Neutral Citation Number: [2022] EWCA Civ 500

Case No: CA-2021-000591 (formerly A4/2021/0847)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION, COMMERCIAL COURT
MRS JUSTICE MOULDER
CL-2021-0000051

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2022

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE PHILLIPS
and
LADY JUSTICE CARR

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Between:

THE CLAIMANTS LISTED IN SCHEDULE 1 TO THE CLAIM FORM	**Claimants/ Appellants**
- and -	
(1) NICHOLAS SPENCE **(2) DEREK KEWLEY** **(3) ANDREW CRUMP** **(4) EMERGING PROPERTY INVESTMENTS LIMITED (IN LIQUIDATION)** **(5) EMERGING PROPERTY LIMITED** **(6) GREEN PARK HOLDINGS (ILFRACOMBE) LIMITED** **(8) GP ILFRACOMBE MANAGEMENT COMPANY LIMITED** **(9) GREEN PARKS (WESTWARD HO!) MANAGEMENT COMPANY LIMITED** **(10) ALPHA PROPERTIES (BRADFORD) LIMITED** **(11) A1 PROPERTIES (SUNDERLAND) LIMITED**	**Defendants/ Respondents**

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Daniel Saoul QC and Matthieu Gregoire
(instructed by **Trowers & Hamlins LLP**) for the **Claimants/Appellants**
Matthew Collings QC (instructed by **Simon Burn Solicitors**) for the **Defendants/Respondents**

Hearing date: 3 February 2022

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 28 April 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Lord Justice Phillips:

1. On 4 February 2021, on an application made without notice by the appellants, Calver J made a worldwide freezing order ("the WFO") freezing the assets of each of the respondents (and those of the third defendant) up to the value of £50 million. Eight of the appellants[1] gave an undertaking in damages and further undertook to provide fortification by subscribing to an insurance policy with a limit of £500,000.

2. On 12 March 2021, the return date specified in the WFO, the respondents applied informally for an increase in the amount of fortification. The basis of the application was evidence from the first defendant ("Mr Spence") that there was a substantial risk that the existence of the WFO might cause Coutts & Co. ("Coutts") to make demand for repayment of a loan of US$9,292,719 ("the US Dollar Loan") and to realise security held for that loan, being a sterling deposit Mr Spence had lodged with Coutts in the amount of £8,888,900 ("the Sterling Deposit"). Mr Spence asserted that, in such an eventuality, he would suffer a loss if the exchange rate was less than US$1.55 to £1, as he was not intending to redeem the loan until sterling had appreciated to that level.

3. Cockerill J continued the WFO until after trial and gave directions for the determination of the application for additional fortification, which came before Moulder J ("the Judge") on 29 March 2021.

4. In a reserved judgment dated 16 April 2021, the Judge accepted Mr Spence's evidence and found he had established a good arguable case that he would suffer loss if the US Dollar Loan were to be called in. The Judge estimated that the likely amount of the loss was £800,000 and ordered an increase in fortification in that amount.

5. The appellants appeal that order with permission granted by Lewison LJ. In outline, they contend that the Judge's decision was wrong because (i) there was insufficient evidence of Mr Spence's plan to convert the Sterling Deposits into dollars when the rate reached $1.55; (ii) the evidence disclosed no real risk that Coutts would call in the US Dollar Loan; (iii) there was no evidence to justify an estimate of loss of £800,000; and (iv) overall, the prospect of loss being suffered above and beyond the £500,000 existing fortification was remote.

The background

The underlying claim in the proceedings

6. In broad outline, the claimants assert that they were the victims of a conspiracy to defraud. They claim that they were induced by fraudulent misrepresentations made by the respondents (among others) to invest in property investment schemes promising a fixed income of between 8% and 12% for 10 years. Between 2012 and 2019 the 448 claimants paid over sums ranging between £3,000 and £170,000. They estimate that sums totalling £45,166,210 have been lost and the Serious Fraud Office estimates that the defendants have profited by the fraud to the extent of £20 million. The respondents deny the claim.

[1] The eight being members of a steering committee taking the lead on behalf of the 448 claimants/appellants.

Mr Spence's relevant financial affairs

7. Mr Spence's evidence was that he relocated to Florida in 2016-2017, a period during which sterling depreciated significantly against the US dollar following the Brexit referendum (sterling declining rapidly from $1.45 to $1.25, at one point in 2020 falling to $1.15). He was concerned about converting his sterling-denominated assets to dollars in order to buy property in the United States at the then prevailing rate as he expected sterling to recover to the "more normal" pre-Brexit rate of $1.55 (the rate having been as high as $1.70 in the period leading up to the referendum). Mr Spence therefore structured his affairs as follows:

    i) On 16 February 2018 Mr Spence agreed with Coutts a multi-currency overdraft and fixed advance facility ("the Facility"), with a Master Limit of £3 million. The overdraft bore interest at 1.5% over the US discount rate (for dollar advances) and the fixed advance carried interest at 1.5% over LIBOR, each subject to variation.

    ii) On 1 July 2019 the Master Limit of the Facility was increased to £8 million and the terms revised, although the interest margins remained the same.

    iii) Mr Spence gave security for the Facility by way of a charge over cash he had kept on deposit with Coutts since 2017, amounting to £8,888,900 as at 1 February 2021. The Sterling Deposit did not earn interest, at least from the date it was charged to Coutts, no doubt reflected in a lower rate of interest accruing on the Facility because it was fully secured by cash.

    iv) Mr Spence drew down US$3.25 million and $300,000 in 2018 and a total of US$5 million in 2019. As at the date of his evidence the total of the US Dollar Loans, including accrued interest, was US$9,272,719. It is important to note that interest was accruing on that debt (and continues to accrue, subject to rate changes) at approximately £120,000 per annum.

    v) Mr Spence used the US Dollar Loans to purchase assets in the United States, listed in his schedule of assets (disclosed as a term requirement of the WFO) as having a total value of US$10,709.78. Those assets included four properties.

8. Mr Spence explained the purpose of the above structure in paragraph 7 of his first witness statement of 11 March 2021 as follows:

> "The point of the arrangement is that, in return for paying interest, I would obtain the dollars I needed, while being able to wait until sterling strengthened again before converting by sterling to dollars. I always planned to (and still do plan) to wait until sterling reaches $1.55 before converting my monies and unwinding the loan."

9. At paragraph 10 of that statement Mr Spence put forward his case that he might suffer loss of £2.3m if Coutts called in the US Dollar Loans and the Sterling Deposits were converted to discharge them:

> "…If the loan is called in, I have no control over when that conversion takes place and I will have to accept whatever spot rate applies. As I

> explained above, my intention from the outset and indeed the very purpose of the exchange rate hedging facility was to apply the UK GBP cash deposit to discharge the USD loans when the GBP had reached the rate of $155. On the basis that it might fall again to the low level of $1.15 in the interim – or, of course, to a lower level – the potential loss to me should Coutts exercise their rights to terminate the USD loan at an adverse time and demand its repayment is in round figures £2.3m, which is the amount for which I contend the Claimants should be required to increase their fortification on the cross-undertaking."

10. In his second witness statement dated 19 March 2021 Mr Spence set out his perception of the risk that the WFO would cause Coutts to call in the US Dollar Loans as follows:

> "9. I believe that there is a substantial risk that this could occur as a result of the freezing injunction…I have seen that, in accordance with clause 8.2.9 of the loan offer..., where "*any litigation or other proceedings are threatened or commenced against you which might adversely affect your ability to meet the obligations under this Agreement or which might adversely affect our or your reputation"* this could entitle Coutts to demand repayment of the loans they have made to me and apply the sterling cash deposit in settlement of them, at the spot rate. Also, under clause 8.1.2 of the loan agreement, repayment maybe demanded [including] where *"we have reasonable grounds to suspect fraudulent activity"* or *"we have reasonable grounds to believe that you may have difficulty in meeting your commitments".* Given that a freezing injunction has been ordered, Coutts might well seek to rely on these grounds (whether or not I would agree with them).
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> 10. I have not had any correspondence or communication with Coutts about the issue and I am not aware of anything which indicates that they have considered the point. However it can only be a matter of time before they do."

11. Whilst the Facility agreement did indeed contain the provisions to which Mr Spence referred, it should be noted that the terms of the Facility, as increased and amended in 2019, also provided (at clause 1.6.1) that Coutts was entitled to demand repayment of any Facility at any time and for any reason.

Relevant events following the WFO

12. Mr Spence was served with the WFO on 18 February 2021, the terms of which required him to give disclosure of his assets by 25 February 2021. On that date Mr Spence's then solicitors (Darbys) provided some disclosure, but informed the appellants' solicitors that information identifying Mr Spence's bank accounts at a number of unnamed banks was being withheld. The justification was that one of the banks held £8,888,900 as security for US dollar loans and that, if notified of the WFO, that bank was "more likely" to consider that an event of default had occurred. Darbys further stated that if the Facility was terminated, Mr Spence would suffer a loss of £800,000. No justification has ever been provided for the refusal to identify Mr Spence's other bank accounts.

13. On 1 March 2021 Darbys wrote providing the name of Mr Spence's UK bankers (including Coutts), but still did not provide account numbers. The letter confirmed that the loan facility which gave rise to Mr Spence's concern was with Coutts but did not provide any loan documentation, indicating that Mr Spence had an annual review with Coutts the following day "*at which he intends to obtain from the bank the details of the exchange rate facility*".

14. The appellants gave Mr Spence 48 hours' notice of their intention to notify Mr Spence's bankers of the WFO. Accordingly on 4 March 2021, nothing further having been heard from Mr Spence following his annual review, Coutts was notified of the WFO. On that date Mr Spence provided details of his UK bank accounts, but did not do so in relation to his US accounts.

15. On 9 March 2021 Darbys asserted that Mr Spence was at risk of losing £2.5m as it was highly likely that Coutts would view the granting of the WFO as an event of default forcing the conversion of the Sterling Deposit into dollars. The loss was calculated as the difference between Mr Spence's desired exchange rate of $1.55 and the low point of $1.15 which had been reached in 2020.

16. Shortly before the hearing before Cockerill J on 12 March 2021 Mr Spence provided the appellants with copies of unsigned loan offer documentation in relation to the multi-currency Facility, an investment report evidencing the Sterling Deposit and the charge over that deposit.

The legal principles applicable to fortification

17. There was no dispute as to the principles to be applied when deciding whether to order fortification of an undertaking in damages (or an increase in fortification), nor that the Judge correctly identified those principles.

18. As the Judge noted, the relevant principles were set out in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, [2015] 1 WLR 2309. Tomlinson LJ (with whom the other members of the court agreed) stated:

> "[52] …since the Claimant has obtained a Freezing Order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the Order, it should equally be protected…
>
> [53] It is completely contrary to principle to require proof on the balance of probabilities on such an application and so to do would encourage wasteful satellite litigation. In my judgment Briggs J was correct in *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) to summarise the principles as he did at para 25:
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> > "Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant for fortification (here the defendants) by reason of the making of an interim order. They require the court to

> ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction."
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> The three requirements are of course inextricably linked. The principles could equally be summarised….as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.
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> [54] As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered…At the stage of considering whether fortification of the undertaking is required, the proposition could be restated as it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered…"

19. The above requirements were summarised by Popplewell J in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14] as follows:

    i) First, that the court can make an intelligent estimate which is informed and realistic, although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant by reason of the freezing order.

    ii) Secondly, that the applicant has shown a sufficient level of risk of loss to require fortification, that is to say, has shown a good arguable case to that effect.

    iii) Thirdly, that the making of the interim order is or was a cause without which the relevant loss would not be, or would not have been, suffered.

20. The appellants emphasised that an application for fortification could not be based on mere assertion or supposition but required an evidential foundation, referring to numerous authorities in support of that proposition, including *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 at [97]. However, that is not in my judgment a separate requirement, but merely an obvious aspect of the need for the applicant to demonstrate a good arguable case, it being impossible to demonstrate such a case without an evidential foundation.

21. The appellants further stressed that it was necessary for the applicant for fortification to demonstrate that the losses would result from the grant of the injunction rather than from the underlying proceedings, referring to the decision of Briggs J in *Harley Street Capital Limited v Tchigirinski* [2005] EWHC 2471 (Ch) and to the recognition in *Energy Venture* that it may be difficult to disentangle any damage which may arise from the mere existence of the litigation from that which may be caused by the making of the order. Again, in my judgment, that proposition, whilst no doubt important for the

court to bear in mind, is no more than an aspect of the causation element of the applicable requirements referred to above.

The Judgment

22. In considering whether Mr Spence had shown a good arguable case that he would suffer loss as a result of the WFO, the Judge first addressed the risk that Coutts would call in the Facility. The Judge recognised at [18] that Coutts had not taken that step since being notified of the WFO on 4 March (some 6 weeks by the date the judgment was handed down), but also noted (i) that it remained open to Coutts to terminate the Facility at any time and demand repayment without giving advance warning to Mr Spence [19]; (ii) that it was arguable that an event of Default under the Facility had occurred [20]; and (iii) that it was not therefore significant that Coutts had not given any indication that they would call in the Facility [21]. At [22] the Judge expressed her conclusion on the point as follows:

> "…. In my view the risk that Coutts might decide to call in the facility remains. Although one might incline to the view that Coutts would call in the facility immediately should they be concerned about a Worldwide Freezing Order equally Coutts may be considering its position or keeping the matter under review. Whilst I doubt that Coutts would wait to consider the position until the regular annual review of the facility, equally there is no evidence to suggest that Coutts has waived its right to demand repayment."

23. The Judge then considered the appellants' argument that Mr Spence had failed to show that the loss would likely be caused by the WFO, rather than by the underlying litigation (which itself involved allegations that Mr Spence had been fraudulent in his business dealings). The Judge rejected that contention, stating at [28] as follows:

> "It seems to me reasonable to infer that a bank would be concerned that not only is there litigation in the sense of proceedings being brought against [Mr Spence] but that a court has now held that there is a good arguable case and a risk of dissipation of assets such as to warrant the grant of a freezing injunction, bearing in mind [clauses of the Facility agreement], dealing with proceedings which might affect [Mr Spence's] or Coutts' reputation or lead the bank to believe that the obligations will not be met."

24. At [29] the Judge also rejected the contention that it would make no commercial sense for Coutts to call in the US Dollar Loans because it was fully secured and receiving interest, stating:

> "…I accept the submission for [Mr Spence] that a bank's decision to lend and to continue lending is based not only on the amount of any security which it holds but also other considerations which inform its willingness to lend to the particular borrower, as the reference to litigation adversely affecting the borrower's reputation in the Events of Default would tend to illustrate and confirm."

25. Turning to the question of Mr Spence's plan to convert the Sterling Deposits and repay the US Dollar Loans only when sterling had reached $1.55, the Judge stated her reasons for accepting that he had presented an arguable case as follows:

> "34. Mr Spence's case is dependent on his evidence that he intended to keep the facility outstanding until rates recovered to a level of $1.55. Although there is an absence of any evidence to support his assertion that he intended to keep the facility outstanding until rates recovered to a level of $1.55, I accept the argument that if the facility is called in as a result of the Freezing Order, he will be obliged to convert sterling to dollars at the then prevailing rate and that may well be lower than the rate he would otherwise have chosen to convert sterling into dollars.
>
> 35. Accordingly, in my view this amounts to a good arguable case that he will suffer loss if the facility is called in although the court then has to consider whether the First Defendant has provided an intelligent estimate of loss."

26. As for the estimate of loss, the Judge accepted Mr Spence's approach of basing the calculation on the difference between the possible rate prevailing at the date on which the Facility might be called in and $1.55. At [40] the Judge recognised that the court needed to make an informed and realistic estimate of the likely loss, which was not the same exercise as an assessment of damages.

27. At [41] the Judge noted that the then current exchange rate was around $1.38, recognising that events of the previous year concerning COVID-19 might account for the drop to the lowest rate of $1.15 in 2020. The Judge rejected Mr Spence's contention that the estimate of loss should be based on the risk of sterling falling again to $1.15 or lower, stating as follows:

> "43. I have referred above to the lack of evidence concerning Mr Spence's intention to wait until the dollar-sterling exchange rate recovered to $1.55. Even if I take this evidence at face value the court has been given no evidence as to how long such a recovery could take, if indeed that rate will be reached in the coming years at all, and I note the Claimants' submission that for so long as the facility is outstanding a significant amount of interest is payable which reduces the amount of any loss.
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> 44. Weighing the matters referred to above, I am not persuaded that the estimate of loss is as high as Mr Spence asserts. Whilst I accept that currencies fluctuate and are unpredictable, I am not persuaded that the estimate should be on the basis of the very low level reached in March 2020 and any loss will be reduced by the fact that Mr Spence would no longer be paying interest."

28. The Judge concluded at [45] that, for the above reasons, she was satisfied that Mr Spence had shown a good arguable case that he would suffer loss in consequence of the making of the WFO, estimating the likely amount of the loss to be £800,000. At [46] she further held that, as the existing security of £500,000 would be required to cover

the losses of the other respondents to the WFO and by third parties, the amount ordered should be additional to that current fortification.

Whether Mr Spence demonstrated an arguable case that he would suffer loss

Analysis of the nature and effect of Mr Spence's financial arrangements

29. The argument below, and the Judge's reasoning, focused on the risk that the Sterling Deposit might forcibly be applied against the US Dollar Loans at a lower exchange rate than Mr Spence would have chosen and the possibility that sterling might thereafter appreciate against the dollar. In other words, the Judge assessed whether there was a case that the early forced realisation of that asset would cause Mr Spence a future loss because its value in dollars might thereafter rise. In my judgment, that approach was too narrow, failing to take into account the nature and effect of Mr Spence's overall financial arrangements and planning, of which the Sterling Deposit was only one part.

30. Mr Spence had acquired and retained substantial assets valued in US dollars, potentially exposing him to a currency risk if the US dollar depreciated against sterling (Mr Spence expressing it as a risk that sterling would appreciate to $1.55 against the dollar when he had purchased at a lower rate). The arrangements he put in place with Coutts were designed to remove that risk by maintaining a sterling fund which would match the US dollar assets (by standing as security for the US Dollar Loan used to purchase them) rather than using those funds to pay for the assets outright. In other words, the arrangement was a physical hedge against the depreciation of the US dollar (and was expressly described as "*an exchange rate hedging facility*" by Mr Spence in paragraph 10 of his first witness statement (see [9] above)). The annual interest of £120,000 was the price Mr Spence was paying to Coutts to maintain that hedge.

31. The purpose and effect of the arrangement was, therefore, to ensure that sterling-dollar exchange rate movements did not cause Mr Spence any net loss. If sterling appreciated (and the dollar correspondingly depreciated), the increased value of the Sterling Deposit would match the diminution in value of Mr Spence's US assets, and vice versa.

32. It follows that:

    i) The realisation of the Sterling Deposit would not in itself cause Mr Spence any net loss, no matter the rate at which the sterling was converted to dollars. Any movement in the exchange rate between the purchase of the US dollar assets and the realisation of the Sterling Deposit would be netted-off by the arrangements in place, as was the intention.

    ii) Any movement in the dollar-sterling exchange rate after the realisation of the Sterling Deposit would give rise to a notional profit or loss in sterling terms for Mr Spence in that his US dollar assets would be worth more or less in sterling as a result, but no more so than any holder of any asset will continually incur such notional profits or losses in terms of other currencies as they fluctuate. The notional profit or loss would only crystallise (or have a real financial effect) if the assets were to be converted into sterling or otherwise valued in terms of sterling (such as standing as security for a future sterling loan).

iii) What Mr Spence would actually lose, if the Sterling Deposit were to be realised, would be the hedge that he had in place against the depreciation of the dollar.

33. When a party loses the benefit of a hedge or other financial protection (such as an insurance policy) which can readily be reconstituted or replaced before the risk against which protection was required has eventuated, the loss suffered must be limited to the cost of putting in place an alternative arrangement (giving credit for any costs saved), and not the prospective loss which would be suffered if the risk materialises without protection in place. For example, the loss resulting from the failure to take out a valid building insurance policy (before any fire) would be the cost of taking out an alternative policy, not the full cost of re-building the house on the hypothesis that it might burn down in future. In the case of a hedge against currency movements, the loss would be the cost of a replacement hedge, not the full amount of the loss which might (in a worst-case scenario) be incurred if the hedge is not replaced. In my judgment this is not simply an application of the requirement to mitigate future losses, but the proper analysis and assessment of the present damage which is incurred by the loss of the relevant protection.

34. In the present case, there would seem to be numerous ways Mr Spence could replace the currency protection he has from the hedging arrangement should Coutts hereafter realise the Sterling Deposit. He could simply replicate the physical hedge, most obviously by re-mortgaging his US properties and converting the proceeds to sterling (if necessary, depositing them as security once more). Alternatively (and perhaps more efficiently), he could enter forward currency trades and/or purchase one or more derivative products, such as options or swaps, which would provide him with the same protection. Mr Spence's loss in so doing would be limited to the amount by which the cost of those replacement arrangements exceeded £120,000 per annum (if indeed it did).

35. Mr Spence did not, however, adduce any evidence as to the availability or cost of replacement options, simply asking the court to assess his loss in the full amount that he would incur in the worst-case scenario (from his point of view) that sterling reaches $1.55 within a reasonable time after the Sterling Deposit has been converted at a much lower rate.

36. The Court raised the above concerns with the parties in advance of the hearing of this appeal and asked that they be in a position to address them. The appellants, perhaps not surprisingly, adopted the above analysis as supporting its fourth ground of appeal. Mr Collings QC, on behalf of Mr Spence, argued that Mr Spence could not reasonably be expected to put replacement arrangements into place given the potential complexity of the transactions in question and could not be expected to produce evidence of the availability and cost of such arrangements in advance of the need to enter them.

37. In my judgment Mr Spence, through his UK and/or US bankers or otherwise, could reasonably have been expected to obtain evidence of the availability and cost of (i) refinance for his US assets so as to replicate the physical hedge; and/or (ii) options or swaps which would have protected him against the appreciation of sterling to $1.55 in respect of a notional sum equivalent to the Sterling Deposit. Further, I consider that adducing evidence that such replacement options were not reasonably available was a pre-requisite of inviting the Judge to embark on the assessment of highly speculative future losses based on currency movements over indeterminate periods of time.

38. For the above reasons I conclude that, overall, Mr Spence failed to adduce evidence demonstrating a good arguable case that he would suffer loss as a result of the WFO and the Judge was wrong, as a matter of principle, to find that he had.

39. I shall nevertheless proceed to consider the appellants' challenges to the Judge's findings in relation to the basis on which the application was advanced by Mr Spence.

Was there sufficient evidence of Mr Spence's plan?

40. The appellants contend that the Judge, having recognised that there was no documentary evidence of Mr Spence's plan to retain the Sterling Deposit until sterling reached $1.55, was wrong to assess his loss on the basis of his bare assertions to that effect. They contended that there was no evidential foundation for the claim in this regard, just as there was no foundation (a) in *Pugachev* for the claim that a freezing order would prevent business transactions generally without evidence of a continuing pattern of business activity and (b) in *Phoenix* for the claim that the freezing order had caused the loss of sales of property without documents evidencing when the purchasers withdrew and for what reason. They further contended that the Judge was in any event wrong to accept Mr Spence's account of his plans at face value given (i) that it was commercially absurd to suggest that Mr Spence would wait indefinitely (paying £120,000 per annum) for sterling to rise to an arbitrary level; and (ii) that Mr Spence was accused of serious fraud in the proceedings and had failed, without any excuse, to comply with the WFO, including orders for the disclosure of his assets.

41. Whilst I agree that the arrangements Mr Spence had made with Coutts seem questionable from a commercial point of view, there is no doubt that they were put in place and, further, that they only make sense if Mr Spence was anticipating a steep rise in sterling in the short to medium term. In those circumstances I consider that the Judge was entitled to accept Mr Spence's evidence as to the exchange rate at which he planned to unwind the arrangement as the basis of the assessment of loss. In fact, however, it appears from paragraph [34] of the Judgment that the Judge may have discounted Mr Spence's asserted rate to some extent in her calculation to reflect that there was no other evidence to support it.

42. I would not, therefore, uphold ground 1 of the appeal.

Was there a sufficient risk that Coutts would make demand?

43. The Judge was right to observe that Coutts was entitled to make demand at any time and without giving warning to Mr Spence, but that, of course, was the case regardless of the WFO. The question was whether it was arguable that the WFO (as distinct from any other factor, including the allegations in these proceedings more generally) would cause Coutts to make such demand.

44. The starting point of the analysis, in my judgment, should have been that Coutts was (at prevailing exchange rates) substantially over-secured, by cash, for the US Dollar Loans, including interest accruing, security which would not be affected by claims against Mr Spence or the WFO. At [28] the Judge suggested that the WFO might lead Coutts to believe that Mr Spence's obligations would not be met, but it is difficult to see what obligations she had in mind given that interest was rolling-up on the US Dollar Loans and, in any event, Coutts held cash it could set off against interest it required to

be paid as it accrued. Coutts therefore had (and still has) no financial or transaction-specific reason to terminate the arrangement, which had been in place for some years.

45. The remaining risk the Judge identified at [28] was that Coutts would decide to make demand because of "reputational" concerns arising from the imposition of a WFO. That risk was inherently difficult to assess (and to disentangle from reputational concerns arising from the allegations in the underlying proceedings), particularly bearing in mind that the case against Mr Spence, no doubt a valued customer given the size of his transactions, was entirely unproven.

46. However, the clearest indication of the extent of the risk was that Coutts had been on notice of the WFO for several weeks and yet had not made demand nor, according to Mr Spence, had they raised any concerns about it with him. The natural inference was that Coutts (having had ample time to consider the position and to raise any concerns with Mr Spence) was not sufficiently concerned by the WFO to terminate its arrangements with Mr Spence as at the date the Judge gave judgment, and it is difficult to see why that position would have changed thereafter as a result of the WFO. Whilst it is important not to view the Judge's decision with hindsight, it may be noted that, one year later, Coutts has still not demanded repayment of the US Dollar Loans.

47. It follows, in my judgment, that there was insufficient evidence to justify the Judge's finding that there was a real (as opposed to fanciful) risk that Coutts would call in the US Dollar Loans because of the grant of the WFO. I would uphold ground 2 of the appeal.

Was there an intelligent estimate of loss?

48. The Judge identified a number of factors that had to be taken into account in estimating Mr Spence's loss on the basis advanced by him and accepted by the Judge (although not accepted by me, for the reasons explained above): (i) the exchange rate at which the Sterling Deposit would be converted into dollars, whenever that might eventually take place; (ii) the exchange rate at which Mr Spence would have unwound the arrangement (allowing for any discount from $1.55 applied by the Judge) and (iii) the interest which Mr Spence would incur on the US Dollar Loans in the (possibly lengthy) period before sterling rose to $1.55 or such other discounted rate chosen by the Judge.

49. Taking those factors into account, the Judge estimated the likely loss to be £800,000, but did not explain her reasoning for reaching that figure. In particular, she did not disclose the values she ascribed to each of the elements referred to above for the purpose of her calculation.

50. I do not find it surprising that the Judge felt unable to state the values she ascribed to the various factors. Estimating exchange rate movements and their timing is notoriously difficult and, by definition, entirely speculative. It is as likely that sterling would fall against the dollar over any given period as it is that it would rise, and estimating a date at which it would reach $1.55 (or some other unidentified level) is next to impossible. In those circumstances, the Judge must have engaged in the very broadest exercise of weighing the relevant factors in her mind (the term she used at [44]) to arrive at an unexplained number. I would regard that as intelligent guesswork rather than intelligent estimation.

51. In my judgment Mr Spence's alleged likely losses were inherently speculative and incapable of intelligent estimation. I would add that the difficulty in the process demonstrates further why the appropriate measure of loss would have been the cost of replacing the hedge rather than the losses arising on the worst-case scenario in the absence of that hedge. I would, therefore, uphold ground 3 of the appeal.

Overall conclusion

52. For the several reasons identified above, and their cumulative effect, I do not consider that Mr Spence advanced a good arguable case that he would suffer loss as a result of the grant of the WFO.

53. I recognise that, as emphasised in *Lakatamia Shipping Co Ltd v Nobu Su* [2012] EWCA Civ 1195 at [27], commercial judges have an instinct as to what is well arguable in the context of freezing injunctions and that this Court should respect that instinct and not interfere in such findings unless it is plain that the judge is wrong. I also accept Mr Collings' submission that the Judge considered the correct principles and took into account the relevant evidence. However, Mr Spence's claim was for entirely speculative losses in what was in any event an unlikely scenario, one which he could in any event protect himself against simply by replacing the arrangement he feared he might lose. With respect to the Judge, I consider that she was plainly wrong to view Mr Spence as having a good arguable claim for fortification on the basis of such losses. I would, therefore, uphold ground 4 of the appeal.

Conclusion

54. I would allow the appeal and set aside the Judge's order that the appellants provide further fortification for the undertaking in damages.

Carr LJ:

55. I agree.

Underhill LJ:

56. I also agree.