



Neutral Citation Number: [2020] EWHC 1475 (Ch)

Case No: BL-2020-000856

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Date: Tuesday, 2nd June 2020

Before:

MR. JUSTICE ZACAROLI

Between:

LENDY LIMITED	<u>Applicant /</u>
(IN ADMINISTRATION)	<u>Intended Claimant</u>
- and -	
(1) LIAM BROOKE	
(2) TIM GORDON	
(3) LP ALHAMBRA LIMITED	<u>Respondents /</u>
(4) RFP HOLDINGS LIMITED	<u>Intended Defendants</u>

MR. TONY BESWETHERICK and MR. PATRICK DUNN-WALSH (instructed by
Pinsent Masons LLP) appeared for the **Applicant**.

APPROVED JUDGMENT

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR JUSTICE ZACAROLI:

1. I have concluded that this is an appropriate case to make the freezing order and proprietary injunction that are sought by the claimants.
2. So far as the freezing order is concerned, which is sought against the first and second defendants, the first question is whether there is a good arguable case on the merits. I am satisfied that this threshold has been reached on the basis of the evidence contained in Mr. Wilson's affidavit, as elaborated upon by a number of documents which I have been taken to by Mr. Beswetherick from the exhibit to his statement. That evidence demonstrates a good arguable case as to the misappropriation of funds in excess of £6.5 million by the first two defendants, by making payments for no proper purpose, purportedly justified by false invoices and at least two service level agreements created after the event. There is also a good arguable case, it seems to me, that these payments were made to offshore companies with whom the directors were connected.
3. Mr. Beswetherick rightly draws my attention to the possible defence arising from the fact that the first and/or second defendants were at various times the sole shareholder or shareholders in the company or sole shareholders in the immediate parent company of the company at the relevant times.
4. The company itself was not insolvent at the time of these payments. It is said, therefore, that there is a possible defence that it was possible for the directors, in their capacity as ultimate shareholders, to have ratified any breach of duty on the basis of the principle in *Re Duomatic*. I am satisfied, however, that there is at least a good arguable case that the *Duomatic* principle does not apply where the purpose of the misappropriation was to commit an unlawful act which would have been beyond the capacity of the company, such as defrauding the Revenue. For that purpose, see, for example, *Auden McKenzie (Pharma Division) Limited v. Patel* [2019] EWHC 257 (Comm). The case was overturned on appeal -- see [2019] EWCA Civ 2291, but not on this issue. Here, the payments were accounted for as legitimate expenses for tax purposes -- at least, the evidence suggests that was the case -- thus reducing the amount of corporation tax paid by the companies.

5. The *Auden McKenzie* decision does, potentially, create a further obstacle as to the quantum of the underlying claim, namely, at least in respect of the claim against the directors for equitable compensation and possibly for an account, that no loss was suffered to the extent that the funds could lawfully have been transferred, and would otherwise have been transferred, in any event. In the Court of Appeal, that was stated to be a sufficiently arguable point to avoid summary judgment being given. Conversely, I accept Mr. Beswetherick's submission that the opposite remains reasonably arguable, i.e. it is also arguable that this would not give rise to a defence.
6. I should point out that so far as there is a proprietary claim to recover the traceable proceeds of the property, which I will come on to in a moment, the potential defence would not have any application to that aspect of the claim.
7. The second hurdle to overcome on an application such as this is to show that there is a real risk of dissipation of assets. While recognising that it is not sufficient to contend that the underlying claim involves dishonesty, here, in my judgment, the nature of the dishonest conduct alleged is such as to give rise to a risk of dissipation. First of all, the alleged dishonest conduct involves deception, via sham invoices and payments to offshore companies. Secondly, this is compounded, if the allegations are made out, by the defendants lying about the lack of connection between them and the offshore companies. Thirdly, the use of offshore companies itself, particularly where that relationship is one which the directors have sought to conceal, can itself be an indicator of a risk of dissipation, and is so on the facts of this case.
8. As to delay -- and this application is brought a substantial period of time after the administrators were first appointed in respect of the company -- on the basis of the principles set out in *Madoff Securities International Limited v Raven*, [2011] EWHC 3102, paragraph 156, I am satisfied that the delay in this case is not such as should deny the claimants relief on their application. This is the kind of application which has necessarily taken a deal of time to prepare.
9. There is clear evidence of assets within this jurisdiction, namely, the real properties I will come on to describe in a moment, alleged to have been

acquired with the proceeds of the misappropriated funds, at least in relation to one of the defendants, and the value of the property here would be insufficient to satisfy the whole of the claim. There is also at least some evidence -- notably, the use of offshore companies, offshore trusts and offshore accounts - - of assets abroad. That, in my judgment, is sufficient to justify the worldwide aspect of the freezing order.

10. Overall, I am satisfied that it would be just and convenient to make the order in this case.
11. Turning to the proprietary injunction, which is sought against the first, third and fourth defendants, the first hurdle is: is there a serious issue to be tried in respect of the real properties in England over which this injunction is sought? There is sufficient material, in my judgment, to establish an arguable link between the misappropriated funds and the acquisition of the property. In the case of Branskesmere House, the evidence suggests at least a prima facie case that £770,000 or thereabouts was channelled from the misappropriated funds to Mr. Brooke via a loan to Argo Private Finance Limited, one of the companies involved in the offshore structure. So far as Ryefields Park is concerned, there is prima facie evidence that £1.2 million was received by the fourth defendant in order to purchase the property, via Conduit -- another company involved in the offshore structure. Finally, so far as the third property is concerned, 10 Alhambra Road, this was acquired by the third defendant with £240,000 transferred to it by the company, but which was initially provided to the company by Mr. Brooke. Despite requests for an explanation of the source of those funds, Mr. Brooke has so far not provided any. There is evidence of a sum of a similar amount being transferred into Mr. Brooke's bank account, most of which came from Argo shortly prior to the acquisition. In the face of silence from Mr Brooke, this indicates at least an arguable case that the property was purchased with the proceeds of the misappropriated funds.
12. In those circumstances, I am satisfied that there is a prima facie case to establish the necessary link between the misappropriated funds and the properties to justify a proprietary injunction. As a matter of law, the company

has a proprietary interest in funds misappropriated by a director on the basis that the director is treated as having committed a breach of trust.

13. The balance of convenience, in my judgment, lies in favour of granting an injunction in this case. As the claimant accepts, there is a risk of damage to the defendants, particularly in relation to one of the properties which is on the market. However, that is outweighed by the potential proprietary interests of the company and mitigated by the fact that any sale could nevertheless go ahead with the proceeds of sale being preserved instead.
14. For those reasons, I am prepared to make the order both in the freezing order form and the proprietary injunction form; and I will discuss the terms of the order with Mr. Beswetherick.
