to the Senior Escrow Amount, it is in my judgment appropriate to make separate injunctions against them.

Disposition

65. The application to discharge the ex parte injunctions is therefore dismissed. However the injunctions should be varied to make it clear that they apply only to the Senior Escrow Amount. I shall leave the parties to agree the appropriate wording.

66. I shall hear the parties as to costs.

DATED this 18th day of June, 2015

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Hellman J