

GOING NUCLEAR: SHOWING A REAL RISK OF DISSIPATION WHEN SEEKING A FREEZING ORDER

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Freezing orders have been described as the “nuclear weapon” of the law and can prove invaluable to an applicant who is concerned that their opponent might take steps to frustrate any future judgment against them by dissipating assets. However, given the draconian nature of the remedy, in order to obtain a freezing order an applicant will need to demonstrate a real risk that such dissipation will occur. This is not always easy, but in *Lakatamia Shipping Company Limited v Morimoto*¹ the English Court of Appeal helpfully confirmed that where the court accepts there is a good arguable case the defendant engaged in wrongdoing against the applicant which is relevant to the issue of dissipation, that will point powerfully in favour of a risk of dissipation.

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BACKGROUND

In 2014 the Commercial Court found Mr Nobu Su, a former billionaire and one of Asia’s richest businessmen, liable to Lakatamia in relation to the breach of a freight forwarding agreement. Judgment was entered against him in the sum of nearly US\$38m, followed by a further judgment for nearly US\$10m. Mr Su failed to discharge these judgment debts voluntarily and in 2019 Lakatamia brought committal proceedings against him, arguing that, in breach of a freezing order that was made against him in 2011, he had dissipated €27m arising out of the sale of two properties in Monaco.

During the committal proceedings Mr Su gave evidence that his mother, Madam Su, had received the proceeds from the sale of the Monaco properties and was aware of the freezing order. In light of these revelations Lakatamia obtained an urgent *ex parte* worldwide freezing order against Madam Su, and subsequently issued proceedings against her, contending that she had conspired to assist Mr Su to breach the 2011 freezing order by dissipating the proceeds of the sale and violating Lakatamia’s rights under the judgment debt, for which Madam Su was liable in tort. However, the Commercial Court refused to continue the freezing order against Madam Su, finding that while there was sufficient evidence of a serious issue to be tried in respect of the alleged tort claim, Lakatamia had not shown a real risk of dissipation on the evidence.

Lakatamia appealed.

COURT OF APPEAL DECISION

In order to make a freezing order, the court must be satisfied that (1) the applicant has a good arguable case that there is a real risk of the judgment not being honoured by reason of the defendant disposing of its assets unless he is restrained by the court from disposing of them; and (2) it would be just and convenient in all the circumstances to grant the freezing order.² Although there has been some confusion in the authorities, the Court of Appeal emphasised that the test for “good arguable case” is not particularly onerous, and that an applicant does not need to establish the risk of dissipation on the balance of probabilities.

In this case the applicant contended that since the court had accepted there was a good arguable case that Madam Su had engaged in wrongdoing against Lakatamia, this in itself pointed powerfully to a real risk of dissipation. The Court of Appeal agreed. While it considered it would go too far to suggest that there should be some automatic rule, the correct approach in law was:

- Where the court accepts that there is a good arguable case that a respondent is engaged in wrongdoing against the applicant, and this is relevant to the issue of dissipation, this will point powerfully in favour of a risk of dissipation; and
- In these circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation. That said, each case will depend upon its own particular facts and evidence.

In this case the Court held that there was clear scope for an inference of dissipation. The wrongdoing alleged against Madam Su did not merely comprise dishonest conduct but was wrongdoing which went to the very heart of the question of the risk of dissipation. While the claims against Madam Su concerned the dissipation of her son’s funds, where the court had found that there was a good arguable case that she had assisted in such dissipation, common sense would suggest that there was a strong inference that there was a risk of her doing exactly the same in relation to her own assets. Indeed, the fact that the wrongdoing in this case involved a finding that there was a good arguable case that Madam Su participated in an actual breach of an existing freezing injunction powerfully reinforced the inference that she would breach another.

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CONCLUSION

Although the Court of Appeal emphasised the importance of considering each case on its own facts, and while this decision is somewhat unusual given that it was accepted that there was a good arguable case that Madam Su had assisted in the breach of a freezing order, it will nevertheless be welcomed by applicants. As well as confirming that the standard of proof required to obtain a freezing order is not as onerous as having to show a real risk of dissipation on the balance of proof, the decision makes clear that where a claim is founded on wrongdoing which goes to the issue of dissipation, that will point powerfully in favour of a risk of dissipation.

However, applicants should also observe the comments made by the Court concerning appeals from decisions regarding the risk of dissipation. In general, the Court of Appeal will be reluctant to interfere with such findings, particularly where, as here, they are made by experienced Commercial Court judges.

[1] [2019] EWCA Civ 2203

[2] *Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272

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