Neutral Citation Number: [2017] EWHC 1030 (Comm)

IN THE HIGH COURT OF JUSTICE **Claim CL-2017-0001666**

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

ICICI BANK UK PLC

Claimant/Applicant

and

(1) MIHIR MEHTA
(2) PURNIMA MEHTA
(3) MONA MEHTA
(4) MANISHA MEHTA
(5) JAYAM DIAMONDS INTERNATIONAL PTE LTD
(6) DIAMOND CAPITAL INVESTMENTS PTE LTD

Defendants/Respondents

Michael Brindle QC and Simon Goldstone (instructed by Zaiwalla & Co., Solicitors) for the Claimant
Karishma Vora and Max Shephard (instructed directly) for the First Defendant
David Caplan (instructed by Mishcon de Reya LLP, Solcitors) for the Third Defendant

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Hearing dates: 13 and 18 April 2017

INTRODUCTION

1. This is the adjourned return date of the application by the Claimant bank ,ICICI Bank UK Plc (the Bank), for worldwide freezing orders against the Defendants. I granted the freezing orders on 9 March 2017 following a without notice hearing. On that occasion Mr Brindle QC appeared (as he does today) leading Mr Goldstone who also appears today.

2. The original return date for the applications was 24 March, when Mr Goldstone appeared before me for the Bank. Also present were Ms Vora for the First Defendant, Mr Caplan for the Third Defendant and a legal representative of the Fourth Defendant. They are all siblings and are content to be referred to as Mihir, Mona and Manisha respectively. Ms Vora and Mr Caplan appear before me today also.

3. I adjourned the hearing on 24 March in order to allow the parties time to file further evidence, mainly expert evidence on foreign law, which was duly served. This raises a number of issues which are dealt with in context below.

4. The Second Defendant (Purnima), the mother of Mihir, Mona and Manisha, has not indicated any objection to the continuance of the freezing order as against her. I therefore see no reason not to continue it against her. Manisha has agreed to the continuation of the injunction against her by a Consent Order made with the Bank. Neither the Fifth nor the Sixth Defendants, which are companies, have engaged in any way with the claim or injunction and they are not relevant for today's purposes. Accordingly the contest over the continuation or otherwise of the injunction is between the Bank, Mihir and Mona.

BACKGROUND

5. The relevant background is as follows. Jayam NV (Jayam) was a Belgian diamond dealing company which was part of the family diamond business started originally by Mihir and Mona's grandfather and then continued by their father, Mahendra Mehta (Mr Mehta). It had previously been very successful.

6. By a facility agreement dated 30 August 2005 the Bank's London branch provided a US$10m loan facility to Jayam. The loan account was later moved to the Bank's Antwerp branch in 2006 and a new facility agreement entered into on 7 September 2006.

7. The loan was secured by two guarantees of relevance to this application:

    (1) a personal guarantee given by Mihir and Mr Mehta together, dated 7 September 2006; and

    (2) a corporate 'all monies' guarantee dated 30 August 2005 provided by Jayam's holding company, the Fifth Defendant (now called Jayam Diamonds International PTE Ltd (JDIP)).

8. Mr Mehta died in 2009, survived by Mihir, Mona and Manisha and his widow, Purnima. He died unexpectedly during an operation and was intestate. His estate is subject to Belgian inheritance law. The death appears to have resulted in a family dispute and Manisha started proceedings in India against her siblings and cousins regarding what she considers to be her rights in a valuable Mehta family property known as Malabar House in the desirable Malabar Hill area of Mumbai – this is relevant for reasons I will come to.

9. In early 2014, Jayam started to experience financial difficulties and in June 2016 it went into voluntary liquidation. The Bank subsequently served a series of demands between June and August 2016 on Jayam and on Mihir and JDIP as guarantors.

10. The Bank also served demands on:

    (1) Purnima, on the basis that under Belgian law, she had acquired a usufruct over Mr Mehta's estate upon his death pursuant to which she became liable for interest owing and accruing under Mr Mehta's debts as guarantor.

    (2) Mona and Manisha, on the basis that under Belgian law Mr Mehta's guarantee liabilities had passed to them and Mihir as Mr Mehta's heirs. The first demand served on Mona is dated 26 July 2016 and it required payment of US$7,619,750.09 within two days.

11. No payment has been made. Jayam is said to owe the bank approximately US$8m.

<u>THE PRESENT CLAIM</u>

12. The Bank issued a Claim Form in August 2016 but held off on serving it whilst settlement discussions between the parties were ongoing and whilst it pursued other securities, including commencing a claim for a freezing order in the High Court of Mumbai against Mihir, Purnima, Mona and Manisha in relation to Malabar House. That injunction was granted ex parte and seemingly in support of the issued claim in England. The return date was set for 7 and 8 March 2017 in Mumbai.

13. With time running out for service of the August 2016 Claim Form, the Bank then decided to issue the present application on 9 March 2017. Originally it was going to seek an extension of time for service of that Claim Form but in the event it decided to issue a new Claim Form a day later on 10 March 2017. This new Claim Form attaches brief details of the claim, which can be summarised as follows:

    (1) Against Mihir for payment of all sums owed as a party to the personal guarantee and as an heir of Mr Mehta.

    (2) Against Mona and Manisha for payment of all sums owed under the guarantee as Mr Mehta's heirs.

    (3) The Bank's case is that Mihir, Mona and Manisha each answer for 1/3 of the total guarantee liability which had been Mr Mehta's. But Mihir would owe the total sum by reason of his separate guarantee liability.

    (4) Against Purnima for payment of the interest on the personal guarantee, she having acquired a usufruct in Belgium over Mr Mehta's estate.

    (5) Against JDIP for payment of all sums owed as a party to the all monies guarantee.

    (6) The Bank also claims against JDIP and the Sixth Defendant (Diamond Capital Investments PTE Ltd (Diamond)) for suitable orders under s.423 Insolvency Act 1986. The Bank contends that starting in September 2014, JDIP transferred assets worth several millions of USD to Diamond which had only been incorporated in June 2014 and from December 2015 at the latest was owned by Mihir's wife. The suggestion from the Bank is that this was an attempt by Mihir to make JDIP judgment

proof and that the relevant transfers of assets were transfers at an undervalue. This aspect of the claim is not directly relevant to the issues before me now.

THE PRESENT POSITION

14. A transcript was taken of the hearing on 9 March and is available at volume A1 tab 4 of the application bundle. Applying the well-known test for a freezing order, I was satisfied that the Bank had a good arguable case in relation to all the Defendants and that there was solid evidence of a risk of dissipation. There were some issues that initially troubled me on jurisdiction and on delay. However, I was nonetheless satisfied on hearing from Mr Brindle that it was appropriate to grant the worldwide freezing orders sought, and I did so with the usual undertakings. Having obtained the freezing orders in England, the Bank withdrew the Indian proceedings relating to Malabar House, as noted above.

15. Since then, the Bank has complied with its undertakings and notified each of the Defendants of the freezing orders. It has also served further pleadings and evidence, including reports on Indian and Belgian law.

16. In response, Mihir, Purnima, Mona and Manisha have disclosed assets and served affidavits pursuant to the terms of the orders. The Bank has some concerns that the disclosure made has been inadequate.

17. The Bank maintains that it is appropriate for all of the freezing orders to stay in place. As noted above the Defendants who are actively opposed to this are Mihir and Mona.

18. I heard submissions from Mr Brindle, Mr Caplan and Ms Vora at the hearing.

19. The issues that fall to be decided as against Mihir and Mona are, therefore:

    (1) Is there a good arguable case against him/her?

    (2) Is there a sufficient risk of dissipation?

    (3) Are there any other reasons to discharge or not to continue the freezing order?

20. It is convenient to deal with the position of Mona first.

MONA

Good arguable case

21. In summary, Mr Caplan's submission is that the Bank's entire case against Mona is founded on an incorrect proposition that Mona is liable for a share of Mr Mehta's debts as a result of the operation of Belgian inheritance law.

22. Both parties have served evidence on this issue. The Bank relies on the evidence of Mr Marco Wirtz, a partner at Peeters Euregio Law in Belgium. Mona relies on evidence from Prof Renate Barbaix of the University of Antwerp. There appears, now, to be a substantial amount of common ground:

    (1) Potential heirs in Belgium can either (a) unconditionally accept an estate, in which case they succeed to their share of its rights but also its obligations, (b) accept the estate under the benefit of an inventory (not relevant here) or (c) reject the estate, in which case they do not succeed to any of its rights or liabilities.

(2) An heir can accept an estate expressly or tacitly, the latter when, according to Mr Wirtz, "the heir performs an act which necessarily subsumes his intention to accept".

(3)

(a) Because Belgian inheritance law is not concerned with foreign immoveable property, which falls outside of a deceased's Belgian estate and devolves in accordance with the *lex situ*, nothing done in relation to such property has any bearing on whether there has been acceptance of a deceased's Belgian estate.

(b) A declaration of rejection of a deceased's Belgian estate, if the relevant formalities are met, is in principle determinative, subject to there not having been a prior acceptance.

(c) An estate can be rejected up to 30 years after the deceased's death.

23. Mr Caplan's primary submission is that, given this common ground, the basis on which the Bank originally sought the freezing order against Mona can no longer be sustained and so the order should not continue.

24. Mr Caplan says – and Mr Brindle accepts - that the Bank's previous argument was that (1) the effect of Belgian law is that, unless and until Mona rejects the estate, she remained liable for its share of the debts and (2) it was not clear on the evidence that she had done all she needed to reject the estate. On 24 March, the Bank's position was that it was <u>not</u> arguing that there had been tacit acceptance of the estate by Mona. The question was whether her recent purported rejection of her inheritance, by way of a declaration before a public notary in Belgium on 20 March 2017, was sufficient. One of the reasons for granting an adjournment was to enable the Bank to investigate that further.

25. Now, however, it is common ground between the experts that Mona has done all she needs to do to reject her father's estate.

26. Mr Brindle says, however, that that is not fatal to the freezing order because it is also common ground between the Belgian law experts that a rejection of the estate can be invalidated if there is an earlier acceptance. The Bank's case now is that there has been such an earlier acceptance. This is because Mona has retained and asserted an inherited interest in shares in the family's Kamala Samir Co-operative Housing Society (the CHS) which owns Malabar House. The Bank's argument is that those shares constitute moveable property under Indian law and, therefore, under Belgian law, fall within the balance of Mr Mehta's estate for the purposes of his inheritance. By asserting an interest in the shares, the Bank says that Mona has tacitly accepted her father's Belgian estate, meaning she remains liable for his debts under the personal guarantee.

27. Mr Caplan describes this change of position as deeply unsatisfactory and submits that it is inappropriate to obtain a freezing order on one basis, which turns out to be flawed, and then to seek to retain the order on a different basis, particularly in Mona's case as she has taken action in response to the case as originally put by formally rejecting her father's estate. Mr Caplan invites me to discharge the freezing order on that basis alone.

28. Mr Brindle's response is that to characterise the Bank's position in such a way is not fair. When the application was originally made, there had been no known rejection by Mona of her father's estate. What has since transpired is not a *volte face* in any sense; rather, it is the development of the Bank's case which is to be expected in applications of this nature where

evidence is produced after the original application and matters move on pending the return date.

29. I accept that submission. Matters have clearly developed since the original application on 9 March 2017, not least because Mona decided to formally reject her father's inheritance on 20 March 2017. Whilst that was shortly before the hearing on 24 March 2017 and the Bank's reformulated case was not presented then, I accept Mr Brindle's explanation that this was because there had not been enough time between the rejection and that hearing to fully assess the impact of the rejection. The original order was not granted on a flawed basis – as Mr Caplan seeks to argue – it was granted on a basis that was then negated by Mona's subsequent actions. Clearly the circumstances of the Bank's change of position (and the fact that it did not allege tacit acceptance at the outset in any event) are still relevant to the court's consideration of whether or not to continue the injunction, but the development itself does not on its own bring an end to the matter.

30. Having concluded as such, I now consider the merits of the Bank's new argument and whether it has a good arguable case on the devolution of Mr Mehta's guarantee liabilities as against Mona.

The issue

31. The key debate is whether or not the shares in the CHS constitute moveable or immoveable property under Indian law. If they constitute moveable property, it is accepted that they fall within Mr Mehta's Belgian estate for inheritance law purposes and that there is a good arguable case that Mona has asserted an interest in them, thereby invalidating the formal rejection of her father's estate will be invalidated, meaning that she is potentially liable for her father's debts. If the shares constitute immoveable property, they fall outside of Mr Mehta's Belgian estate and can have no impact Mona's rejection that estate.

The evidence

32. Both the Bank and Mona adduced Indian law expert evidence on the issue.

33. The Bank relies on a Memorandum of Advice dated 3 April 2017 from MZM Legal (MZM), an Indian law firm. The Memorandum sets out that MZM:

> "…has been instructed…to give an opinion as to whether the shares held by a deceased in the [CHS] at the moment of his death and/or his heirs, would, under Indian Law be considered as movable or immovable property."

34. MZM reach the conclusion that the shares in the CHS constitute moveable property. Mr Caplan submits that the evidence follows an odd approach and fails to deal with the appropriate authorities and that I should therefore dismiss it as weak, tentative and illogical.

35. The Bank also relies on evidence from a further expert, Mr Soli J Sorabjee, a Senior Advocate of the Supreme Court of India since 1971 and a former Solicitor General of India from 1977 to 1980 and Attorney General of India from 1998 to 2004. Mr Sorabjee has provided a written opinion dated 11 April 2017 and a supplementary opinion dated 12 April 2017. Mr Sorabjee also concludes that the shares are moveable property.

36. Mr Caplan strongly objected to this evidence being adduced. He rightly pointed out that it was served at the last minute before the present hearing on 13 April without good reason and without permission, the Bank not having been granted permission to adduce the evidence of an additional expert. I decided to deal with this evidence *de bene esse* and, having reached

the conclusion that I have below on the weight to be attached to it, I need not consider from a procedural perspective whether or not formally to allow the Bank to adduce it.

37. Mona relies on evidence from Nishith Desai Associates (NDA), an Indian law firm, dated 7 April 2017. The introduction to the evidence states as follows:

> "This legal note analyzes whether shares held in a cooperative housing society representing undivided right, title and interest in [Malabar House] the Premises…constitutes a holding of such immovable property under Indian law."

38. The conclusion is in these terms:

> "…it is our clear view that shares held in a cooperative housing society representing undivided right, title and interest in [Malabar House] …constitutes a holding of such immovable property under Indian Law."

39. The parties therefore adduce competing expert evidence. Whilst I am mindful that this is not a trial and that the Bank need only establish a good arguable case to succeed, a careful assessment of the Bank's expert evidence is nonetheless required.

The Indian law

40. Mr Caplan submits that Indian law is clear that, contrary to the evidence of MZM and Mr Sorabjee, shares in the CHS constitute immoveable property. He refers me to what he submits are the three most relevant cases on the issue which are cited by NDA.

41. The first is a decision of the Karnataka High Court of 7 December 2012 (*Digambar Warty* Writ Appeal No. 885/2008 and Writ Appeal Nos 2062-2106/2008).

42. This was an appeal in two conjoined cases between members of cooperative housing societies and the Indian revenue. The first appeal concerned a co-operative housing society registered under the Karnataka Cooperative Societies Act 1959. The society owned the relevant land, and members of the society were allotted apartments on the basis of their membership. The second appeal concerned another society registered under the Cooperative Societies Act 1959. The revenue argued in both cases that the grant of such rights to the members, which enabled them to enjoy possession of the relevant apartments, amounted to a conveyance of immoveable property and, as such, attracted stamp duty. The members argued that none of the rights granted involved the transfer of immoveable property.

43. The High Court found for the revenue and concluded that there had been a conveyance of immoveable property liable to stamp duty:

> "Having regard to the definition of the immovable property in the general Clauses Act and after amendment under the Stamp Act and in particular the said definition being an inclusive one, it not only includes the land and buildings, but includes the benefits that arise out of land and things attached to the earth. Therefore, though a person may not be the owner of a land or a building and the said land or building may not vest with him, if a person is entitled to have the benefit of that property like possession, right to transfer possession, right to lease, then that right constitutes 'immoveable property'. It falls within the definition of 'conveyance' and it is chargeable to duty under Section 3 of the Act. Therefore, the contention that a mere right to possession and right to transfer or let-out such possession do not constitute 'immovable property' has no substance, in view of the said definition contained, both in the General Clauses Act as well as under the Stamp Act 1999."

44. That paragraph appears to me to be highly relevant.

45. Second, Mr Caplan relies on the case of *Hanuman Vitamin Foods v State of Maharashtra* 2000 (7) TMI 921 SC which also concerns stamp duty. Hanuman was a member of a cooperative society registered under the same Maharashtra legislation as applies to the CHS in this case. It held shares in the society which gave it the right to occupy certain office space. It purported to transfer its shares and the issue arose as to whether or not stamp duty was payable on the transfer. Hanuman said that it was not, because "*it cannot* [by] *any stretch of the imagination be said to be a conveyance of any right in any immovable property*". On the contrary, the court at first instance held that:

> "9. In the circumstances, we feel that it would be a travesty of the truth to hold that the document being the instrument of transfer under the heading "Form of Transfer" purports to transfer only the shares and nothing beyond the shares. We find that in substance and effect in addition to the transfer of shares, the document also conveys the petitioners' right to occupy the office premises No. 904 on the 9th floor and it is only subject to the said terms and conditions that the said transfer has been accepted by the transferee. In substance and effect, therefore, this document incorporates along with the transfer of shares the conveyance of property."

46. This decision was upheld by the Supreme Court as follows:

> "The question whether or not a transfer of shares in a Co-operative Society is subject to levy of stamp duty on the basis that it is a conveyance has already been answered by this Court in the case of Veena Hasmukh Jain and Another v. State of Maharashtra and Ors., reported in (1999) 5 SCC 725. In this case it has already been held that such agreements would be covered by Article 25 of the Bombay Stamp Act, 1958. It is held that stamp duty would be leviable as if it is a conveyance. This Court has held that these are in effect agreements to sell immovable property as the possession of such property is transferred to the purchaser before or at the time of or subsequent to the execution of the agreement. It is held such an agreement to sell must be deemed to be a Conveyance."

47. I consider this to be directly on point.

48. Third, Mr Caplan relies on *Dattaprasad Co-Operative Housing Society v State of Karnataka* ILR 2004 KAR 1892. This was a judicial review case in which a cooperative housing society sought to have struck down certain changes to the Karnataka Cooperative Societies Act 1959 including removing exemptions from charges such as stamp duty. The government's submission was that the exemptions had been introduced "*to encourage co-operative activities in the State by giving exemption to them for registration of documents, transfer of shares creating title and interest in immovable property in favour of the transferees*" but had to be changed because they were being abused. The court held that the transfer of shares in a cooperative society amounted to a transfer of interest in immoveable property and was and always had been liable to stamp duty. The court followed *Hanuman* and dismissed the case.

49. According to Mr Caplan, neither MZM nor Mr Sorabjee properly address this case law or the relevant issues.

50. As regards MZM's evidence, Mr Caplan's criticisms are three-fold. First, he submits that MZM's opinion proceeds on an odd basis in that it:

   (1) notes that certain transfers of shares in co-operative housing societies, including transfers on death, are exempt from registration and stamp duty and says therefore that "*For the purposes of such transfer by way of inheritance, the shares held in a cooperative society may be construed to be movable in nature*";

(2) then however, it also appears to acknowledge that a transfer of shares might also be "*considered a transfer of interest in an immovable property*" albeit one which need not be registered;

(3) notes that pursuant to section 2(7) of the Indian Sale of Goods Act 1930:

> " "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares…";

and

(4) concludes that because of the way the shares are transferred on death, and the fact that such a transfer is exempt from registration and is not considered a conveyance, "*In this view, the shares of a cooperative society and the share certificate issued in pursuance thereof, may be considered moveable property.*"

51. Mr Caplan argues that the fact that no tax is paid on a transfer on death is irrelevant for present purposes and that the distinction MZM seek to draw between *inter vivos* and death transfers does not answer the question of what the shares being transferred either way actually are. He also says that the reliance on the Sale of Goods Act 1930 definition of goods is irrelevant. Mr Brindle accepts that the order in which MZM approached the issue is slightly curious but submits that it does not undermine the conclusion they ultimately reach.

52. Second, Mr Caplan accuses MZM of failing to grapple with the relevant authorities cited by NDA. Although the case of *Hanuman* is cited by them, that is only to support a statement that stamp duty is attracted only in cases of conveyances and not upon transfers on death. There is no further analysis of the case, and there is no mention of *Digambar Warty* nor *Dattaprasad.* Given that these cases appear highly relevant to the issues in this case, such omissions are surprising.

53. Third, Mr Caplan says that the other cases MZM cite do not go to the question of whether shares in a cooperative housing society constitute immoveable property as a matter of Indian law at all. One case is cited, *Usha Arvind Dongre v Suresh Ragunath Kotwal* 1990 Mh. L.J 306, but not elaborated on and a copy of the judgment is not appended to MZM's opinion or otherwise provided. The case of *Hindustan Dorr Oliver Ltd v AK Menon* [1994] 80 Comp Cas 384 (Bom) is appended to the opinion but is not cited within it. It relates to whether a transfer of shares in a unit trust constituted a sale or a sub-pledge, given that the transferor only had a security interest in the shares. It was held it was a sub-pledge, yet this appears to have nothing whatsoever to do with co-operative housing societies or whether a shareholding in such societies constitutes moveable or immoveable property.

54. Finally, MZM refer to *Pallonji Shapoorji and Co. (P) Ltd v Deputy Commissioner of Wealth Tax* [2006] 102 ITD 101 (Mum), which concerned the question of whether the existence of a company's right to occupy premises belonging to a cooperative housing society meant that the value of the property had to be taken into account when calculating the company's wealth tax. The key question related to the scope and meaning of section 40(2) of the Finance Act 1983 which provided that for the purposes of calculating wealth tax only the value of assets "*belonging to the company*" were to be taken into account. The judgment records at [12] that counsel for the company submitted that the right to occupy premises in a co-operative housing society constituted moveable property and at [29] that the decision in *Hanuman* was not applicable because it related to "*tenant co-partnership societies*" rather than co-operative

housing societies. Mr Caplan says that is not so and correctly points out that the extract from *Hanuman* that counsel for the company there cited in support of his submission at [29] is actually a passage from a separate case in the Gujurat High Court citied in *Hanuman* itself which did refer to tenant co-partnership societies. I accept Mr Caplan's submission that *Hanuman* quite clearly does relate to co-operative housing societies. I also accept his argument that the tribunal's conclusion in *Pallonji*, having distinguished *Hanuman*, that "*unless the title of a property is vested in a person, it cannot be said that such property belongs to him even though he may be owner of the property*" is specific to the application of section 40(2) of the Finance Act 1983 and is not relevant in this case.

55. Turning to the content of Mr Sorabjee's evidence, Mr Caplan submits that the mere fact the Bank seeks to adduce it in addition to MZM's evidence speaks volumes as to the limited weight I should give MZM's opinion. He says that Mr Sorabjee also fails to deal with the relevant cases mentioned by NDA, dismissing *Hanuman* in his supplementary opinion as "*clearly distinguishable*" on the basis that it was "*decided in the context of Article 25 of the Bombay Stamp Act 1958*" and that it "*proceeded on a concession that agreement to sell must be deemed to be a conveyance*".

56. Instead, Mr Sorabjee relies on the case of *Anita Enterprises v Belfer Cooperative Housing Society Ltd* [2008] (1) SCC 285. Belfer was a tenant co-partnership housing society which held both land and flats constructed on it. A member of the society sublet his flat to Anita. A number of years later, Belfer and the member sought to evict Anita: Belfer on the basis that the member had unlawfully sublet his flat to Anita; and the member on the basis that Anita was not his tenant. The question arose as to whether there was a relationship of landlord and tenant between Belfer and the member. For these purposes, the court distinguished between a 'tenant ownership housing society' where land is held either on leasehold or freehold basis by the society and houses are owned by its members, and a 'tenant co-partnership housing society' where the society holds both land and buildings either on a leasehold or freehold basis and allots them to its members.

57. Mr Sorabjee's opinion is that the CHS is a tenant co-partnership society and he cites the following passage of the judgment in *Anita* in support of his conclusion that a member cannot be said to have any right, title or interest in the underlying property – so that the shares in the CHS constitutes moveable property:

> "It appears to us that the status of a member in a tenant co-partnership housing society is very peculiar. The ownership of the land and building both vests in the society **and the member has, for all practical purposes, right of occupation in perpetuity after the full value of the land and building and interest accrued thereon have been paid by him. Although de jure he is not owner of the flat allotted to him, but, in fact, he enjoys almost all the rights which an owner enjoys, which includes right to transfer in case he fulfills the two preconditions, namely, he occupies the property for a period of one year and the transfer is made in favour of a person who is already a member or a person whose application for membership has been accepted by the society or whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub- section (1A) of Section 23 of the Societies Act. In case any of these two conditions is not fulfilled, a member cannot be said to have any right of transfer.** Thus, we reiterate the law laid down by this Court in the case of Sanwarmal that a member has more than a mere right to occupy the flat, meaning thereby higher than tenant, which is not so in the case of a tenant within the meaning of Section 5(11) of the Rent Act. This being the position, we have no difficulty in coming to the conclusion that the status of a member in the case of tenant co-partnership housing society cannot be said to be that of a tenant within the meaning of Section 5(11) of the Rent Act, as such there was no relationship of landlord and tenant between the Society and the member."

58. Mr Caplan raises three issues with this analysis. First, he says it is not relevant to the question of whether the shares in the CHS constitute moveable or immoveable property. Second, he says that the conclusion that the CHS is a tenant co-partnership housing society as in Anita is wrong, on the basis that under recital (o) of the Family Arrangement Agreement, being the agreement regulating the rights of the members of the CHS in and to the Malabar House property, the Mehta family has "*leasehold interest in the Land and ownership rights in the Building*" as opposed to the society holding both land and buildings either on a leasehold or freehold basis. Third, he points out that the section of the judgment I have highlighted in paragraph 57 above was omitted from Mr Sorabjee's opinion. Mr Caplan argues that this is because the reference to a member enjoying *"almost all the rights which an owner enjoys"* contradicts the conclusion Mr Sorabjee seeks to draw from the case that the member cannot be said to have any right, title or interest in the underlying property. I agree and its omission from Mr Sorabjee's report is highly unsatisfactory.

59. Mr Sorabjee goes on to cite from the case of *Sanwarmal Kejriwal v Vishwa Co. Housing Society Ltd* [1990] (2) SCC 288, which again deals with tenant co-partnership societies, and concludes that: "In a tenant co-partnership type of society, the members are shareholders; but the title to the property vests in the society."

60. However that does not take the matter any further since *Sanwarmal* was relied upon by the court in *Anita* for the proposition that *"a member has more than a mere right to occupy the flat, meaning thereby higher than tenant"* and which is supportive of the "immoveable" point.

61. Mr Sorabjee also refered to the same definition of goods under the Sale of Goods Act 1930 that MZM rely on and, I note with concern, appears simply to have taken a paragraph from MZM's opinion (which recites s2 (7) and then refers to the case of *Pallonjii* in identical terms) and used it his own opinion, without attribution, in support of his conclusion. [1]In any event, as stated above, I do not accept that this definition is of any relevance here.

62. On the basis of the above, Mr Caplan submits that on the issue of Indian law the Bank has no good arguable case.

63. Mr Brindle's principal response is that Mr Caplan's submissions and NDA's evidence are directed at the wrong question. In his submission, the issue is simply whether the shares in the CHS are moveable or immoveable property, yet NDA's evidence is directed at the overlapping but incorrect question of whether or not the shareholders in the CHS have direct ownership rights in the underlying immoveable buildings/property.

64. In Mr Brindle's submission, Malabar House is a valuable property and so there must be economic value in the ownership of the land and its buildings. A share in the CHS must therefore have its own value and, of its own nature, must be movable. Whatever the position as to who owns the land itself versus the buildings for the purposes of distinguishing between a 'tenant ownership housing society' and a 'tenant co-partnership housing society' (which Mr Brindle says is unclear) CHS owns the land. Whilst the shareholders might have overlapping ownership rights in the land and the buildings, that does not detract from the fact that they hold a distinct valuable share which is moveable, according to both MZM and Mr Sorabjee's analysis.

[1] See p3 of his report as appended to Mr Crestohl's witness statement and the MZM Advice at B6/164.

65. Mr Brindle says that *Anita* is the case to follow. *Hanuman*, in his submission, did not turn on whether the relevant shares were moveable or immoveable, but on whether there was a conveyance, which does not apply in this case. The further cases that Mr Caplan relies on are also irrelevant, Mr Brindle says, and do not undermine his submission that whilst the share may well confer a right to occupy which is itself immoveable, that does not mean that the share conferring the right is itself immoveable. The most that can be said, in Mr Brindle's submission, is that through ownership of a share (which itself is moveable) one acquires an interest in immoveable property.

Conclusion on the Indian law issue

66. I have well in mind in considering this point the test set out in *Ninema Maritime Corporation v Trave Schiffahrtgesellschaft GmbH* [1983] 2 Lloyds Rep 600 at 605 as to what constitutes a good arguable case. A good arguable case is one:

> "…which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

67. A mini-trial is to be avoided and the court should not conduct a complete assessment of the evidence as it would do during a trial.

68. Having reviewed the evidence provided and considered the helpful submissions of Mr Brindle and Mr Caplan, I have reached the view that based on the evidence it has presented the Bank does not have a good arguable case against Mona.

69. The evidence of MZM and Mr Sorabjee, in my view, raises more questions than it provides answers. The fact that Mr Sorabjee has copied an extract directly from MZM's report, as well as the fact that the Bank thought it necessary to attempt to adduce his evidence in addition to MZM's in the first place, makes me very sceptical as to how the experts have reached their conclusions and the weight that I should attach to their evidence. I also do not accept their substantive analysis. MZM's approach is convoluted and does not address what in my opinion are directly relevant cases. The same criticism can be made of Mr Sorabjee's opinions. I do not accept his conclusion that the decision in *Anita* dictates that the shares must be moveable. That case did not deal with that question. The correct approach, in my view, is to follow *Hanuman* which reaches the clear conclusion that a transfer of a share in a co-operative housing society constitutes a transfer of immoveable property.

70. The evidence of NDA is clear, logical and refers to case law which, upon review, is directly relevant to the matters at hand. I do not accept Mr Brindle's criticism that NDA and Mona have addressed the wrong question. The report shows that they clearly have directed themselves to the crucial issue of whether the shares in the CHS constitute immoveable property. The decisions in *Digambar Warty* and *Hanuman* are clear authority for the conclusion NDA reaches that the shares constitute immoveable property. None of the cases cited by MZM and Mr Sorabjee, nor any of their analysis, presents a good argument as to why *Digambar Warty* and *Hanuman* do not apply.

71. Moreover, Mr Brindle's argument in reply is unsupported by any direct expert evidence on Indian law. Further, it is inconsistent with the view expressed in *Hanuman* which concentrated on the substance which was being transferred (ie there is a transfer of possession of property) rather than a simple transfer of shares without regard to the context – see the passage quoted in paragraph 45 above.

72. On that basis, the Bank has failed to show a good arguable case that there has been a tacit acceptance by Mona of Mr Mehta's Belgian estate by reason of her interest in the Malabar property.

Other matters raised on good arguable case

73. I should also deal with two other arguments raised by the Bank as to its good arguable case on tacit acceptance.

74. The first is that the Bank says that evidence has recently come to light in relation to valuable paintings belonging to Mr Mehta which suggests Mona may have taken possession of them thereby tacitly accepting his estate. On 21 March 2017, the Bank wrote to Mona asking whether she had paintings which had belonged to her father "*in her custody or possession*" (Mihir having previously told the Bank that about US$1m of his father's paintings were with "my sister", which the Bank inferred was Mona). The Bank says that Mona's reply on 23 March 2017, in which she said that she does not "*own*" such paintings was evasive. The Bank also says that Mona's later explanation that Purnima gifted a painting to her children "*years ago*" is both inconsistent with her 23 March 2017 response and raises questions of its own.

75. Mr Caplan says that Mona did not inherit the paintings and that the Bank has put forward no evidence to support its contention of tacit acceptance.

76. Whilst Mona's 23 March 2017 response is not very helpful, I nonetheless agree with Mr Caplan that the Bank has not put forward sufficient evidence on this point to satisfy me that it has a good arguable case that Mona has tacitly accepted her father's Belgian estate via these paintings.

77. The second argument, made very faintly by the Bank, is that Mona may have tacitly accepted her share of her father's estate by becoming a shareholder in Jayam. That point was not pursued orally before me. In fact the Bank never asserted in its original evidence that she was a shareholder and the auditor's report of 2010 did not describe her as one. It is also very hard to see why she would have accepted any part of her late father's shareholding which, as the same report makes clear, would have been worthless since the company had a significant negative value. Thus, absent any evidence that (a) she is a shareholder or (b) she inherited those shares from her father, I do not consider that the Bank has a good arguable case on this basis.

Conclusion on good arguable case

78. Accordingly, since there is no good arguable case on the merits, the Bank's claim for the continuation of the injunction as against Mona must fail.

Risk of dissipation

79. Although this does not arise given my conclusion as to the lack of a good arguable case, I will briefly deal with the other matters raised the first of which is risk of dissipation.

80. The case of ***Holyoake v Candy*** [2017] EWCA Civ 92 has provided some recent guidance on this. In the course of her judgment Gloster LJ said this:

> "49. The next stage of the analysis is to ask whether the evidence…demonstrated that there was indeed the requisite risk of dissipation. In my judgment the evidence was not sufficient so to demonstrate.

50. There are three points which inform this analysis. First, it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The respondent's evidence will be immaterial – unless, unusually, it lent support to the application.

51. Second, it follows that, unless an applicant has raised a prima facie case to support a freezing order, the respondent is not obliged to provide any explanation or answer any questions posed – and nor can a purported failure to do so be held against the respondent. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the respondent will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference.

52. If authority were needed for this second point, it can be found in The Ninemia. At 1424B-D and 1425D-1426B, the Court of Appeal quoted with broad approval the judgment of Mustill J (as he then was) that:

The less impressive [the defendant's] evidence, the less effective it will be to displace any adverse inferences. But there must be an inference to be displaced, if the injunction is to stand, and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed….

Defendants] have no obligation to disclose their financial affairs, simply to answer a challenge from the [Claimants] which is unsupported by solid evidence."

53. In Flightwise Travel Service Ltd v Gill, Neuberger J made the same point:

> 32. Finally, because the point has been raised, it really should go without saying that it is for the applicant to make out his case to support a freezing order, namely an appropriately strong case against the respondent concerned, and that there is a real risk of dissipation by the respondent. It is not for the respondent to show that a freezing order ought not [to] be granted."

54. The third and final point of general application is to emphasize that the requisite risk of dissipation must be established against each respondent…. the fact that the appellants are alleged to be co-conspirators does not – without more – entail that evidence proving a real risk of one appellant dissipating their assets transposes to the other appellants, and nor did the judge so conclude…

59. (iii)…An applicant must show a risk of dissipation as opposed to it merely being possible (without more) that the respondent could dissipate in that way"

81. On the initial application here, the Bank presented its case on real risk of dissipation against all of the Defendants, arguing that taking each in turn would be artificial given what they submitted was likely to be a general desire amongst all of the Defendants to keep valuable assets within the family.

82. In short, the Bank's original arguments as against Mona were as follows:

(1) Mona instructed the same lawyers as Mihir, a convicted fraudster;

(2) Mihir acted on behalf of Mona when he made purportedly misleading statements to the Belgian notary regarding Mr Mehta's estate; and

(3) Manisha has accused Mona in the proceedings she has commenced in India of operating "hand in glove" with other Mehta family members to siphon away family assets.

83. Mr Brindle maintains these arguments and also says that there is further evidence that has arisen which supports the Bank's case:

(1) Mona has not disclosed any assets other than cash, which can be readily dissipated.

(2) Mona has been inconsistent and evasive regarding her father's paintings, as explained above, which suggests a risk of dissipation.

(3) Mona disclaims detailed knowledge of her father's affairs in her witness statement, but nevertheless felt able to give Mihir permission to make representations to the Belgian notary regarding her father's estate.

(4) Mona claims to have had no involvement in her father's business or the diamond industry more generally yet:

(a) around 10 years ago, made an undocumented short term loan of US$600,000 to JDIP on her father's instruction;

(b) was included on a list of receivables prepared by Jayam NV's accountants in December 2015; and

(c) purchased 24 carats of diamonds for almost US$1.4m from Jayam in three transactions in 2010, which are not reflected within her affidavit of means.

(5) Mona's Belgian ID was used by Jayam in response to a request by the Bank for details of its shareholders;

(6) Mona's 20 March rejection in Belgium may be a device designed to avoid the injunction.

84. Ms Shetty, the Bank's Head of Legal, summarised the Bank's overall concerns about Mona in her first affidavit as follows:

> "I accept that as against Purnima, Manisha and Mona there is clearly no 'smoking gun' showing direct evidence of a risk of dissipation. However, as mentioned above, there is nevertheless good reason to be sceptical as to their motivations; and in the particular circumstances of this case, where the assets of a family are at stake, and a man of demonstrable dishonesty seems to be the major influence on those around him, there is a serious risk of collusion. The most obvious risk is that Mihir enters into an arrangement with (either or both of) his sisters whereby he formally disclaims the inheritance, leaving them with a 50% share each, in the expectation that they will hide their assets and re-unite him with his share of the fruits of the estate, following judgment, via a clandestine arrangement. Purnima might be party to a similar arrangement. Unless the injunction operated against Mona, Manisha and Purnima, the result of such an arrangement would be that the judgment would be unsatisfied."

85. In response, Mr Caplan correctly reminds me that I should bear in mind that the underlying case against Mona is not based on dishonesty; it is based entirely on the alleged effect of Belgian inheritance law on a guarantee liability with regard to an heir. So there needs to be other evidence from which one could conclude that there is a real risk of dissipation. In his submission, the evidence against Mona is insufficient.

86. I accept that submission, for the following reasons.

(1) In relation to the Bank's original arguments, the fact that Mona instructed the same lawyers as Mihir is no basis for suggesting that there is a risk that she is intending to dissipate assets to defeat a judgment. Similarly, the fact that Manisha has accused Mona and other family members of acting together with Mihir is simply an allegation and, in any event, does not demonstrate that there is a real risk of dissipation. Whilst Mona does not positively dispute (without accepting) that Mihir's statements to the Belgian notary were misleading, that goes principally to the question of risk regarding Mihir, and I am satisfied by Mona's explanation that, although she provided Mihir with the power to deal with her father's estate as she could not be in

Belgium at the time, she did not authorise him to give misleading information on her behalf.

(2) With regards the Bank's new arguments:

(a) The fact that Mona has cash assets and that cash is an asset which can be easily dissipated does not demonstrate that there is a real risk that Mona will dissipate such assets. Whether she has failed to disclose other assets is clearly a relevant question, which I deal with below.

(b) As I have set out above, I do consider that there is an element of evasion in Mona's responses regarding the paintings. However, I am not satisfied that there is a real risk of her dissipating them so as to defeat any judgment.

(c) Even if Mona had detailed knowledge of her father's affairs, as the Bank suggests, that does not seem to me to be evidence of a real risk of dissipation. Neither do the facts that she made a loan to JDIP, which was included on a list of receivables of Jayam and that her ID was in the hands of Jayam. As to the latter she gave a plausible explanation in paragraphs 19 and 20 of her fourth witness statement (which in general terms I found credible) namely that the company dealt with many aspects of the family's arrangements, including travel so that its possession of a copy of the ID card was not indicative of anything in particular. As to the suggestion that the copy of the ID card was sent to the Bank because it had requested details of the shareholders, I have already adverted to the paucity of the evidence that she was a shareholder in paragraph 77 above and anyway the Bank has not exhibited the actual request it had apparently made earlier.

87. There was considerable debate before me on the question of Mona's purchase of diamonds in 2010. The transaction by which she bought them does not of itself establish a risk of dissipation. However, it does raise the question of why they were not included in her statement of assets in response to the freezing order, and whether that demonstrates any real risk of dissipation. Mona's explanation for this is that she bought the diamonds for her husband, Mr Soni, who wanted to start up a diamond investment business, and that the diamonds are accordingly in her husband's name. Mr Soni has provided a witness statement to this effect. Mr Brindle submits that I should not accept this explanation on the basis that it is improbable. He took me to the relevant invoice for the diamonds dated 6 May 2010 which is addressed to Mona and states her contact details - with no mention of Mr Soni. During the hearing, Mona and Mr Soni produced copies of emails between Mr Soni and a number of what appear to be potential investors in his investment business around 2010 which Mr Caplan submits showed that their explanation is true. Mr Caplan also shows me an email from 3 May 2010 in which Mr Soni specified to someone (the recipient is redacted) that he is going to buy 10 category D diamonds, which closely matches the 9 such diamonds listed on the 6 May 2010 invoice a few days later. Mr Brindle objects to such evidence being adduced so late, points out that it could have been adduced earlier, and says that I should therefore attach no weight to it. I agree with him – the evidence could and should have been adduced earlier – but, in any event, the emails do not conclusively support Mona and Mr Soni's explanation. Nonetheless, I do not consider that there is sufficient evidence to suggest a real risk of Mona dissipating her assets. Her explanation is not as improbable as Mr Brindle suggests and I do not consider that it amounts to solid evidence of a real risk of dissipation.

88. Looking at the matter in the round, Mr Caplan submits that Ms Shetty's evidence as to the Bank's concerns is nothing more than a mix of speculation and guilt by association. Mr

Brindle denies that and says that the Bank makes no attempt to establish guilt – its case is simply that the evidence against each of the family members is sufficient to demonstrate a real risk that they all will dissipate assets to defeat a judgment. I disagree. The authority in *Holyoake* is clear – the freezing order applies individually to each respondent and so the requisite risk of dissipation must be established against each. As against Mona, the Bank's overall concern about the family working together to manipulate their assets is both speculative and predicated on transposing Mihir's conviction (discussed below) on all the other family members. It cannot be the basis for determining that there is a real risk that Mona will dissipate her assets.

89. In this context, Mr Caplan also complains about the delay between the Bank first intimating its claim via the original demands and claim form and seeking these freezing orders roughly seven months later. He points out that Mona received a formal demand specifically threatening asset seizure in July 2016, that she was notified of a claim form being issued against her in August 2016, an injunction was obtained against her in India by the Bank, and there were without prejudice offers being made right up to March 2017.

90. Mr Brindle acknowledged at the hearing on 9 March that there had been some delay. I observed then that delay alone will not usually prevent the grant of a freezing order: if the court remains satisfied that there is a real risk of dissipation, it should grant the order notwithstanding delay, according to *JSC Mezhdunarodniy Promyshlenniy Bank & Another v Pugachev* [2014[EWCA Civ 906.

91. Mr Brindle's explanation for the delay was that the Bank had genuine cause to believe that without prejudice negotiations would be successful and wanted to give the Defendants every opportunity to settle without commencing proceedings. I accepted this originally – and now – as to how the Bank was approaching matters.

92. Nonetheless. while delay in and of itself is not usually a reason for refusing relief of this kind, the delay and settlement discussions which took place over several months before the Bank's application do make it more difficult to find the necessary risk of dissipation on the simple basis that if Mona did really pose a such a risk, or the Bank thought that she did, it is somewhat odd that it took no earlier step to secure its position; it could still have negotiated with her afterwards.

93. Accordingly, and for all the reasons given above, I would not have been satisfied that the Bank had showed a real risk of dissipation on Mona's part.

Non-disclosure on the part of the Bank

94. Mr Caplan also submits that the injunction should be discharged and not replaced with a new one, by reason of the Bank's material non-disclosure at the original hearing. He says that there has been such non-disclosure by reason of the following matters.

    (1) The Bank failed to bring to the Court's attention the distinction between Mr Mehta's non-Belgian estate comprising immoveable property and his Belgian estate comprising moveable property, which is material to the central question of whether Mona is liable for a share of her father's debts. I do not consider this to be a failure on the Bank's part – for the reasons I have set out above in relation to good arguable case, this was not the key question at the 9 March hearing. Its relevance only became apparent in light of subsequent events as matters developed. It is right to say that the Bank had originally advanced an argument that even before any form of acceptance the estate would pass automatically on death subject only to any later rejection. That

point was not later pursued and became academic because of the rejection. But to the extent that the Bank's Belgian law expert (Mr Wirtz) was wrong on the issue of automatic succession, temporary or otherwise, I do not think this amounts to material non-disclosure; nor does the fact that initially the Bank was focusing on a lack of rejection;

(2) The Bank presented the evidence against each individual on real risk of dissipation in a misleading manner. Mr Caplan presents this point as effectively a failure to "drill down" into the detail of the Bank's allegations against each individual. Mr Brindle says the individuals were clearly distinguished and arguments were presented against them together only where it was appropriate to do that. Although the actual argument has failed as against Mona, I do not see this as a case of non-disclosure either;

(3) The Bank submitted, on the question of delay, that the last substantive without prejudice discussions took place in November 2016, that there had been no further meetings or contact with Mihir since then, that a letter of settlement had recently been sent by the Bank but that no discussions had taken place, and that the Bank had discovered something about Mihir in January 2017 that was the "last straw" insofar as an injunction application was concerned. Mr Caplan says that none of that was correct. Without prejudice correspondence continued right up until the Bank obtained the freezing order and the most recent offer made by the Bank had been prompted by a discussion with Mihir and that offer had expired the day before the Bank applied for the freezing order. Mr Brindle accepts that discussions did take place after November 2016 but says they were not substantive and maintains that the essence of his original submission was true. It is true that it was only because I raised the question of settlement discussions at the initial hearing (because I had seen a brief reference to this in Ms Shetty's witness statement) that more detail was provided by Mr Brindle on instructions. It would have been better if the Bank had set all of this out more clearly and in more detail at the outset but in the event, the key points were disclosed at the hearing and there was no material non-disclosure;

(4) I do not think there were any other operative non-disclosure points.

95. So I would not have discharged the freezing order on the grounds of material non-disclosure. In the event of course, this pint is academic.

Conclusion

96. For these reasons, I shall discharge the freezing order as against Mona. I now turn to Mihir.

MIHIR

Good arguable case

97. So far as Mihir's liability *qua* heir is concerned, it is not suggested on his behalf that the Bank does not have a good arguable case against him. His position is different to that of Mona. Equally, it is not suggested for present purposes that there is no good arguable case against him by reason of his own guarantee liability. Instead, the two main points taken by Ms Vora concern (a) jurisdiction and (b) risk of dissipation.

Jurisdiction

98. Unlike Mona, Mihir is not resident here but in Belgium. Ms Vora's principal submission is that the Court has no jurisdiction to deal with the Bank's claims against him, whether under

the Recast Brussels Regulation or the "common-law" jurisdictional gateways set out in CPR PD 6B.

The claim against Mihir qua heir

99. The issue of jurisdiction was considered at the ex parte hearing on 9 March 2017. At that hearing, as they do now, the Bank acknowledged the general rule under Article 4(1) of the Recast Brussels Regulation that a defendant must usually be sued in his country of domicile (ie Belgium).

100. There is also a jurisdiction clause at clause 9(b) of the personal guarantee in favour of Belgium. However, clause 9(c) of the personal guarantee allows the Bank to commence an action against the guarantors in any jurisdiction. So this clause is irrelevant.

101. The Bank relies on Article 8(1) of the Recast Brussels Regulation which provides as follows:

> "A person domiciled in a Member State may also be sued:
>
> where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"

102. Mona and Manisha are domiciled in England. The Bank argues therefore that Mihir, although domiciled in Belgium, can also be sued in England as the claim against him *qua* heir is sufficiently closely connected to the same claims against his sisters as to engage the exemption from the general rule in Article 8(1).

103. Ms Vora contests jurisdiction against Mihir in respect of the claim against him as heir, not because, all other things being equal, Article 8 (1) cannot be satisfied but because of Article 1(2)(f) of the Recast Brussels Regulation. This states that:

> "This Regulation shall not apply to:…wills and succession, including maintenance obligations arising by reason of death."

104. The term "*wills and succession*" was defined by Henry Carr J in <u>*Peretz Winkler & Ors v Angela Shamoon & Ors* [2016] EWHC 217 (Ch)</u> according to the definition in the Succession Regulation 650/2012 (to which the UK is not a party) as covering "*all forms of transfer of assets, rights and obligations by reason of death*". Ms Vora argues that the claims against Mihir fall within such a definition and thus outwith the Recast Brussels Regulation altogether.

105. Mr Brindle relies on two authorities in support of a submission that these proceedings are not sufficiently related to "*wills and succession*" so as to exclude the operation of the Regulation. The first of these is <u>*Re Hayward* [1998] 1 Ch 45</u> in which a trustee in bankruptcy sought to recover from a deceased bankrupt's wife an interest in a Spanish property which the trustee claimed belonged to the bankrupt's estate (and had therefore vested in the trustee) but that the wife had transferred to herself. At first instance, the claim failed on the basis that by virtue of Article 16 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, the Spanish courts had exclusive jurisdiction to deal with the ownership of Spanish property. The trustee argued at first instance and on appeal that Article 16 did not apply because of an exception in Article 1 for proceedings concerned with succession, bankruptcy and analogous proceedings. The question therefore arose as to whether the trustee's claim was so concerned with matters of succession or bankruptcy so as to fall within the exception. Rattee J held as follows:

> "[53H]…it seems to me that the trustee's claim in these proceedings raised no issue of succession. Succession was in no sense the principal subject matter of the proceedings. The trustee's claim was simply on the basis that the bankrupt had been entitled to a half-share of the villa and that, on his appointment as trustee, the trustee had taken over the bankrupt's entitlement thereto. That in no sense, in my judgment, raises any questions of succession.
>
> [54C]…the nature of the claim made by the trustee in the proceedings, in my judgment, is not a matter of bankruptcy in the sense that any question of bankruptcy is the principal subject matter of the proceedings. The claim made in the proceedings is essentially a claim by the trustee to recover from a third party, the first respondent, Mr. Hulse, assets said to belong to the bankrupt's estate and, therefore, to be vested in the trustee. It is very like a claim made by a liquidator of a company to recover the company's debts…
>
> [55B] "The only connection between these proceedings and bankruptcy, it seems to me, is that the title sought to be established by the trustee depends, as a first step, on the fact that, as trustee in bankruptcy under the English statute, the trustee is entitled to whatever property was vested in Mr Hulse at the date of the bankruptcy. That does not, in my judgment, make bankruptcy the principal subject-matter of the proceedings…"

106. The second case is that of *Sabbagh v Khoury and others* [2014] EWHC (Comm) 3233. The background facts are very detailed but irrelevant for present purposes. In short the Claimant, Ms Sabbagh, brought claims against various family members alleging that (a) she had been deprived of her inheritance of shares held by her father when he died and (b) the family members engaged in a conspiracy to deprive her father (and so also ultimately her) of his assets leading up to his death. The defendants brought various jurisdictional challenges against the claims being brought in England. Some of the defendants were sued in England under Article 6(1) of the Brussels Regulation (the former equivalent of Article 8(1) of the Recast Brussels Regulation) via an anchor defendant domiciled in England. They sought to challenge this on the basis of Article 1(2) of the Brussels Regulation (which contained the same "wills and succession" exemption as in Article 1(2)(f) of the Recast Brussels Regulation) on the basis that the principal subject matter of the claims related to succession and so Article 6(1) of the Brussels Regulation could not apply.

107. Carr J provided helpful guidance on identifying the principal subject-matter of proceedings as follows:

> "268. In identifying the principal subject-matter of the proceedings, the court looks to substance not form. It is necessary to look at each claim separately, but the exercise is then to characterise the proceedings as a whole. The defence (or issues likely to be raised by way of defence) are relevant to the assessment – see paragraph 21 of BVG. Whilst concerned with substance, the court is nevertheless concerned with the (substance of the) claim that has actually been brought, even if for purely tactical jurisdictional reasons – see Cooper Tire & Rubber Co Europe Ltd and others v Bayer Public Co Ltd and others [2010] Bus LR 1697."

108. Carr J considered the authority of ***Re Hayward*** finding Rattee J's conclusions on the bankruptcy exclusion at [55B] (cited above) to be apt. She concluded that the Claimant's "*entitlement as heir in principle is a first (and uncontested) step but it is not the principal subject-matter*" and accordingly dismissed the jurisdictional challenge.

109. Mr Brindle says that I should reach the same conclusion on these facts as those reached in *Re Hayward* and *Sabbagh*. His submission is that, whilst the first step in the claims against Mihir as heir (i.e. establishing his liability for his father's debts) concerns succession, the principal subject matter of the claim is simply a claim to recover a debt under a guarantee, meaning Article 1(2)(f) cannot apply.

110. On balance I agree with Mr Brindle. Unlike Mona, Mihir does not raise any argument at all as to whether he is liable *qua* heir. That is hardly surprising since he has been actively involved in his father's estate. Thus, while it is true that the first step to his liability (on this ground) is his status as heir, it is uncontested. That does then raise the question as to what the "principal" issue in the claim against him is going to be, since no substantive defences have yet been put forward. Nonetheless, if in truth the devolution to him of his father's liability as heir is not an issue, I find it hard to conclude that the case against him involves succession as a matter of substance. That being so, the Recast Brussels Regulation does apply and if so, then Article 8 (1) applies and the Court has jurisdiction to hear the claim against Mihir as heir.

111. However, Ms Vora says that even if I conclude that the requirements of Article 8(1) are satisfied, I should decline to find jurisdiction on the basis that there is clear evidence that the claims against Mona and Manisha as the anchor Defendants are brought solely for the purpose of establishing jurisdiction against Mihir, citing *Sibir Energy Ltd v Tchigirinksi* [2012] EWHC 1844 (QB). I disagree. There is not clear evidence that the claim against Mona and Manisha is brought only to establish jurisdiction against Mihir. Ms Vora has shown me no evidence to suggest that the Bank is only using them to get to Mihir.

112. As a further point, Ms Vora then directed me to the case of *Bord Na Mona Horticulture Limited & Ors v British Polythene Industries Plc & Ors* [2012] EWHC 3346 (Comm). She argues, on the basis of that judgment, that the claim against Mona and Manisha has no real prospect of success and that therefore they cannot be used as anchor defendants for the purposes of Article 8(1). In *Bord Na* the first defendant applied to strike out the claim against it which alleged breaches of Article 101 of the Treaty on the Functioning of the European Union and/or for summary judgment in its favour. In addition, the second defendant applied to set aside service of the claim form upon it outside the jurisdiction, on the basis *inter alia* that, as the claim against it was brought under Article 6(1) of the Brussels Regulation (the precursor to Article 8(1) of the Recast Brussels Regulation) with the first defendant as anchor defendant, if the claim against the first defendant fell away, the court would have no jurisdiction.

113. Mr Justice Flaux refused to strike out the claim against the first defendant, so that the second defendant's argument fell away. However, he went on to consider whether, had he struck out the claim against the first defendant, there would nonetheless have been jurisdiction against the second defendant. He pointed out that there are a number of decisions of the English courts to the effect that in order to invoke the jurisdiction under Article 6(1) a claimant must show a sustainable claim against the anchor defendant, in the sense of a serious issue to be tried or a real prospect of that claim succeeding, giving the example of the judgment of Lord Justice Tuckey in *FKI Engineering Ltd v De Wind Holdings Ltd* [2008] EWCA Civ 316 at [18]. He also distinguished Case C-103/05 *Reisch Montage* [2006] ECR 1-6827, where the European Court allowed proceedings in Austria against a German company pursuant to Article 6(1) to continue notwithstanding the case against the German anchor defendant being struck out on procedural grounds, on the basis that:

> "…it was only purporting to determine the position where an otherwise sustainable claim against the anchor defendant was precluded for some procedural reason under the national law. It was not purporting to decide that, if the claim against the anchor defendant was unsustainable because substantively, as opposed to procedurally, it had no real prospect of success (which on the hypothesis upon which I am proceeding would be the present case), the requirements of Article 6(1) were nonetheless satisfied."

114. Accordingly, Mr Justice Flaux reached the view that:

> "…if contrary to my decision on [the first defendant's] application, I had concluded that the claim against [the first defendant] was not arguable, I would have concluded that jurisdiction under Article 6(1) could not be maintained."

115. The question therefore arises here as to whether the Bank's case against Mona and Manisha, the anchor Defendants, is not arguable or has no real prospect of success. So far as Manisha is concerned, she appears to have accepted her father's estate and she has asserted an interest in her father's paintings, so I am satisfied that there is a properly arguable case against her. That is reflected in her consent to the injunction continuing which assumes that there is in fact a good arguable case against her. The position in respect of Mona is less clear. I have already found firmly that there is no good arguable case against her and on the materials presently before me, it is difficult to see how the Bank will make good its case against her. But given that further evidence might emerge to change the position and given that for the purposes of *Bord Na* the Bank needs strictly only to find a real prospect of success against one anchor Defendant, which has been achieved in respect of Manisha, I do not propose to say anything more about the claim against Mona.

116. Accordingly, I decline to find that there is no jurisdiction against Mihir by virtue of the decision in *Bord Na*.

117. Otherwise Ms Vora makes some general points to show that under the Recast Brussels Regulation, the Court has no jurisdiction even if Article 8 (1) itself is satisfied. However they are best left until I have dealt with the claim against Mihir as guarantor in his own right.

118. However, before turning to that claim, I should set out what the position would be if I was wrong in finding that this was not a "succession" case, and should have found that it was, in which case the Recast Brussels Regulation does not apply at all.

119. In that event, the question is whether or not the court has jurisdiction over the claim against Mihir as an heir at common law. The relevant gateway relied on by the claimant is at paragraph 3.1(3) of CPR PD 6B. The relevant part provides:

> "A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> > (a) there is between the Bank and the defendant a real issue which it is reasonable for the court to try; and
> >
> > (b) the Bank wishes to serve the claim form on another person who is a necessary or proper party to that claim."

120. Ms Vora's objection here is to say that Mihir is not a necessary or proper party to the litigation against his sisters in England. I disagree. I am satisfied that Mihir is a proper party to the English litigation against his sisters. I have in mind the summary of the law on this question provided in *AK Investments CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC7 by Lord Collins from [74] (where "D1" refers to the anchor defendant and "D2" to the defendant over whom jurisdiction is claimed as a result):

> "76. First, the mere fact that D1 is sued only for the purpose of bringing in D2 is not fatal to the application for permission to serve D2 out of the jurisdiction: The Brabo [1949] AC 326, 338-9, per Lord Porter; Derby & Co Ltd v Larsson [1976] 1 WLR 202, 203, per Viscount Dilhorne…
>
> 80. Second, the action is not properly brought against D1 if it is bound to fail: The Brabo [1949] AC 326, 338-9, per Lord Porter…
>
> 87. Third, the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": .. Clarke LJ

also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at [46], [49] ."

121. Applying these principles to this case:

(1) As I have found above, I do not consider that Mona and Manisha are sued only for the purpose of establishing jurisdiction against Mihir.

(2) The action against Manisha at least is not bound to fail, for the reasons I have explained above.

(3) Applying the cited test in *Massey v Heynes & Co* (1888) 21 QBD 330, the claim against Mona and Manisha as heirs is identical to that against Mihir as an heir and will indeed "involve one investigation".

122. In my judgment, therefore, if the Regulation did not apply, Mihir is a proper party to the claim against Mona and Manisha and the court does have jurisdiction over the claim against him as an heir.

123. If this claim can only be made against Mihir under the common law gateway then the Bank must additionally satisfy the Court under CPR 6.37(3) that England and Wales is the proper place in which to bring the claim. As is well-known the Claimant has the burden of showing that England is clearly the more appropriate forum.

124. Ms Vora makes four principal points. First, she says that the relevant transaction took place in Belgium, the monies were payable in Belgium, loss was suffered in Belgium, the primary witnesses are in Belgium and Belgian law applies. On that basis, she says, the English court should exercise its discretion to refuse jurisdiction.

125. Second, she says that the parties have chosen Belgian law to govern both the loan agreement and the personal guarantee. She submits that, following *VTB v Nutritek* [2013] UKSC 5, this persuasively favours Belgium as the jurisdiction in which the Bank should really bring its claims.

126. Third, she argues that by including non-exclusive jurisdiction clauses in the loan and the guarantee, the Bank has accepted the risk of parallel proceedings and cannot argue that the claim against Mihir must be brought in England to avoid the risk of irreconcilable judgments.

127. Finally, Ms Vora says that England was not a foreseeable jurisdiction when the personal guarantee was signed given that Mona was then resident in Hong Kong and Manisha was spending time in Belgium and the UK. She also submits that it is relevant that none of the children could have reasonably foreseen that they might become liable as heirs under the guarantee.

128. In my judgment, England is clearly the more appropriate forum for the claim against Mihir as heir. As I have set out above, the claim is in substance the same as that against his sisters who are domiciled in England and the claims against all of them are essentially the same. On Ms Vora's points, whilst I accept that the parties' choice of law is a factor to consider, both the loan agreement and the personal guarantee also include non-exclusive jurisdiction clauses allowing the Bank to commence proceedings elsewhere. The argument that the Bank has accepted the risk of parallel proceedings and cannot therefore use that as a basis for bringing proceedings in England is all very well, but the point cuts both ways. The non-exclusive jurisdiction clause expressly allows the Bank to bring proceedings wherever it

choses. Even if Ms Vora is correct that English proceedings were not foreseeable to the parties at the time the guarantee was entered into (which, given the express term in the guarantee that the Bank could sue wherever it wished, I doubt), that would not outweigh the other factors. That the children might not have foreseen that they would become liable for their father's debts also does not seem to me to have any relevance to the question of jurisdiction.

The Claim against Mihir as guarantor in his own right

129. Here, of course, there is no question of any succession. However, Ms Vora says that Article 8(1) is still not engaged because the claim against Mihir in this capacity is not sufficiently closely connected to the claim against him and his sisters as heirs. She argues that as against each party to the personal guarantee there is a different agreement and that claims against each party need not therefore be connected.

130. In my view, the claim against Mihir as a co-guarantor is sufficiently closely connected to the claim against his sisters. Whilst the claim against Mona at least may involve additional issues relating to Belgian inheritance law, the heirs are sued as parties to the same guarantee as Mihir in his capacity as co-guarantor. And insofar as there are issues as to the underlying liability to the Bank in respect of the principal debt, they are likely to be common.

131. Accordingly Article 8 (1) is made out in this respect as against Mihir.

132. I also do not consider it would be appropriate to nonetheless decline jurisdiction on the basis of the decision in ***Sibir***.

General further points

133. Ms Vora also made some general submissions regarding the Recast Brussels Regulation. First, she sought to suggest that the general rule in Article 4(1) should prevail over Article 8(1) given that it provides that a party "*shall*" be sued in the courts of their domicile Member State, whereas Article 8(1) provides that they "*may*" be sued elsewhere when the relevant conditions are satisfied. I reject this argument – if that were the case then Article 8(1) could never be engaged. The word "*may*" is used in the permissive sense because it is up to the Claimant to decide whether to found jurisdiction under Article 8 (1) instead of suing the Defendant in his domicile.

134. Second, Ms Vora argues that Jayam is a proper and necessary party to the proceedings and should have been sued as well. If it had been, the Recast Brussels Regulation cannot apply because (a) Jayam is currently in liquidation and (b) Article 1(2)(b) excludes proceedings relating to the winding-up of insolvent companies. I do not accept that Jayam should have been sued as well as the Defendants or that there can be no claim against them without Jayam. The Bank is entitled to seek to enforce the personal guarantees against the relevant parties rather than to pursue Jayam.

135. Third, Ms Vora relies on Recital 16 of the Recast Brussels Regulation which states as follows:

> "In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."

136. Ms Vora says that this amounts to a requirement that the parties must have reasonably foreseen England as a forum in order for there to be jurisdiction here, and Mihir could not have reasonably foreseen this. I do not accept that submission. Recital 16 is exactly that – a recital. Whilst it helps inform one's interpretation of the various Articles in the Recast Brussels Regulation, it is not of itself a requirement that must be satisfied in order for the Regulation to apply. Article 8(1) includes no such requirement. There is no basis in law at all for Ms Vora's submission here.

Conclusions on Jurisdiction

137. Accordingly, for all the above reasons I am quite satisfied that there is a good arguable case in this jurisdiction against Mihir both as co-guarantor and also as heir.

Risk of dissipation

138. This issue is examined in detail in relation to Mona above and I have set out the relevant law in that section of this judgment.

139. Ms Vora submits that there is no real risk of dissipation because:

(1) the Bank has proper security for the loan in the hands of Jayam's liquidator; and

(2) Mihir's only valuable asset is an interest in Malabar House in respect of which there is no risk of dissipation as it is the subject of ongoing proceedings which will take several years to resolve.

140. In relation to security, Ms Vora points to evidence of US$48.7m of receivables listed in Jayam's accounts certified on 18 December 2015 by Jayam's accountants that have been pledged to the Bank. She also relies on a number of invoices showing monies payable to Jayam that have been pledged to the Bank. Her submission is that these receivables are in the custody of the liquidator and there is therefore no risk of them being dissipated. The Bank, Ms Vora submits, is perfectly able to enforce against the pledged receivables to recover the outstanding sums, hence the continuation of the freezing order is unjustified.

141. The Bank's evidence is that it has tried to enforce the pledges but that the relevant counter-parties have not paid up. It also accuses Mihir of interfering by telling the counter-parties not to pay. Mr Brindle argues that simply pointing to a pledge of another entity's assets does not detract from Mihir's liability under the guarantee.

142. I accept the principle that the Bank is perfectly entitled to go after Mihir as a guarantor and is not obliged to pursue Jayam as original party to the loan. I do not accept Mr Brindle's suggestion that this goes as far as meaning that the availability of assets in the original debtor cannot be a relevant factor when determining whether to grant a freezing order against a guarantor. However, I do not accept Ms Vora's argument on the facts of this case. The status of these receivables, in particular why they are still receivable as opposed to in hand, is very unclear. Ms Vora tells me that they relate to assets of Jayam which were sold but in relation to which Jayam has not received payment. The only explanation she could offer was that the payees might not want to pay because the company is in the hands of the liquidators. That is not, in my view, a satisfactory explanation. There is nothing before me which contradicts the Bank's evidence that its attempts to enforce against the receivables have been unsuccessful, possibly as a result of the actions of Mihir. This is not a case where the Bank plainly has ready access to sufficient funds from another party to repay the debt. The position here is

much less clear than that and I therefore do not consider that this point undermines the Bank's position that there is a real risk of Mihir dissipating his assets.

143. Regarding Malabar House, Ms Vora says that the value of that asset is more than sufficient to discharge the debt to the Bank. She says the dispute in relation to the property will take a number of years to resolve and, therefore, there is no risk of Mihir's interest being dissipated pending the resolution of this dispute. I have no evidence, however, of the value of Mihir's interest in the property and am conscious that that is liable to change depending on the outcome of the Indian litigation. The fact that the litigation will be so protracted also calls into question whether the interest could even be used to satisfy a judgment in this litigation against Mihir. In my view, therefore, the status of Mihir's interest in Malabar House is not enough to outweigh the factors which do suggest that he represents a risk of dissipation, to which I now turn.

144. A factor which weighs heavily in favour of continuing the freezing order, in my judgment, is that in May 2016 Mihir was found guilty of forgery and money laundering by a Belgian Court and received an 18-month suspended prison sentence and fine. In his evidence, Mihir says that this conviction followed a group trial of over 100 diamond traders relating to fraudulent exports. He points to the fact that he was not banned from being a director of a company to argue that he was not seriously involved and says that his conviction was political, having come a short while after the Panama Papers scandal. He did not appeal the decision, he says, because he was emotionally fatigued from various business and banking disputes that he was involved in at the time.

145. I am not persuaded by this explanation that Mihir does not represent a dissipation risk. The conviction relates to dishonesty, is recent and is from a reputable jurisdiction. There is nothing in his complaint that the conviction was political. That he was not disqualified as a director does not undermine the fact that he was nonetheless convicted. Coupled with the available evidence that he made misleading statements about his father's assets to the Belgian notary, and the evidence from the Bank that he has attempted to encourage other parties not to make payments under the various pledges to the Bank (though denied by Mihir – see paragraphs 112 and 113 of his third Affidavit), I am satisfied that there is a real risk of him dissipating his assets so as to frustrate a judgment if the freezing order were to be discharged. There is of course a delay point, as advanced by Mona, but in the case of Mihir, this is clearly outweighed by all the other points against him on risk of dissipation.

146. The Bank therefore succeeds on the second limb of the test. I now must consider whether or not there are any other reasons not to continue the freezing order.

Other reasons not to continue the freezing order

147. Ms Vora argues that there are four other reasons not to continue the freezing order, which I shall deal with in turn.

148. First, Ms Vora submits that the Bank failed to disclose material information at the original ex parte hearing. She says that the court was not told at the 9 March 2017 hearing about the pledges owed to the Bank and was misled as to the history of the without prejudice negotiations between the parties. In her submission, those breaches of the Bank's duty of full and frank disclosure were so severe that the freezing order should be discharged. However, Mr Brindle correctly points out that the pledges were included in the evidence before me on 9 March 2017 and that the Bank adduced evidence in relation to them. As to the without prejudice negotiations, Ms Vora's point mirrors that of Mr Caplan's for Mona and I have dealt with that above.

149. Second, Ms Vora says that the Bank has misused the freezing order granted by forwarding it to a number of parties unnecessarily, including a rough diamond broker who Mihir says he has not had any business dealings with for at least three years, a company with whom Mihir says he has only dealt once seven years ago, members of Mihir's extended family and his bookkeeper, and one of the four diamond exchanges in Antwerp. Mr Brindle does not deny that the Bank has served the freezing order on others, but in his submission that was appropriately limited to business associates the Bank had reason to believe had recent dealings with Mihir and the parties with an interest in Malabar House who were respondents to the original Indian injunction proceedings. I must say that the Bank appears to have published the freezing order more widely than one would usually expect in these cases and I doubt that it was necessary to serve the order quite as widely as the Bank appears to have done. However, I do not consider that the Bank's conduct is such as to amount to an abuse and it does not outweigh the factors in favour of granting a freezing order that I have set out above. Accordingly, I decline to discharge the freezing order on this basis.

150. Third, there is also a point on delay which I dealt with in paragraph 145 above.

151. Finally insofar as a separate *forum non conveniens* point is advanced generally, this has no separate application where the Recast Brussels Regulation applies and otherwise I have dealt with it in paragraphs 123 to 128 above.

Conclusion

152. In conclusion, the freezing order against Mihir shall continue but the order against Mona must be discharged.