IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 162 OF 2019 (RPJ)

BETWEEN

RAIFFEISEN INTERNATIONAL BANK AG
Plaintiff / Respondent / Applicant

AND

(1) SCULLY ROYALTY LTD
(a company incorporated in the Cayman Islands)
First Defendant

(2) LTC PHARMA (INT) LTD.
(a company incorporated in the Marshall Islands)
Second Defendant

(3) MERKANTI HOLDING P.L.C.
(formerly MFC Holding Ltd, a company incorporated in Malta)
Third Defendant / Applicant / Respondent

(4) 1178936 B.C. LTD.
(a company incorporated in British Columbia, Canada)
Fourth Defendant

(5) MFC 2017 II LTD.
(a company incorporated in the Cayman Islands)
Fifth Defendant

(6) 1128349 B.C. LTD.
(a company incorporated in British Columbia, Canada)
Sixth Defendant

(7) IEM SERVICES CO. LTD.
(a company incorporated in the Marhsall Islands)
Seventh Defendant

(8) LTCM ASSET PRIVATE LIMITED
(a company incorporated in the Marshall Islands)
Eighth Defendant

APPEARANCES: Tim Penny QC instructed by William Jones and Christopher Levers of Ogier for the Applicant

John Wardell QC instructed by Peter McMaster QC and Mehreen Siddiqui of Appleby for the Respondent

BEFORE: THE HON. RAJ PARKER

HEARD: 19 – 20 January 2021

Draft Reasons Circulated: 10 February 2021

Reasons Delivered: 12 March 2021

Headnote

Application to set aside permission to serve proceedings out of the jurisdiction - GCR Order 11 rule 1(1)(c) and Order 11 rule 4(1)(d) - serious issue to be tried - necessary or proper party - good arguable case-discretion - Fraudulent Dispositions Act (1996 revision) - application to series of transactions - unlawful means conspiracy - application to strike out evidence - Order 41 rule 6-discretion.

Introduction

1. These proceedings were issued by RBI against D1-D4 in August 2019. It seeks relief, amongst other things, that dispositions of property from D2 to the other of the defendants, D1 and D3-D7, be set aside. It also seeks consequential orders so that this property is made available to satisfy RBI's claims.

2. These claims arise against D2 under an Austrian law governed guarantee dated 2 January 2017 under which D2 guaranteed liabilities in respect of underlying borrowing, which, together with interest and other charges, amounts to over EUR 43 million.

3. An *ex parte* hearing took place on 27 September 2019 following which orders were made freezing assets of D1 worldwide and permission was granted to serve the proceedings out of the jurisdiction against D2 -D4.

4. Following a three-day return date hearing in January 2020, a number of other applications were also determined including: the grant of a worldwide freezing order against D5, the dismissal of an application by D4 to set aside service, the grant of an application by RBI to amend and join D5 and D6-D8 and to serve out (the re-amended) claim against D2, D3 and D6-D8. The court also continued the worldwide freezing order against D1. D1-D7 together are '**the MFC defendants**'.

5. Holdings Malta (D3) and 112BC (D6) (together '**the defendants'**) apply to set aside permission to serve them out of the jurisdiction in Malta and Canada respectively. D6 is a company in Canada which is only party to transfers that took place in Canada concerning the Scully Mine. D3 is a holding company in Malta and an indirect transferee of the majority of the shares in MFC A and D. Permission to serve the re-amended writ on the defendants out of the jurisdiction was granted by an order dated 1 May 2020 following the three-day hearing in January 2020.

6. At the hearing in January 2020, D1 and D5 (the parent companies of the defendants) as well as D4 were represented and contested numerous issues. The resolution of those issues and reasons can be found in the judgment of 7 July 2020 (Parker J). All the represented MFC defendants have common legal advisers. They also have or had common directors in Mr Morrow and/or Mr Smith.

7. RBI seeks to strike out substantial parts of the evidence that D3 and D6 have filed as part of their applications to set aside permission.

8. This judgment will deal with the strike out application first.

Strike out application

9. Mr Penny QC for RBI argues that the defendants' set aside challenges are circumscribed by reason of concessions made in correspondence. Those concessions are that grounds (a) and (e) of each of the applications are not pursued at this stage, although the right to pursue them has been reserved to any appeal.

10. The result of that is that no argument is put forward by the defendants in relation to ground (a) whether there is a serious issue to be tried as between RBI and each of the anchor defendants, D1 and D5, both under the Fraudulent Dispositions Act (1996 revision) (**FDA**) and in the tort of unlawful means conspiracy, and ground (e) that the Cayman Court is the appropriate forum for the resolution of the disputes between RBI and all of the defendants, including D3 and D6.

11. It follows that the defendants' applications are now limited to three grounds (b) – (d), namely whether there is a serious issue to be tried as between RBI and D3/D6, whether D3/D6 are necessary or proper parties to the claim, and whether the joinder of D3/D6 would confer a real advantage to RBI.

12. Mr Penny QC submits that the evidence and written arguments adduced by the defendants are an attempt to reopen and re-argue issues decided against D1, D2, D4 and D5 following the January 2020 hearing. The evidence sought to be adduced could and should have been adduced at that stage. The evidence is part of an abusive collateral attack on the judgment handed down on 7 July 2020, which is under appeal to the Court of Appeal to be heard in September 2021. By that appeal, D1 and D5 have appealed the respective worldwide freezing orders made against each of them.

13. The defendants, he submits, seek to avoid the rules for the reliance on fresh evidence by D1 and D5 on that appeal, as any appeal by D3 and/or D6 from these applications to set aside permission as are presently before me will be sought to be heard at the same time.

14. Moreover the evidence in question is irrelevant to the narrow scope of issues between RBI and D3/D6 particularly because of the concessions made.

15. Further he submits that the defendants, as a result of their strategy, seek to turn this hearing into an impermissible mini trial which seeks to attack the findings of the 7 July 2020 judgment at which the defendants' parent companies were represented and advanced substantial factual and expert evidence and argument.

16. Mr Penny QC submits that this is unfair and prejudicial to RBI particularly where there is an information asymmetry at this stage of the litigation. RBI does not have underlying documentary material which it contends is likely to shed light on the conspiracy it alleges and the intention to effect the transfers in order to put D2's assets beyond the reach of its creditors. He argues that the MFC defendants

have picked and chosen bits of evidence to reveal to suit their interests at various times. He goes so far as to allege evidence has been suppressed and documents altered.

17. Mr Wardell QC for the defendants vehemently denies these allegations on their behalf. He maintains that the allegations have no basis and that the defendants have simply relied on their rights as to giving disclosure at an appropriate time.

18. The court does not need to decide the questions of alteration of documents and deliberate suppression of evidence for the purposes of this application.

19. The 'offending material ' which RBI seeks to have struck out is said to be at:

    (a) *Morrow 9* §§5-65, 85-88, 94-105 and 111-116 and corresponding exhibits SSM-9 pp 1-25, 28-37, 39-41 and 45-49; and

    (b) *Morrow 11* §§14-57, 60-61, and 66-68 and corresponding exhibits SSM-11 pp 1-2.

20. Mr Penny QC made a number of submissions by reference to these passages on topics which can be grouped as: irrelevance, oppression/abuse of process/collateral attack, 'could and should have been made earlier', and collateral purpose.

21. Mr Wardell QC for the defendants argues that the application to strike out the evidence and related material is misconceived and should be dismissed. He characterised the agreement not to run grounds (a) and (e) at first instance, whilst preserving the right to run them on appeal, as a pragmatic way of saving court time. It was not a concession.

22. He submitted D3 and D6 must be entitled to deploy such material as they deem relevant in support of their contention that the claims made do not raise a serious question to be tried against them. They were not privies to the applications in respect of the hearing in January 2020 and the matter proceeded against them *ex parte*. He argued that the material was relevant to whether there was a serious issue to be tried against D3 and D6 and even if it was not, the power to exclude it should not be exercised by the court without compelling reasons. No such reasons were made out by RBI.

Legal principles

23. RBI's application is based upon GCR O.41, r.6 which provides:

> *"The court may order to be struck out of any affidavit any matter which is scandalous,* ***irrelevant or otherwise oppressive****".* (my emphasis)

24. The court has a discretion whether or not to strike out evidentiary material pursuant to this rule. The power to do so should only be used sparingly[1].

25. The question for the court is whether it should do so on the grounds of relevance or oppression.

26. Unfair, oppressive or abusive tactics for a collateral and illegitimate purpose can be controlled by the court. For example in circumstances where a point could and should have reasonably been taken but was not taken for a tactical or other reason, and the opposing party has therefore been put to time trouble and expense in having to deal with it unreasonably and perhaps twice and where the court's process has been subverted. Or where matters are sought to be relitigated without justification or pursuant to an improper procedure.

27. It is an exceptional jurisdiction whereby the court intervenes to control proceedings to protect its procedures from abuse.[2] The court also would have in mind the Overriding Objective to ensure parties conduct litigation reasonably, expeditiously, fairly and efficiently in order to save time and costs so that the court's resources are not wasted.

28. In this case whilst the conduct of the defendants is criticised by RBI, it is the 'offending material' itself which is attacked as irrelevant and oppressive.

Decision

29. I have come to the view that RBI's application to strike out fails for the following reasons.

30. First, D3 and D6 are entitled to put forward all appropriate matters which they consider assist their application to set aside. To the extent that it might be said the January 2020 hearing involved them, it was treated as *ex parte* as far as they were concerned, and they were not privies to it. No principle of issue estoppel or *res judicata* applies to them.

31. Second, having reviewed the 'offending material' it is in my view not necessary to exercise the court's discretion to strike it out. To the extent that the court has determined, in its consideration of the applications to set aside service, that the evidentiary material is not relevant or only marginally relevant to the points advanced by D3 and D6 the court will have disregarded it, or given it appropriate lesser weight in the usual way.

32. The court accepts that the result of the agreement of the parties not to run grounds (a) and (e) whether properly described as a concession or not has saved the court

[1] *Alan Bates v Post Office [2018] EWHC 2698 and Wilkinson v West Coast [2005] EWHC (Ch) Mann J §§4-6*
[2] *Allsop v Banner Jones [2021] EWCA Civ 7*

time. It is essentially a matter for the parties to determine which points they wish to run and for them to then deal with any consequences which follow.

33. The court has been left in the position where it does not have to consider in detail or make a reasoned ruling on those two grounds by the agreement of the parties, as there has been no argument on them.

34. Third, the court does not view the material objected to, against that agreement, as a collateral attempt to attack the 7 July 2020 judgment and oppressive. The 7 July 2020 judgment made certain findings of fact it is true, but they are necessarily provisional and interlocutory at this stage of the proceedings, which is well before trial. D3 and D6 are not bound by them. It would not in my view be manifestly unfair to RBI if the same points were to some degree challenged, nor do such arguments bring the administration of justice into disrepute.[3]

35. On the other hand it would however in my view be unfair to D3 and D6 to strike out the 'offending material' in the circumstances, notwithstanding the consequences visited upon RBI.

36. Fourth, as a matter of discretion whilst Mr Penny QC's argument that the material objected to is pertinent to the case against D1, D2, D4 and D5 and could and should have been adduced by them at the January 2020 hearing does have considerable force, it does not result in this court exercising its discretion to strike it out.

37. Fifth, the court does not find that the material objected to is in and of itself irrelevant or oppressive. There is obviously, from the material objected to, going to be a competing narrative at trial which the defendants will argue is consistent with legitimate commercial dealings and honesty and which will need to be explored at some length and depth with all relevant evidence and the necessary testing of that evidence.

38. The important 'headline' issues remain whether D1, D5 and the other defendants were involved in a scheme to defeat any contingent liability of D2; whether D2 was removed from the MFC structure for legitimate commercial reasons; D2's solvency at the time of the transfers; and the rationale for the removal of the assets from D2 into the new MFC group (which I shall refer to as the 'Scully Group').

39. Whilst Mr Penny QC says that these evidential points could and should have been raised at the January 2020 hearing by the represented defendants at that hearing it would not in my view be just (despite the commonality of attorneys and directors) to visit any such failure on D3 and D6 who were not privies to the 7 July 2020 judgment (or the January 2020 hearing which was treated as *ex parte* against them) in relation to their set aside applications.

[3] *PWC v BTI [2021] EWCA Civ 9 at §86 per Flaux LJ*

40. If as Mr Penny QC effectively submits this is a ruse to get the material before the Court of Appeal in September,that matter, if it is raised, will be for the Court of Appeal to determine.

41. The application by RBI to strike out the 'offending material' is dismissed.

The set aside application

Factual context – findings in the 7 July 2020 judgment

42. The court in the 7 July 2020 judgment made certain provisional findings which, although not binding on D3 /D6, nevertheless were made following a contested 3 day hearing in January 2020 against the anchor defendants D1 and D5, as well as D4. A summary of each of D1 to D8 and their alleged involvement is set out in the 7 July 2020 judgment[4] and will not be repeated here.

43. Although D1 and D5 can be said to be the key players in this case, D4 is important as the ultimate transferee of the majority of the mining interest.

44. D2 was the Canadian parent of the MFC group and the ultimate beneficial owner of all of the entities in the MFC Group as at 2 January 2017. It did not attend the January 2020 hearing and was not represented. It was this company which allegedly had its assets unlawfully divested from it and which is a party to the disputed guarantee with RBI.

45. A wealth of factual and expert material was examined and detailed argument was considered (both written and oral) before the court produced its judgment (of 7 July 2020).[5]

46. These provisional findings are relevant to record here as the background context in which these applications need to be assessed. Indeed Mr Wardell QC put his case on the basis that this application is not an attempt to reargue them or reopen the case against D1 and D5.

47. It is therefore important to assess when they were challenged in the course of argument, whether there is a good reason to depart from them in any respect as regards the case against D3 and D6.

48. Based upon the evidence before the court in January 2020, findings were made that the relevant transfers were made with the express purpose of asset stripping D2 so that it could avoid its obligations to its creditors and were carried out without notice to RBI and at an undervalue.

49. In support of that purpose the court found there was a plausible evidential basis for RBI's allegations that the transactions were structured in a deliberately

[4] *7 July 2020 Judgment §§ 34-42*
[5] *7 July 2020 Judgment §3*

convoluted way, that the MFC defendants' conduct was evasive and showed a lack of candour following the Plan of Arrangement, and the true state of affairs and true financial position were obscured. There was also an arguable case that incomplete and misleading evidence had been given in some respects.[6]

50. Further relevant findings were that D1 and D5 could be treated as the alter egos of the MFC Group subsidiaries that received D2's assets.[7] They were found to be at the apex of the conspiracy.[8] They owned or controlled the other relevant MFC entities (D3, D4, D6 and D7).

51. It is RBI's case that these entities were used to further the aim of stripping and distancing D2's assets, with Mr Morrow and Mr Smith, the only relevant Directors of all of the MFC entities, pulling the strings. Mr Morrow and Mr Smith signed all the relevant documents relating to the transactions involving D3 and D6.

52. The inferences drawn by the court as to their knowledge and the plan to remove assets from D2 may well in due course be ultimately attributed to D3 and D6 assuming they owe the relevant duties to the respective companies to impart information, or that the conspiracy is proven against them for the relevant transactions. For the time being the question is whether there is a real prospect that attribution of knowledge will be established.

Scully Mine

53. As regards the Scully Mine transfer, there was a good arguable case under the FDA and in the tort of conspiracy against D1 and D5, because D2 did not receive payment for the first transfer from D2 to D6.[9] The court held that there was no reason to limit the enquiry to the transfer by D2 to M Financial Corp pursuant to which C$41 million was paid as consideration and the court was entitled to look at all of the transfers and transactions as a whole. No consideration was paid to D2 nor any legitimate explanation given for the transactions.

54. There was a plausible case in the tort of unlawful means conspiracy[10] and a plausible evidential case that the transaction was at an undervalue. The motivation for the transfer was to defeat a claim against D2.[11] No explanation was given for the consideration for the transfer of shares in 117BC (defined below) from D6 to D4.[12]

[6] *7 July 2020 Judgment §§106(a), 106(g), 146, 161, 147-150, 151, and 184*
[7] *7 July 2020 Judgment § 173*
[8] *7 July 2020 Judgment § 168*
[9] *7 July 2020 Judgment §§83 and 89*
[10] *7 July 2020 Judgment §89*
[11] *7 July 2020 Judgment §§81-83.*
[12] *7 July 2020 Judgment §106 (h)*

55. The court also found that D1, D2, D4 and D6 were all involved such that there was a good arguable case against D4 as a party to the conspiracy[13] and a serious issue to be tried that D4 was the ultimate transferee of the mining interests[14].They were each transferees, either immediately or by successor in title, within the terms of the FDA.

56. There was a clear juridical advantage in having all the alleged conspirators, including D4, at the same trial.[15] The court was not prepared to take the view that D1 had sufficient realisable assets to meet the claim.[16]

57. The defendants outside the jurisdiction (D2, D3, D4, D6, D7, and D8) were necessary or proper parties to the claim against D1 since the claims involved one investigation which was bound by a common thread. It was unnecessary to show that D4 was a party to a transfer from D2.[17]

58. As regards the dividend, the court found that there was a plausible evidential basis that its purpose was to defeat creditors of D2 and that it was part of the unlawful scheme (it inherently being for no value).[18]

Merchant Bank

59. As regards the transfer of the shares of D3 (and therefore the Merchant Bank) from D2 to D1, RBI had established a good arguable case against D1 and D5 that the transfer was at an undervalue[19] and D2 at the time was insolvent, following the dividend.[20] It was a transaction caught by the FDA and one carried out as part of a conspiracy. [21]

60. Whilst it is accepted that these are all provisional findings, not binding on D3 and D6, this is an unpromising position from which Mr Wardell QC sought to argue that there was no improper motive and there was a valid commercial rationale for the relevant transactions in issue.

61. Mr Penny QC for RBI naturally emphasised the findings made as to the background factual context as regards the dividend transfer, the transfer of the Merchant Bank, D2 leaving the MFC group, the transfer of interest in the Scully Mine, and the subsequent transfers.

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[13] *7 July 2020 Judgment § 90*
[14] *7 July 2020 Judgment § 93.*
[15] *7 July 2020 Judgment §94.*
[16] *7 July 2020 Judgment § 95*
[17] *7 July 2020 Judgment §§161-166*
[18] *7 July 2020 Judgment §100*
[19] *7 July 2020 Judgment §104*
[20] *7 July 2020 Judgment §§59-63 and 103-105*
[21] *7 July 2020 Judgment §§59-63 and 103-105*

The law

Ground B -serious issue to be tried

62. RBI needs to show there is a serious issue to be tried, in the sense of a case which has a real prospect of success, in respect of each cause of action which has to be examined separately (the FDA claim and the claim in the tort of conspiracy), against each of D3 and D6.

63. A serious issue to be tried is a lower threshold test than that of a good arguable case.[22]

Ground C-necessary or proper party[23]

64. RBI needs to show that it has a good arguable case that D6 and D3 are necessary or proper parties to the claim brought by RBI against D1 and D5 as anchor defendants served in the jurisdiction.[24]

65. To satisfy the 'good arguable case' test RBI needs to establish a plausible evidential basis for its claim under this head.[25] The court needs to assess whether RBI has the better of the argument[26]. The assessment on the application to set aside is to be directed to the situation at the time permission was originally granted. [27]

66. Since D3 and D6 are not contending that D1 and D5 were not properly joined or that the Cayman Islands is not the proper place to bring these claims (whilst reserving the right to argue those points on appeal,) RBI needs to show that the claims against D3 and D6 have a real prospect of success and a good arguable case that they are necessary or proper parties to the action.[28]

67. As is well known this gateway allows a party to be joined despite the fact that there may be no territorial connection to the claim or other gateway available and so the court exercises caution in relation to its use.[29] It would be wrong to grant permission under this gateway as a matter of course merely because not to do so would mean that more than one set of proceedings would be required.[30]

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[22] *AK Investments v Kyrgyz [2012] 1 WLR 1804 (UKPC)*
[23] *GCR O.11,r1(1)(c)*
[24] *O.11r.1(1)(c) and O.11 r.4 (1) (d)*
[25] *Lakatamia § 38 and Kaefer §§73-80*
[26] *Four Seasons v Brownlie [2017] UKSC 80 § 7*
[27] *Satfinance (see below), Morgan J § 39*
[28] *Lungowe v Vedanta [2019] UKSC 20 per Lord Briggs*
[29] *Kyrgyz §73*
[30] *Dicey §11-161 and Satfinance v Athena [2020] EWHC 3527 (Ch)*

68. RBI needs to show that each of D6 and D3 are necessary *or* proper parties, but its case is that it has a good arguable case as to both defendants being necessary *and* proper parties.[31]

69. A way of approaching the test is to ask if D1, D5, D3 and D6 were all domiciled in Cayman, would D3 and D6 be proper parties to that case?[32] If there was one investigation with a common thread and an alleged overarching conspiracy, would they be proper parties?[33]

Ground D - joinder will confer a real additional advantage

70. This 'ground' arises from the submission made by Mr Wardell QC that even if RBI was successful in establishing that D3 and D6 were necessary or proper parties, as a matter of discretion the court should not permit service out, because in practice no advantage would be gained by RBI from their joinder. This follows from the proposition that if adding a defendant is not likely to achieve any potential advantage to a claimant, it would not ordinarily be a proper case for service out.[34] This is one of the factors which goes to the court's discretion.

D3 and D6 submissions

No Motive

71. Mr Wardell QC first argues that RBI had to prove that the intention behind the dividend, the Merchant Bank transfer and the dealings with the Scully Mine was to fraudulently remove assets from D2 in order to render them unavailable for the claims that D2 was expecting to have to meet under the disputed guarantee.

72. He submits therefore that RBI's case is premised on the allegation that D2 formed a fraudulent intention to divest itself of assets because it believed that it was at risk of having to pay as guarantor the liabilities of MFCC and its subsidiaries (namely the Austrian subgroup).

73. By reference to the evidence submitted since the January 2020 hearing, (Morrow 9, Dellemann 11 and Morrow 11) he argues that it is evident that in the second half of 2017 when the dividend was declared and the Merchant Bank and the Scully Mine were transferred away from D2, a relevant administrator of a creditor of MFCC (German Pellets), D2 and RBI[35] considered that MFCC (the company at the head of the Austrian subgroup) was solvent. This he submits is important because it goes to the likelihood that D2 would be called upon under the disputed guarantee and the intention underlying the restructuring.

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[31] *Condoco [2004-5] CILR 236 at §47*
[32] *Contadora [1999] CILR 194 (CICA), 202 and 206*
[33] *Kyrgyz § 87,Massey v Heynes (1888) 21 QBD 330 ,Dicey Morris and Collins on The Conflict of Laws (15th Edn 2012) at § 11-165, Ch Offshore [2015] EWHC 595 (Comm)*
[34] *Dicey §11-165*
[35] *See Dellemann 11 § 41*

74. MFCC's solvency he submits is highly relevant to the case RBI seeks to make out that D3 and D6 were knowing participants in a fraudulent scheme to remove assets from D2 for the purposes of defeating liabilities that it had under the disputed guarantee.

75. He submits that the court should conclude from the knowledge and belief as stated by the relevant parties, that MFCC was solvent at the time of the transfers, that it would pay its debts and there was no reason for D2 to be concerned as to its guarantee liability. There was no motive to deal with the assets in the way RBI alleges to defeat anticipated claims against D2.

Commercial rationale

76. The court remarked in its 7 July 2020 judgment upon the lack of a positive case put forward by the represented defendants which set out the purpose and legitimate commercial explanation for the relevant transfers following the January 2020 hearing.[36]

77. Mr Wardell QC said there is now a commercial rationale put forward for the dealings impugned by RBI which can be found in Morrow 9 and 11. There were sound commercial reasons to remove D2 from the Scully Group structure as it had become redundant as a result of a tax efficient share swap.[37] He relies on the evidence given by Mr Morrow[38] to the effect that D2 needed to be removed from the Scully Group, whilst the assets needed to be kept within the group. It followed that those assets had to be removed from D2 and that RBI could reasonably have expected this.

D6-no serious issue to be tried

FDA

78. In relation to the FDA claim against D6, Mr Wardell QC argued that RBI had to prove that the relevant transfer from D2 to D6 was at an undervalue and that the transfer was made with an intent to defraud.

79. Mr Wardell QC argued that on 26 October 2017, D6 received from D2 a transfer of the Scully Mine interest (which at that time was an interest under a sublease of the Scully Mine) for sound commercial and tax reasons as explained by Mr Morrow[39]. D6 received the entire beneficial interest in the Scully Mine leaving D2 as a trustee for D6's beneficial interest.

[36] 7 July 2020 Judgment § 76
[37] Morrow 11 §52
[38] Morrow 9 §50 and 54-57 and Morrow 11 §§ 52-56
[39] Morrow 9 §69

80. This was done by way of a hive down by which, in return for the interest in the Scully Mine, D2 received all of the shares in D6. As D6 owned the Scully Mine, what D2 received when it received the shares was an asset that exactly matched the value of the Scully Mine. The shares were issued for consideration and the undervalue case is therefore not sustainable.

81. On the intent to defraud case, he relies on the 'no motive' argument since RBI is unable to point to an anticipated liability of D2 under the disputed guarantee. Further after the transfer, D2 remained the legal owner of the mine and the 100% shareholder of the beneficial owner of the Scully Mine, D6.

82. He argues that hiving down the sublease cannot have had any impact on the availability of the mine interest for the purposes of the disputed guarantee. D2 was the trustee of D6's beneficial interest which was only brought to an end in March 2018 and which had no impact on the availability of the asset for D2's creditors.

83. From that factual scenario he argues that the FDA could not apply to the hive down as the transaction had no detrimental impact on creditors at that stage. That, according to Mr Wardell QC, should be the end of the matter.

84. Mr Wardell QC accepted that in economic terms the asset had remained with D2 only until D2 sold shares in D6 to M Financial Corp, which happened on the same day as the hive down,for C$41m, and that 'could in theory' engage the FDA.

85. He went on to argue that there was no substantial factual basis that the price for the share sale was at an undervalue or that the onward sale did not involve payment of fair value for the asset. It was wrong, Mr Wardell QC suggested, that the onward sale did not involve payment of C$41m, as proof of payment is exhibited to Mr Lawler's reports. He relied upon Mr Lawler's expert evidence[40] to show that there was no factual basis that the agreed sale price for the shares was at an undervalue. In 2017 it is clear from Mr Lawler's evidence that C$30m represented fair value.

86. He also accepted that D2 did not receive the money because it was paid directly to D5. This was done at the direction of D2's then parent D8, because it had been agreed when D2 was sold to D8 that the sale was not to include the value in the Scully Mine.

87. He rejects RBI's contention that this is a dishonest transfer, but he argues that RBI's real complaint about this, is that it results in an inappropriate benefit to D5. This complaint only affects D5 and arguably D8, and does not involve any suggestion of fraud or a sale at an undervalue on the part of D6.

88. He submits that it would be an error of law to treat any further transactions affecting the mine interest as giving rise to FDA claims against D6 because no further dealings could impact upon the availability to D2's creditors at the time of

[40] Lawler 1 §§ 83 and 167

D6's involvement, because the asset had already left D2 and D6 had no further involvement.

89. Moreover as a matter of law Mr Wardell QC argued that the FDA did not apply to subsequent transactions. I deal with this legal submission in some detail below.

90. In addition, Mr Morrow's evidence was that until Tacora made an announcement in November 2018 that it would restart mining operations at the mine site, it was not known whether or not the mine would reopen, especially as early attempts to raise money to do so had proved abortive. He referred to the fact that the former lessor under the sublease became the subject of insolvency proceedings in the course of which the interest as lessor under the sublease was transferred to Tacora in 2017. D2 as the legal owner of the lease objected to the transfer and made a claim for unpaid royalties owed by the transferor. As part of the process by which Tacora acquired the sublease this claim was settled. Monies that had been paid into court were paid out under the settlement agreement described by Mr Morrow.[41] Mr Wardell QC submitted that there was nothing sinister in this arrangement or any plausible basis for suggesting any dishonesty in either the settlement or the amendment and restatement. The trust was then brought to an end in March 2018 and the legal interest vested in D6. It had no impact on the availability of the asset for D2's creditors and made no change to the owner of the interest.

91. On 4 October 2018 D6 assigned its rights to 99% of the royalties under the sublease (C$29,700,000 based on a value of C$30m). By this time the mine had been under the ownership of the group headed by D1 for a year. The assignee of the royalties was a wholly-owned subsidiary of D6 (117 BC) which was also owned ultimately by D1. Again this had no impact on D2's ability to pay creditors. It did not involve the asset leaving the Scully Group.

92. As a result even though it is unnecessary to consider whether the C$30m was the fair value on which to base the royalty sale (as the asset stayed in the Scully Group), the evidence is that the Tacora announcement that impacted on value, i.e. that the mine would reopen in November 2018, which does not support a case that the assignment on 4 October 2018 was at an undervalue.

93. The wholly-owned subsidiary (117BC) was subsequently wound up and its assets transferred to its parent, D4, in December 2018. Likewise D4 being an MFC group company did not involve the asset leaving the group and impacting on D2's ability to satisfy any guarantee liability. The net result was that D4 is the entire owner of the mine save for 1% of the royalties which remain with D6. Since D5 owns D4 and D6 it controls the entire economic interest in the mine.

94. Mr Wardell QC submits that there was no plausible evidence that the 2017 and 2018 transactions were at an undervalue or made with an intention to defraud D2's creditors. The permission to serve D6 out of the jurisdiction should be set aside as there is no arguable case against it under the FDA.

[41] Morrow 9 §76

D6 -unlawful means conspiracy

95. Mr Wardell QC argues that to show a serious issue to be tried under this head it is not sufficient to allege merely an association between D1 and D6. It is necessary to advance a substantial factual basis for the allegation that D6 combined with D1 and others or agreed with D1 and others to use unlawful means. In view of the submissions on the FDA claims which showed that there was no substantial factual basis against D6 in respect of the transactions it was involved with, it followed that there was no substantial factual basis for the conspiracy claim against D6.

96. The first transaction involving the mine with which D6 was involved was the transfer of the beneficial interest to D6 in exchange for shares. That did not involve a fraudulent disposition because it was for full value and did not involve D2 'losing the mine'.

97. The mine did leave D2 when the shares were sold but this was not a transaction in which D6 was involved. Subsequent dealings by D6 with its interest in the Scully Mine had no impact on D2 because it had already divested itself of its interest, as the result of a transaction that D6 was not involved with.

98. There is no plausible evidence to conclude that D6 combined or agreed with anybody to bring about the event that D8 caused to occur, namely that the C$41m in respect of the shares of D6 should be paid to D5, rather than D2.If RBI has a case arising out of those transactions it is against D5, not D6.

D6-Not a necessary or proper party/no real additional advantage

99. Since on Mr Wardell QC's case there is an available remedy against D5 in respect of the Scully Mine, it is not necessary or proper to join D6 even if, contrary to his case, there was a serious issue to be tried against D6 as a result of the FDA or in conspiracy.

100. There is a freezing order in place in respect of D5 and D6 is owned by D5, so it is not necessary to bring D6 into the action. It is not legitimate for RBI to join D6 for the purposes of applying pressure on D1 and D5.

101. This argument, Mr Wardell QC submits, applies to both the FDA claim and the conspiracy claim as remedies exist for any findings against D1 or D5 where they are able to pay damages in respect of RBI's case against them.

D3-no serious issue to be tried

FDA claim

102. D3, formerly known as MFC Holding Limited, has all but one of its shares held by D1. The remaining share being held by D5. D3 is the immediate parent of the Merchant Bank.

103. Mr Wardell QC relied upon the fact that it was always intended that a block of shares in D3 which was sold by D2 to D1 remained part of the Scully Group and the explanation given by Mr Morrow that it was necessary to remove D2 from the group. There was nothing sinister in the transfer of these shares away from D2.

104. For the purposes of this application, but not for any appeal, D3 was not proposing to revisit the issue as to whether it is reasonably arguable that the value attributed to the Merchant Bank for the purpose of the sale of the shares was a fair value.

105. He submitted that the obvious point is that a claim in respect of this transaction lies against D1 as the recipient of shares in D3 and not against D3. It cannot give rise to an FDA claim against D3 as it was not a party to the transaction, so there can be no serious issue to be tried against D3 in relation to the FDA. D3 did not receive any transfer of property from D2 so the relief sought to set aside or retransfer (or money in lieu) does not lie against it.

106. He relies on Dellemann 9[42] where he submits Mr Dellemann accepts that D3 was joined at most for the purpose of enforcement. It is not permissible he submitted to join an overseas defendant to a claim for enforcement purposes.

107. The argument that the transfers of shares in MFC A and MFC D to D3 in December 2018 were made at an undervalue to defeat obligations owed by D2 was likewise unsustainable as those shares had already left D2's possession in August 2017 when its indirect interest in the shares (which it held via its shareholding in M Financial Corp) were transferred to D1 by way of the dividend.

108. While there is a pleaded FDA case in relation to the dividend transfer in August 2017, that did not involve a transfer to D3. If there was a transfer that affected D2's ability to pay under the guarantee it was this transfer and not the subsequent transfer in December 2018, that is relevant for the purposes of the FDA.

109. With effect from August 2017 the shares in MFC A and MFC D were no longer available to D2. The subsequent transfers over a year later could have had no impact on D2's ability to pay any of its creditors because it no longer held those shares, which themselves remain within the Scully Group headed by D1 and D5.

110. When those shares were transferred in December 2018 to D3, more than a year after the dividend, they were used to securitise a bond issue in July 2019 as explained by Mr Morrow. That was not a further dissipation of the asset but represented a monetisation of it and the evidence before the court is that the money realised did not leave the group.[43]

111. RBI therefore cannot show that the transfers of the MFC A and MFC D's shares to D3 in December 2018 raise a serious issue to be tried on the FDA claim because it cannot show that it has a case with a realistic prospect of success either

[42] Dellemann 9 §26
[43] See Morrow 9 §91.

that they were at an undervalue or that they were made with a view to defeating D2's obligations.

D3-unlawful means conspiracy

112. Similarly, in respect of the conspiracy claim, RBI cannot show a case of conspiracy with a realistic prospect of success. It attempts to do so by reference to the relevant transfers of shares i.e. of D3's shares from D2 to D1 or shares in MFC A and MFC D to D3 but they provide no substantial factual basis for the conspiracy claim against D3.

113. As to the transfer of D3's shares, D3 was not a party to the transfer and therefore cannot be implicated in a conspiracy. As to the transfer of the MFC A and MFC D shares, those were not made either at an undervalue or with an intent to defeat D2's obligations. They were simply intragroup transfers in respect of which there is no plausible basis for a suggestion that they were in furtherance of the conspiracy to impair D2's ability to pay money that it might owe to RBI.

D3-Necessary or proper party

114. If RBI was to succeed in showing that the transfer of D3's shares from D2 to D1 was a fraudulent disposition, the consequence would be that the court would make orders against D1 and D2 setting aside the transfer and re-transferring the shares to D2. D3 would be no part of any such order.

115. On the conspiracy claim, D1 and D5 can use assets they own to pay RBI if found liable for conspiracy with a freezing order in place to preserve the position. It is not a legitimate reason to bring D3 into the case to add another pot against which RBI can enforce any judgment obtained.

Decision

The no motive argument

116. The court is not able to finally decide between the two competing narratives at this interim stage. It can only examine the evidence and argument and form provisional views.

117. The court does now have, albeit belatedly through the evidence put forward by D3 and D6, 'another side to the story', as Mr Wardell QC put it, which deals with the detailed negotiations, solvency, substantial payments made and further anticipated payments involving the indebtedness of the MFC group.

118. It is not however an account which at this stage undermines the case RBI made out that there was a concerted intent and scheme implemented to asset strip D2. If the MFC group properly thought that the guarantee would never be called upon at the time of the transfers, it went to extraordinary lengths to divest D2 of its assets

and move it out of the group, which is not explained away by the financial position of MFCC.

119. MFCC was one of the six underlying borrowers pursuant to the credit facility that is the subject of the disputed guarantee. If MFCC was indeed solvent it is not clear it would have satisfied the debt owed by D2 in full resulting in no need for a call on the disputed guarantee. There appears to be no requirement under the disputed guarantee that RBI has to call on MFCC or any of the other borrowers prior to making a call on D2.

120. Moreover, the court is not persuaded at this stage that MFCC was in fact solvent at the time, whatever Mr Dellemann or others may have been led to believe. There is no evidence before the court as to what the directors of MFCC believed to be its solvency position at the time or any strong independent evidence of solvency.

121. Indeed Mr Morrow himself has given evidence that the solvency or otherwise of MFCC turned on whether or not it would be found liable upon a substantial avoidance claim by the administrator of German Pellets, following the latter's insolvency.[44] He has also given evidence that in early 2017 D2 owed C$130m under the guarantees[45] including the disputed guarantee. RBI froze any further withdrawals by the borrowers (including MFCC) in the light of the risk that they might become insolvent because of the German Pellets administrator claims.[46]

122. At this stage whilst Mr Wardell QC's 'no motive' contention does provide 'another side to the story', it is one which has not been fully developed to disturb the court's conclusions.

123. The competing narrative provides another factor for the court to assess. It does not by itself lead the court to seriously doubt at this stage whether there was a sound inferential basis for a dishonest motive for the transfers of assets. The net effect of these transfers took assets away from D2, against the provisional factual matrix found by the court as set out above following the January 2020 hearing.

The commercial rationale argument

124. The case made by Mr Morrow, as argued by Mr Wardell QC, is that it was necessary for D2 to be redomiciled out of Canada in order to achieve tax efficiencies. The court also finds that this case has not been developed sufficiently to call into serious question the previous provisional findings.

125. No proper evidence of the relevant tax laws in the relevant jurisdictions[47] has been put forward in support of the rationale for D2's re-domicile and removal

[44] *See June and August 2017 letters at Morrow 9 SSM-9 pp 6 and 9 /49*
[45] *Morrow 11 § 28*
[46] *Dellemann 11 § 41*
[47] *Canada, the Cayman Islands and possibly the Marshall Islands where D2 was re-domiciled in July 2017*

from the group.[48] Indeed Mr Morrow has given earlier evidence that D2's re-domicile was not part of the Plan of Arrangement.[49]

126. The point that the need for D2 to re-domicile was obvious and could reasonably have been expected by RBI[50] was also made at the January 2020 hearing and was found to be not credible in view of the conduct of D1, D4 and D5 and the lengths undertaken to remove companies and assets from D2.[51] The court has found that RBI was not told of any re-domicile by D2 and believed wrongly that it had not been re-domiciled.[52]

127. To reiterate, D2 was the entity with the alleged guarantee liability to RBI which underpins this case and is RBI's stated purpose for bringing it. RBI has an arguable case that D2's assets are not available, having been stripped away on a complex and convoluted basis to other entities in the MFC group without notification following the re-domicile and removal of D2 from the MFC group, again without notification. This is not on the face of it consistent with openly and honestly informing creditors such as RBI of the true plan and dealing with any concerns as to contingent liabilities and security.

D6-serious issue to be tried

FDA claim

128. *Section 4 (1)* of the FDA[53] provides that:

a) *'**every disposition of property** made with **an intent to defraud and at an undervalue** shall be **voidable** at the instance of a creditor thereby prejudiced'.* (my emphasis)

129. *Section 2* of the *FDA* provides that:

a) *'**Disposition**'* is defined at *section 2* as having the same meaning as part VI of the Trusts Act 2020 which is drafted in wide terms (section 87). It includes every form of conveyance transfer, lease, mortgage, pledge or other transaction by which any legal or equitable interest in property is created, transferred or extinguished.

b) *'Intent to defraud* 'is defined at *section 2* of the Act as '*…an intention of a **transferor wilfully** to defeat an obligation owed to a creditor'.* (my emphasis)

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[48] *The Deloitte memo at SSM-9 pp 11-16 provides no support for the detailed legal context for or the particular decisions made by the MFC group*
[49] *Morrow 1 § 13*
[50] *Morrow 9 §50-53*
[51] *7 July 2020 Judgment§ 106(e)*
[52] *Dellemann 1 § 168-196*
[53] *Fraudulent Dispositions Act (1996 Revision)*

c) *'Transferor'* is defined in *section 2* as *'the person who, as owner or as the holder of a power in that behalf* ***directly or indirectly, makes a relevant disposition or causes it to be made'.*** (my emphasis)

d) *'Transferee'* is defined in *section 2* as *'the person to whom a* ***relevant disposition is made and shall include any successor in title'.*** (my emphasis)

130. *Section 5* deals with the saving of certain rights, in circumstances when the transferee has not acted in bad faith:

> "*In the event that any disposition* ***shall be set aside under this Act then-***
>
> *If the court is satisfied that the transferee* ***has not acted in bad faith-***(my emphasis)

131. The sub-section then goes on to provide the consequences of that finding: (i) the transferee shall have a first and paramount charge over the property of costs incurred by the transferee in defending the claim; and (ii) the relevant disposition shall be set aside subject to pre-existing rights claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

132. *Section 6* deals with the extent of avoidance of relevant dispositions, confining them to the extent necessary to satisfy the obligation to a creditor:

> "A disposition shall be set aside under this Act only **to the extent necessary to satisfy the obligation to a creditor at whose instance the disposition has been set aside** together with such costs as the court may allow". (my emphasis)

133. As to the proper application of the FDA Mr Wardell QC submits:

a) that one should only look at first transfer and that there is no statutory power under the FDA to set aside subsequent transactions. He submits that if the legislature had wanted to achieve an outcome that treated all subsequent transfers as having been avoided it would have used the word 'void' and not 'voidable' and it would also have dealt with remedies;

b) that Section 5 simply mitigates the common law consequences of a transaction having been avoided . It does not by a 'side wind' interfere with property rights of bona fide purchaser for value who would ordinarily obtain good title unless he had not acted in good faith;

c) that subsequent transfers to which D2 is not a party do not affect the position in terms of any detriment to D2's creditors. If the transfer of an asset out of D2 is made with an intention to defraud the creditors of D2 and is for less than full value then the claimant has its remedy under the FDA at that point under section 4 to void that particular transaction, not any further transactions;

d) that subsequent transfers to which D2 is not a party cannot impact on the question of whether section 4 applies to the earlier transaction and cannot give rise to further claims under the FDA. He also relies on section 6 for the proposition that a disposition shall be set aside only to the extent necessary to satisfy the obligations to a creditor, which he says is important when one considers whether D3 and D6 are necessary or proper parties to this litigation; and

e) that the fact that the hive down immediately preceded the sale of shares to D5 (instead of D2) should not be treated as the same disposition for the purposes of the FDA.The hive down was a separate transaction and there was nothing wrong with it and with consideration provided by an allotment of shares.

134. I find that that these submissions whilst skilfully advanced are not on analysis sound. My reasons for not accepting these submissions are as follows.

135. First, contrary to Mr Wardell QC's submissions, an arguable case has been established against D2, as the transferor, that the mine was transferred to D6 for no consideration.[54] D6 was the immediate transferee from D2. It does not have to be shown by RBI that there was intention to defraud by D6 under the FDA as transferee.

136. Second on a proper construction of the relevant sections of the FDA (2, 4 ,5 and 6) the avoidance of fraudulent dispositions and the saving of certain rights (see section 5) clearly contemplate more than one transaction, or else the *successor in title* phrase in section 2 and *predecessor transferee* phrase in section 5 (a) (ii) would not make sense.

137. The FDA also provides a remedy in terms by reference to a disposition being set aside under the Act (sections 4, 5 and 6[55]) and by the rights given to transferees to ask the court for relief if they can show they have not acted in bad faith (section 5).

138. The definition of '*disposition*' as a matter of construction includes a series of transactions that make up a single disposition when looked at as a whole. To construe the FDA in a narrow way and to 'salami slice' it, would also severely curtail the effect and scope of the Act so as to limit its application and would result in subsequent transfers in a related chain not being caught. I therefore reject Mr Wardell QC's argument that the question of whether any subsequent transfers should be set aside are a matter of general law, not the FDA.

139. Third, the court should not confine itself to any particular transfer or series of transfers at any particular point in time. The argument that it should do so had been rejected particularly in respect of D4 following the January 2020 hearing and

[54] 7 July 2020 *Judgment §§ 83 and 100, 103-4*
[55] *Johnson v Cook Bodden p 427, Skandinaviska [2020] 1111 UKPC*

there is no good reason to doubt that finding.[56] The court should not simply shut its eyes to subsequent transfers and what was really sought to be achieved (and was achieved) and assess the position only at the first transfer from D2 to D6.

140. The court should rather stand back and look at the overall and ultimate effect of the entirety of the transfers which deal with the various dispositions in the scheme. When one does that there are serious questions to be tried under the FDA against D6 as to the assets moving from D2, cash compensation being paid to D5, the assets now being held by D6 and D4, against a fact pattern of circumstances which give rise to inferences of intent to defraud, conspiracy and wrongdoing in order to move the relevant assets from D2.

141. There may have been regulatory and tax considerations which were in play in addition, but this factor does not of itself displace the court's view of the case with a real prospect of success made out by RBI of convoluted asset removal (and removal of D2 from the MFC group itself) through various intra group entities to defeat a potential guarantee claim against D2.

142. There is no plausible legitimate explanation, if the money and assets were to remain at the disposal of D2 , why it went round in distancing circles between the various entities in the MFC group, including 'shell companies' in different jurisdictions,[57] in such a convoluted and deliberate series of transactions. This is evident from the detail I set out below.

143. As to the evidence submitted by Mr Morrow (and previously by Mr Smith), I have carefully reviewed the evidence given[58] as to the consideration for value (by allotting and issuing shares in D6 to D2) in the hive down which transferred the beneficial interest in the mine from D2 to D6, and the declaration of trust by D2 in favour of D6, the payment of cash consideration of C$41m to D5 (not to D2), which was said by Mr Smith to discharge an obligation on the part of D8 to D5,[59] and was said to constitute good consideration to D2 for the shares in D6 .

144. The account given by Mr Morrow is different in that the payment of C$41m was a cash payment and not the discharge of an obligation. D2 was owned by D8 which had purchased it expressly on the basis that the value in the Scully Mine would remain with D5 which required D8 account to D5 for the cash, which it did by directing D2 to make the payment to D5.[60]

145. I have also reviewed the evidence concerning the agreements by which D6 granted a royalty right to 117BC in exchange for shares in 117BC and the circumstances relating to the transfer by D6 of its shares in 117BC to D4.

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[56] *7 July 2020 Judgment § 82-83*

[57] *D8 re-domiciled from the Marshall Islands to Liberia in January 2020, D5 re-domiciled from the Cayman Islands to the Marshall Islands in June 2020*

[58] *Smith 4,Morrow 9 §66-84 and Morrow 11 §58*

[59] *Smith 4 § 10*

[60] *Morrow 11 §58 (b) and Morrow 9 § 73*

146. Having done so, the findings the court arrived at from the January 2020 hearing remain in my view sound.[61] The court finds that there is a serious issue to be tried under the FDA against D6 that it received the mining interest in return for no consideration at the end of October 2017.

147. The court has, as a result of examining the account in Smith 4, formed the view that there was a serious issue to be tried with regard to D4 under the FDA following the January 2020 hearing. The evidence given by Mr Morrow in 9 and 11 does not advance the important questions relating to these transfers satisfactorily on behalf of D6.

148. Indeed, it seems to be Mr Morrow's evidence[62] that the dividing up of the interest in the Scully Mine into the leasehold interest (which D6 retains) and the royalty interest (which passed to 117BC and then to D4) in October 2018 was paid for by way of a cash payment from 117 BC to D6.

149. However Mr Smith[63] identified that the consideration was a share issue in 117BC in October 2017. The way in which D4 acquired the royalty interest from 117 BC was described as a distribution upon the winding up of 117 BC to its parent in December 2018, which by then was D4. The cost of the winding up of 117 BC seems to be the only consideration that was provided by D4.

150. There was a transfer from D6 to D4 of the shares in 117 BC (D6's wholly owned subsidiary) belatedly explained in Mr Morrow's 12th affidavit submitted on the eve of this hearing, which refers to a share purchase agreement between D6 and D4 whereby D4 purchased D6's shares in 117 BC so that 117 BC became a wholly-owned subsidiary of D4. The effect of this is that D6 becomes a holding company of D4.

151. D6's involvement in the transactions was extensive. It included being the transferee to whom D2 sold the interest in the Scully Mine in exchange for shares in D6, the beneficiary of the trust D2 declared over that interest in 2017, the recipient from D2 of the legal title to the interest in the Scully Mine in 2018 and the transactions which split the interest in the mine into the royalty interest (which had the largest value) and the leasehold interest which D6 still holds, also in 2018. The royalty interest found its way from D6 to 117BC to D4 in exchange for D6 receiving shares in 117BC. There is then a further transfer of D6's shareholdings in 117 BC to D4 which has only recently been explained.

152. Mr Wardell QC submits that if this restructuring was intended to defeat a claim under the disputed guarantee it has completely failed because the asset has ended up being owned by D5 which is in the litigation 'sights' of RBI. There has been no leakage of assets outside of the group and RBI is fully protected. It seems to me that misses the point.

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[61] *7 July 2020 Judgment §§ 65-67, 70-75 and 81-98*
[62] *Morrow 9 § 79*
[63] *Smith 4 § 14*

153. The sequence of complex and convoluted events which I have described had the effect of rendering D2 unable to satisfy its guarantee obligations to RBI. The series of transfers which on a provisional basis the court has found is unlawful under the FDA and in the tort of conspiracy, stripped D2 of its assets.

154. As to the intention behind the restructuring, it does not seem to me to matter that the assets remained in the MFC group or that RBI has a legal remedy against one or more of the other defendants.

155. On 'undervalue' Mr Wardell QC's arguments as to the Tacora settlement are not convincing in circumstances where, unless and until the settlement agreement is disclosed or given in evidence, the court is not in a position to properly assess the value of the mining interest at the end of October 2017 and as to whether it equates with the sum paid to D5.

D6-Unlawful means conspiracy

156. The facts under the FDA claim cover the same factual matrix as the conspiracy claim. The breaches of the guarantee by D2 in transferring the assets away in the circumstances that it did can properly be described as unlawful means.[64] There is no requirement of knowledge of the unlawfulness of the means employed for the tort of unlawful means conspiracy to be made out.[65]

157. There is a serious issue to be tried concerning D6's involvement as set out above with the other entities to conspire and combine with a common intention to bring that about. There is an inference to be drawn from D6's involvement in the scheme and its participation in it that it knew about its purpose through the common directors who pulled the various strings to bring it about, through the entities they controlled, including D6.

158. RBI does not need to show at this stage that D6 agreed with anybody that payment should be made to D5 or that it was involved from the outset in the scheme or had exactly the same involvement and specific aims as D1, D4 and D5.

159. RBI has shown that there is a serious issue to be tried that there was a combination and concerted action which D6 participated in, which was unlawful because it had a dishonest intention and purpose of deriving a benefit at RBI's expense, namely the putting of D2's assets outside the reach of RBI's guarantee claim against D2.[66]

160. I am satisfied there is a serious issue to be tried against D6 on the unlawful means conspiracy claim.

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[64] 7 July 2020 *Judgment §106(c)*

[65] *Racing Partnership [2020] EWCA Civ 1300 (CA) per Arnold LJ §139 and Phillips LJ agreeing at § 171, Lewison LJ dissenting*

[66] *Racing Partnership (CA) Arnold LJ § 104*

D6 -necessary or proper party to claims against D1 and D5

D6-no real advantage

161. I take these two grounds together as they overlap.

162. I do not accept Mr Wardell QC's submission that RBI can execute any judgment obtained against D1/D5 and so there is no real advantage to be gained by RBI joining D6. D6 is the immediate transferee of the Scully Mine asset, not D5.

163. I also reject Mr Wardell QC's contention that the court should look at the capability of the other defendants (D1,D4 and D5) to meet any claims made against them when considering the case against D6 under this gateway.

164. The outcomes of those claims and the ability of the relevant defendants to meet any ultimate judgment liability after trial cannot be predicted at this stage.

165. The court should not engage in an exercise as to whether a defendant would be likely to materially add to the capability (or 'pot') of meeting any future judgment, or indeed if any judgment would come from one 'pot'.

166. Exercising due caution under this gateway the court should look at the case against D6 and determine whether it is necessary or proper to have that case tried and to bring it into the same forum as the claims against D1 and D5.

167. In that regard the court has already held that D4 is a necessary and proper party to the case. Since D6 is engaged as a transferee in the same series of transactions it would be an unusual outcome to say the least, and there would have to be a reason specific to D6's case, to refuse permission.

168. Moreover there is no argument (it being reserved for a possible appeal) that the Cayman Islands are the most convenient forum to try the case against D1 and D5 to which D6 would be joined.

169. I have come to the view that there is no good reason specific to D6's case to refuse permission, notwithstanding Mr Wardell QC's submission that this another part of the pressure tactic of RBI in this case. There is a serious issue to be tried against D6 under the FDA and in conspiracy.

170. In a conspiracy claim there is an advantage in having all the alleged conspirators in one forum both to serve the interests of justice and for reasons of efficiency. The court will be examining a complex chain of transactions involving parties which it is alleged were orchestrated by two common conductors, Mr Morrow and Mr Smith, who there is a good arguable case for holding were the directing minds of D6 (and D3) as well for these purposes.

171. RBI has established a plausible evidential basis and has the better of the argument as to the joinder of D6 as a necessary or proper party to this claim.

D3 -Serious issue to be tried

172. Mr Penny QC made it clear that the Merchant Bank transfers have never formed part of RBI's case against D3. D3 was not a party to the relevant transfers between D1 and D2 and RBI does not seek to justify the joinder of D3 to assist in enforcing any judgment obtained against D1 in relation to those transfers .

D3-FDA claim

173. There is a serious issue to be tried against D3 because D3 is a successor in title transferee to the shares that were transferred under the dividend. The court has held in the 7 July 2020 judgment that the dividend was unlawful and at an undervalue and the subject of an FDA and conspiracy claim.

174. The majority of the shares in MFC A and MFC D were transferred to D3, which has since charged them as security to third parties in a bond issue.

175. There is a plausible evidential case which gives rise to a serious issue to be tried that the transfer was unlawful. The dividend on 21 August 2017 provided that 100% of the shares in those entities were transferred indirectly from D2 to D5 by way of the *in specie* dividend and transfer of the shares in M Financial Corp from D2 to D5, for no apparent consideration. At some point thereafter at least 85% of those shares were held by D7 and it then transferred that 85% shareholding to D3 on 27 December 2018.[67]

176. On dishonesty, the FDA does not require RBI to establish an intent to defraud against D3, only D2. D3 is a successor in title to D2 and D7 in respect of the transfer of shares in MFC A and MFC D which were transferred away from D2 by way of the dividend.

177. On undervalue I reject Mr Wardell QC's contention that the FDA requires that RBI needs to show an undervalue at each stage of the transfers from D7 and therefore cannot succeed against D3. On a proper construction of the FDA it is only the first immediate transfer that needs to be shown to be at an undervalue with the original transferor having the intent to defraud. Thereafter a claim can be brought against any successor in title subject to the protections in play at Section 5.

178. In this case the immediate transfer is the dividend and there is a serious issue to be tried that it was not for value. There is no evidence before the court as to what consideration if any was provided as to the transfer from D7 to D3. In my judgment there is a serious issue to be tried that the transfer by D7 to D3 was at an undervalue.

[67] *See 7 July 2020 Judgment §§ 38 and 41. Mr Morrow does not address these facts in Morrow 8, 9 or 11*

D3-Conspiracy claim

179. Mr Wardell QC submits that a party coming late to a conspiracy cannot be liable for losses that pre dated its involvement[68] or losses incurred after it left. It follows from this, he contends, that any claim that a particular defendant joined a conspiracy after the relevant asset left D2 cannot succeed. He submits that on the facts the assets had left D2 well before D3 was alleged to have been part of the conspiracy in 2018.

180. I do not accept this argument. There is a plausible evidential basis to give rise to a serious issue to be tried that D3 joined the conspiracy when it acquired the relevant shares. The conspiracy continued beyond the immediate transfers of shares in August to October 2017 and the transaction in December 2018 demonstrates that there is a serious issue to be tried that those earlier transfers were made for a purpose of putting the assets further beyond the reach of D2's creditors. It was a continuing process and it will be for assessment at trial as to what damage was caused and when.

D3-necessary or proper party to RBI's claims against D1/D5

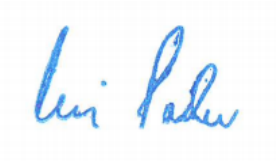
181. For the same reasoning above I reject Mr Wardell QC's argument that the court should look at the potential of RBI succeeding on a claim against D1 which means that a claim against D3 is unnecessary. It is clear that D3 is both a necessary and a proper party to the claim and there is serious issue to be tried concerning its involvement in the assets transferred to it. There is a good arguable case ,or plausible evidential basis as to the joinder of D3 and that it confers a real additional advantage to RBI.

Conclusion

182. RBI's strikeout application in relation to the 'offending material' identified is dismissed.

183. D3 and D6's applications to set aside permission to serve them out of the jurisdiction are dismissed.

184. I will deal with costs arising, if they cannot be agreed, by way of written submission.



HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

[68] *Kuwait Oil Tankers [2000] 2 All ER (Comm) 271 (EWCA)§ 106*