IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 54

Civil Appeal No 21 of 2020 (Summons No 21 of 2020)

Between

JTrust Asia Pte Ltd

… *Appellant*

And

(1) Group Lease Holdings Pte Ltd
(2) Mitsuji Konoshita
(3) Cougar Pacific Pte Ltd
(4) Aref Holdings Limited
(5) Adalene Limited
(6) Bellaven Limited
(7) Baguera Limited
(8) Yoichi Kuga

… *Respondents*

JUDGMENT

[Tort] — [Misrepresentation] — [Fraud and deceit]
[Tort] — [Conspiracy]
[Civil Procedure] — [Mareva injunctions]

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JTrust Asia Pte Ltd
v
Group Lease Holdings Pte Ltd and others

[2020] SGCA 54

Court of Appeal — Civil Appeal No 21 of 2020 (Summons No 21 of 2020)
Steven Chong JA and Quentin Loh J
21 May 2020

1 June 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 The law is clear that an applicant for a Mareva injunction would need to satisfy the court that it has a good arguable case and that there is a real risk of dissipation of the defendant's assets to defeat any judgment which might be made in the applicant's favour. By its interlocutory nature, evidence in support of such an application need not be strictly proved at this stage.

2 What happens to the Mareva injunction if the trial is resolved against the applicant? The dismissal of the claim would typically result in the discharge of the injunction. In the event of an appeal, what is the applicable threshold for the unsuccessful applicant to satisfy in order to continue the injunction pending the appeal? The authorities rightly suggest that the threshold should no longer be a good arguable case since a trial has already been concluded against the

applicant. Instead the cases suggest that the threshold should be that of a good arguable appeal. In practical terms, what is the true difference between these two thresholds? This judgment will thus examine what the threshold to establish a good arguable *appeal* actually entails and how it is, in substance, different from the threshold of a good arguable *case*.

Procedural history

3 In HC/S 1212/2017 (the "Suit"), the appellant, JTrust Asia Pte Ltd ("JTA"), brought (a) an action in the tort of deceit against the first respondent, Group Lease Holdings Pte Ltd ("GLH"), and the second respondent, Mr Mitsuji Konoshita ("MK"); and (b) an action against the first to seventh respondents in the tort of conspiracy, alleging that they had conspired to defraud JTA of its investment in the parent company of GLH.

4 Pursuant to this action, JTA successfully obtained *ex parte* Mareva injunctions against GLH, MK and the third respondent, Cougar Pacific Pte Ltd ("Cougar") on 26 December 2017. These Mareva injunctions were subsequently set aside by the High Court judge ("the Judge") on 23 February 2018 in the decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] SGHC 38 (at [16]).

5 In the appeal against the Judge's decision to set aside the Mareva injunctions in CA/CA 46/2018, this court reinstated the domestic Mareva injunctions ordered against MK, GLH and Cougar and expanded the Mareva injunctions against GLH and Cougar to worldwide Mareva injunctions (collectively referred to as the "Injunctions"), in the decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 ("*JTrust CA*") (at [3] and [122]).

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6 Following the trial of the Suit, the Judge dismissed JTA's claims in deceit and conspiracy against the first to seventh respondents on 12 February 2020 (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGHC 29 (the "Judgment")). The extinction by judgment of JTA's claims discharged the Injunctions and JTA's application to renew the Injunctions pending its appeal was refused by the Judge. The Judge however, ordered a temporary stay of the discharge to allow JTA the opportunity to make an application to this court. On 13 February 2020, JTA filed an appeal against the Judgment in CA/CA 21/2020 ("CA 21").

7 The present application by JTA under CA/SUM 21/2020 ("SUM 21") is for an order that the Injunctions be continued or renewed pending the determination of CA 21.

8 Given the context under which SUM 21 came to be filed, the following issues arise for our determination:

(a) what are the relevant legal principles governing the grant of Mareva relief pending an appeal against the dismissal of the applicant's claim;

(b) whether JTA has a good arguable appeal; and

(c) whether there continues to be a real risk of dissipation of assets with respect to MK, GLH and Cougar.

9 Before we address the above issues, it would be useful to refer to a brief summary of the material facts in order to properly appreciate the evidence which was before the Judge when he made the decision to dismiss JTA's claims.

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Material background facts

10 JTA is a Singapore-incorporated investment company and is wholly owned by J Trust Co, Ltd ("J Trust Japan"), a company listed on the Tokyo Stock Exchange.

11 GLH is a wholly owned subsidiary of Group Lease Public Company Ltd ("GL Thailand"), a Thai public company. GLH has four directors, including MK and Mr Tatsuya Konoshita ("TK"), who is MK's brother and is also a director of GL Thailand. MK is a Japanese national and a Singapore Permanent Resident. He was the chairman of GL Thailand until October 2017, when he relinquished his office after the publication of an incriminating news release by the Securities and Exchange Commission of Thailand ("the Commission"), the regulatory body in Thailand that oversees listed companies. After MK stepped down, TK assumed his office.

12 The third respondent, Cougar, is a Singapore incorporated company which has the same registered address as GLH. Its sole shareholder is a company incorporated in Luxembourg called Pacific Opportunities Holdings SARL ("Pacific"), which was owned by Mr Tep Rithivit, a Cambodian businessman, until 12 June 2018. Mr Rithivit was a director of Cougar from August 2015 to end 2017. Pacific was acquired by Saronic Holdings Ltd ("Saronic") on 12 June 2018, after the Suit was filed but prior to the commencement of the trial.

13 On 9 March 2017, the Stock Exchange of Thailand ("the Exchange") issued a public notice to GL Thailand, requiring it to provide to its investors information on loans that it had extended to two sets of borrowers ("the GLH Loans"). The first set is known as the "Singapore Borrowers", who comprise Cougar, Pacific, Mr Rithivit and a Brazilian company called Kuga

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Reflorestamento Ltda ("Kuga"), which was also wholly owned by Pacific (and, ultimately, by Mr Rithivit). The second set is referred to as the "Cyprus Borrowers". They comprise the fourth to seventh respondents, which are companies incorporated in Cyprus.

14 Yoichi Kuga ("YK"), who claimed to be the beneficial owner of Cougar, joined the action on 8 May 2019 and affiliates himself with the first to seventh respondents (Judgment at [4]).

15 APF Group is a corporate group of companies with a complex structure which includes APF Group Co Ltd ("APF BVI"), APF Holdings Co Ltd ("APF Thailand"), Showa Holdings Co Ltd ("Showa"), Wedge Holdings Co Ltd ("Wedge") and a wholly-owned subsidiary of Wedge, Engine Holdings Pte Ltd ("Engine"). JTA alleges that the APF Group is controlled by MK through APF BVI which was MK's "personal asset management and investment vehicle".

16 Between March 2015 and September 2017, JTA made a number of investments in GL Thailand. During this time, MK was the chairman of GL Thailand. The investments were as follows:

(a) On 20 March 2015, JTA invested US$30m in GL Thailand under the first investment agreement ("1st IA") which provided that JTA would subscribe to US$30m worth of GL Thailand's convertible debentures. JTA completed the subscription on 22 May 2015.

(b) In December 2015, JTA exercised its right to convert the debentures into shares at 10 Thai Baht per share. This gave JTA 98.1m shares in GL Thailand, which was 6.43% of the company's shareholding.

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(c) In June 2016, JTA entered into a second similar investment agreement ("2nd IA") with GL Thailand, under which JTA subscribed for US$130m of GL Thailand's convertible debentures. The subscription for the convertible debentures was completed on 1 August 2016. JTA has yet to convert the debentures into shares. If JTA elects not to do so, it is entitled to be repaid its investment in 2021.

(d) On 1 December 2016, JTA entered into a third similar investment agreement ("3rd IA") with GL Thailand, under which JTA subscribed for a further US$50m of GL Thailand's convertible debentures and has likewise not converted the debentures into shares. The subscription of the convertible debentures was completed on 20 March 2017. If JTA chooses not to do so, it is entitled to be repaid its investment in 2020. Although it is not precisely clear which month in 2020 this debenture is due for repayment, during the hearing, counsel for JTA, Mr Chan Leng Sun SC, informed the court that the debentures are indeed already due for repayment but GL Thailand has denied liability and has brought a counterclaim in the Thai proceedings. Nothing turns on this development.

(e) A fourth set of investments consisted of purchases of GL Thailand's shares and warrants on the open market. These purchases were made between March and September 2017.

17 Each of the three investment agreements contained *an express warranty in respect of the accuracy of GL Thailand's consolidated financial statements*.

18 It is not disputed that GL Thailand's financial statements were prepared on a consolidated basis (meaning, that GL Thailand's financial statements incorporated the financial information of its subsidiaries, including GLH)

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(Judgment at [9]). GL Thailand filed its accounts on a quarterly and annual basis and GLH's revenue, assets and profits were duly reflected in GL Thailand's quarterly and annual financial statements. In particular, over a period of just over two years which corresponded to the period of the alleged fraud, (*ie*, from 1Q2015 to 2Q2017), GL Thailand's reported quarterly net profits increased approximately 300% from 110,238,000 to 336,852,000 Thai Baht. The chronology of JTA's respective investments in GL Thailand and the dates in which GL Thailand's financial statements were released is summarised below at Annex B.

19 Further, prior to each of JTA's investments in GL Thailand, representations were made as to GL Thailand's financial health and profitability by MK to Mr Nobuyoshi Fujisawa ("Fujisawa"), the managing director and Chief Executive Officer of JTA, and Mr Shigeyoshi Asano ("Asano"), a director of JTA and J Trust Japan. On 9 March 2017, the Exchange required information from GL Thailand on the loans that it had extended to (a) the Singapore Borrowers; and (b) the Cyprus Borrowers (collectively referred to as "the Borrowers").

20 On 13 March 2017, GL Thailand responded to the Exchange's notice by issuing a clarificatory note. Some seven months after GL Thailand's clarificatory note, on 16 October 2017, the Commission issued a news release stating that GLH, a subsidiary of GL Thailand, had issued sham loans the interest on which was repaid using the loan principals under a round-tripping scheme designed to inflate GL Thailand's operating results. The borrowers included the Cyprus Borrowers and Cougar *ie*, the third to seventh respondents, who were allegedly owned and controlled ultimately by MK. The principal in the loans had been used by the Cyprus Borrowers and Cougar to repay the interest on the GLH Loans. That interest was recorded as income in GLH's 2016

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financial statements, which was in turn a "fabrication of accounting records and exaggeration of [GL Thailand's] operating results". As a result, the Commission lodged a criminal complaint against GL Thailand and banned MK from occupying directorships in Thai companies.

21 After the Commission's news release, Ernst & Young, who was the independent auditor of GL Thailand and its subsidiaries, issued on 13 November 2017 a "Report on Review of Interim Financial Information" to the shareholders of GL Thailand ("EY Interim Report") which revised GL Thailand's 2015, 2016, 1Q2017 and 2Q2017 profits and net assets downwards. To date, the downward revisions have remained unchanged.

The Suit commenced by JTA

22 On 26 December 2017, JTA commenced the Suit against GLH, MK, Cougar and the Cyprus Borrowers for the tort of deceit and conspiracy. In relation to JTA's claim for the tort of conspiracy, JTA alleged that the first to seventh respondents had an agreement to fabricate GL Thailand's accounting records, exaggerate GL Thailand's operating results and conceal the true nature of the GLH Loans in order to defraud JTA into believing that GL Thailand's financial performance was better than it truly was. The first to seventh respondents, with the intent to damage or injure JTA, committed unlawful acts in furtherance of their agreement by, *inter alia* (a) bringing JTA in as an investor and using the initial investment to issue loans at high interest rates which artificially inflated GL Thailand's earnings; (b) transferring the monies from JTA's investment funds from GL Thailand to GLH; (c) arranging for sham loans to the Borrowers and concealing the true nature and purpose of the loans; (d) making fraudulent misrepresentations to JTA that GL Thailand and GLH were genuinely profitable companies in good financial health and their financial

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accounting records represented a true, fair and accurate representation of their financial situation; and (e) diverting and misappropriating GL Thailand and GLH's monies for MK's benefit.

23 JTA's claim for the tort of deceit was brought only against both MK and GLH, alleging that the GLH Loans were not genuine arm's length transactions and were falsely accounted for in the financial and accounting information provided by GLH and GL Thailand's financial statement. GLH manipulated its financial statements and presented a false and misleading picture of GLH's and GL Thailand's financial health with the intention of inducing JTA into investing in GL Thailand. GLH was liable for MK's deceit *via* the principles of agency and vicarious liability. In addition, in the course of negotiating the investment agreements, JTA relied on repeated representations by MK in person, over the phone, emails and LINE messages that (a) GLH and GL Thailand were genuinely profitable companies in good financial health; (b) JTA's investments were intended to drive the projected growth of GL Thailand's retail financing business in Southeast Asia; and (c) the financial statements of GL Thailand could be relied upon to provide a true and fair picture of GL Thailand's financial position. Contrary to MK's representations to JTA, JTA's investments were used for purposes other than to drive the projected growth of GL Thailand's retail financing business in Southeast Asia.

24 JTA claimed damages as a result of GLH's and MK's misrepresentations and/or the conspiracy of the respondents in that had JTA known of GL Thailand's true financial performance and/or the true nature of the GLH Loans and/or that JTA's investments were being misappropriated by MK for his own benefit, it would not have:

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(a) converted the convertible debentures it obtained under the 1st IA;

(b) invested the aggregate sum of US$180m under the 2nd IA and 3rd IA; and

(c) purchased in the open market 8,116,900 units of warrants of GL Thailand's shares and 24,063,100 shares of GL Thailand.

The Judge's decision

25 As JTA is required to demonstrate a good arguable appeal in respect of the issues in CA 21, it is essential to examine the material findings of fact made by the Judge:

(a) GLH Loans were "suspicious" and "undoubtedly unusual" (Judgment at [14] and [19]).

(b) The Borrowers had no substantial commercial activity, or at least none that would justify the GLH Loans, and were incorporated shortly before the GLH Loans were made (Judgment at [14]).

(c) Loan documentation was prepared only after the GLH Loans had been advanced pursuant to the requests of auditors, and money was disbursed to the allegedly unrelated parties with no documentation (Judgment at [14]).

(d) The requests for the GLH Loans on behalf of the Singapore Borrowers were made orally. The GLH Loans' alleged purpose for the development of land in Brazil was in fact not carried out, as YK admitted and the value of the land in Brazil was also in doubt. Some of the

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transfers from GLH to the Cyprus borrowers were marked as "internal transfer" or "same group transaction" (Judgment at [14]).

(e) After the money was transferred to the Borrowers, it passed through other companies before it was used to purchase shares in GL Thailand, artificially increasing GL Thailand's share value, and the shares were then put up as collateral for the GLH Loans. The loans to the Cyprus Borrowers were used to (a) acquire two villas in Cyprus, one of which was recorded as MK's personal residence; and (b) purchase government bonds and shares in various businesses (Judgment at [15]).

It would be apparent that none of the above findings of fact are adverse to JTA's case. In fact, they would appear to be adverse findings against the respondents. This has a material bearing when the good arguable appeal threshold is examined below.

26 In dismissing JTA's claim for the tort of deceit, the Judge made the following findings:

(a) A claim in the tort of deceit requires that the representation be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff (Judgment at [8]).

(b) Even though it was clear that MK was in charge at both GLH and GL Thailand, JTA had not made out its case that GLH's financial statements were prepared with the requisite dishonest intention. GL Thailand's financial statements were not prepared solely for JTA and were audited by professional accountants. GL Thailand was also a listed company with its own board of directors and hence the decisions

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of GL Thailand and GLH may not be solely attributed to MK (Judgment at [9]).

(c) On the question of proof of reliance, the cross-examination of Fujisawa and Asano demonstrated that J Trust Japan's board of directors did not appear to have read GL Thailand's financial statements in detail or they would have seen that the GLH Loans were in fact disclosed, albeit without full details. JTA seemed content to rely on a general impression of GL Thailand's profitability. It was more likely that JTA was satisfied with the performance of its investment thus far, and hence was prepared to continue investing money into GL Thailand (Judgment at [10]).

(d) As for MK's representations that GL Thailand was making great profits, both JTA and J Trust Japan must have been well-aware of the dangers of large investments, and to claim that JTA and J Trust Japan relied purely on MK's verbal assurances of profitability made through LINE messages and emails seemed overly simplistic. JTA's willingness to take MK's words at face value and its lack of due diligence bordered on negligence and made any reliance on MK's representations far less reasonable (Judgment at [11]).

(e) As for whether the representations were false, wilfully false, or made in the absence of any genuine belief of its truth, it was intrinsically tied up with JTA's submissions about GLH's and MK's intentions and reliance as JTA's plea was effectively that the round-tripping scheme was so extensive and elaborate that it must had been done with the necessary intent to deceive JTA (Judgment at [12]). Although the GLH Loans were unusual and might have raised questions, it was different from using that as a basis to allege fraud (Judgment at [14]). The GLH

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Loans, though suspicious, could be explained as GLH maintained that they were advanced on a goodwill basis between MK and the Borrowers (Judgment at [19]). JTA had not shown that the conduct of GLH and MK crossed the threshold of dishonest intent to prove fraud, especially where it involved large and established listed companies. GL Thailand's absence as a party to the proceedings also meant that it was denied the opportunity to refute or explain the allegations of fraud during the trial (Judgment at [20]).

27 In coming to his decision to dismiss JTA's claim for the tort of conspiracy, the Judge made the following findings:

(a) The GLH Loans were disbursed to various parties after receipt of the funds into the accounts of the Singapore and Cyprus Borrowers. However, several parties were excluded from the action. The funds, according to JTA, found their way back to GL Thailand through various parties, including Showa, Wedge, Engine and APF BVI, all of whom are controlled by MK. Loans were also made to Mr Rithivit, who passed the money through APF Thailand, which JTA alleges is also owned by MK. However, Showa, Wedge, Engine, APF BVI, APF Thailand, Mr Rithivit, as well as the recipient of the investments, GL Thailand, were not parties to the action (Judgment at [6]). Even though the liability for the tort of conspiracy is joint and several, where a party omitted from the suit is a protagonist in the alleged conspiracy, it would be difficult for the plaintiff, as a matter of evidence, to prove its case (Judgment at [7]).

(b) JTA had to show Cougar's and the Cyprus Borrowers' intention to cause injury to JTA, which it had failed to do so. No conclusive

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> evidence was tendered to attribute MK's fraudulent intention to Cougar and that the Cyprus Borrowers were merely instruments under his control. The existence of the GLH Loans, though unusual, could not themselves amount to sufficient evidence for finding dishonest intention to injure JTA (Judgment at [21]).

28 It is apparent that the Judge's decision in dismissing JTA's claims for deceit and conspiracy was not based on any assessment of the veracity of the witnesses called by the parties. His findings were instead based on his understanding of the relevant legal principles together with inferences which he drew from the primary facts before the court.

29 Having identified the issues in SUM 21 with reference to the material facts before the court as well as the findings made by the Judge, our first task is to explain what is required for an applicant like JTA to satisfy the threshold of a good arguable appeal.

Issue 1: The relevant legal principles governing the grant of Mareva relief pending an appeal

30 The main requirements for the grant of a Mareva injunction *before the trial of the action* are well-established – see [1] above. However, the present case concerns the applicable test for the grant of Mareva relief *pending an appeal* against the decision of the Judge in dismissing the claim. It is common ground between the parties that in order to justify an order to maintain the injunction pending appeal, JTA must demonstrate that:

> (a) it has a good arguable *appeal* (as opposed to a good arguable *case*); and

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(b) there is objectively a real risk of dissipation *under the current circumstances*.

However, the parties parted company as to what constitutes a good arguable appeal.

A good arguable appeal

31 A good arguable *case* is one which is more than barely capable of serious argument, but not necessarily one which a judge considers would have a better than 50% chance of success (*Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") at [36]). The English Court of Appeal in *Ketchum International Plc v Group Public Relations Holdings Ltd and others* [1997] 1 WLR 4 ("*Ketchum*") at 10G–H, which was affirmed by the English Court of Appeal in *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583 at [35] and *Metropolitan Housing Trust Ltd v Taylor and others* [2015] EWCA Civ 1595 at [15], held that the test for a good arguable appeal would "likely to be a more difficult test to satisfy" than a good arguable case and "if the case turns upon questions of fact which the judge has resolved against the plaintiff, [it] may well be insuperable". The English Court of Appeal observed that the threshold "must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required".

32 Before us, counsel for MK and GLH, Mr Lawrence Teh, submitted that based on the decision in *Ketchum*, the threshold for a good arguable *appeal* needs to be one that the court regards that the appeal is *more likely than not to succeed* (meaning, a more than 50% chance of success in the appeal). In contrast, Mr Chan cited the decision of the Court of Appeal of the Supreme Court of Victoria in *Rozenblit v Vainer* [2019] VSCA 164 ("*Rozenblit*") that the

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purpose of a freezing order in preventing frustration or abuse of the court's process applies equally pending *trial* or pending *appeal* and the test applicable to an appeal is not any more stringent (at [18]). It was observed at [19] that the threshold that an applicant has to establish is that "it can be seen from the available material that the appeal has a *real prospect of success*" [emphasis added].

33 In our judgment, Mr Teh's argument is plainly untenable. It cannot be right that the threshold for a good arguable appeal requires the court to find a more than 50% chance of success in the appeal. Taking this submission to its logical conclusion would mean that the appellate court hearing an application to maintain the injunction would have to essentially decide and pre-empt the outcome of the substantive appeal before the substantive appeal is even heard. While it is correct that the English Court of Appeal in *Ketchum* stated that a good arguable appeal is "*likely* to be a more difficult test [than a good arguable case]" [emphasis added], it did not hold that this threshold meant a more than 50% chance of success in the appeal. We note that in the preceding sentence, the English Court of Appeal in *Ketchum* stated at 10F–G that it "cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a *Mareva* injunction should not be applied in favour of a plaintiff, even if he has lost in the court below" [emphasis in original]. What this means is that in the absence of any factor which would render the good arguable appeal to be a more difficult test to satisfy, the court in considering an application to continue the injunction pending the appeal against the dismissal of the claim would apply the same considerations as it would before the trial. In our view, the threshold that "the appeal is more likely right than wrong" simply cannot be accepted.

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34 What then should constitute the threshold of a good arguable appeal? While we agree in principle with the observation in *Rozenblit* that the purpose of a freezing order in preventing frustration or abuse of the court's process applies equally pending *trial* or pending *appeal*, the appellate court must remain cognisant that certain developments may take place during the trial which may impose a more stringent test on the applicant. Much will depend on the findings made by the trial judge. In this connection, we agree with the English Court of Appeal's observations in *Ketchum* at 10G–H that a good arguable appeal would likely be a more difficult test to satisfy than a good arguable case. However, that is usually limited to a situation where the appeal turns upon *questions of fact* which the trial judge has resolved against the plaintiff and the threshold for appellate intervention is high – in such a case, it must be shown that the trial judge's assessment was "plainly wrong or against the weight of the evidence": *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 ("*Sandz Solutions*") at [37].

35 Furthermore, unlike an interlocutory injunction pending trial which can be supported by evidence without formal proof, the court when considering an application to maintain an injunction after a trial would have to assess the good arguable appeal threshold with reference to the evidence which was proved at the trial. In other words, hearsay evidence (pending proof at the trial) which may be relied upon in support of an interlocutory injunction would no longer suffice to justify the continuation of an injunction following the dismissal of the claim by the trial judge. As an illustration of this distinction, while in *Jtrust CA* ([5] *supra* at [43]), it was permissible for this court to rely on the Commission's news release of 16 October 2017 in granting the interlocutory injunctions (prior to the trial), for the purposes of the present application, the Commission's news release can no longer be relied upon since it was not proved at the trial.

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36 In our judgment, the distinction between a good arguable case and a good arguable appeal is borne out by the need to recognise two significant developments which would typically take place in any trial process, *ie*, findings of facts made by the trial judge and the proof of evidence at the trial. Therefore, whenever either of these two trial developments have occurred in a particular case, it is correct that the good arguable appeal threshold would likely be a more difficult test to satisfy (see above at [33]).

37 Accordingly in practical terms, absent the burden to challenge adverse findings of facts or the need to address any failure to prove evidence at the trial to support the injunction, the threshold to satisfy a good arguable appeal would effectively be similar to that of a "good arguable case". During the hearing, both Mr Chan and Mr Teh agreed with this formulation of a good arguable appeal threshold save that Mr Teh's primary position was that an applicant like JTA would need to show that it has a more than 50% chance of success in the appeal. Mr Teh, however, agreed that he would accept this formulation of the threshold if his primary position was not accepted.

38 Based on our assessment of the Judge's findings, the two trial developments which we have identified above at [36] (*ie*, the burden for JTA to challenge adverse findings of facts or the impact of JTA's failure to prove evidence to support the injunction) do not come into play in the present application. This will be elaborated below. As such, JTA's threshold to establish a good arguable appeal is in substance no different from a good arguable case.

Real risk of dissipation

39 As regards the requirement of a real risk of dissipation for the grant of a Mareva injunction pending appeal, Mr Chan and Mr Teh also agreed that the test is essentially the same save that the appellate court should evaluate the risk

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with reference to the *current* circumstances following the conclusion of the trial. The relevant inquiry is whether there is a *current* risk of dissipation, though past events may be evidentially relevant only if they serve to demonstrate a *current* risk of dissipation of assets: *National Bank Trust v Yurov and others* [2016] EWHC 1913 (Comm) at [70(d)]. This would necessitate an examination of any change in circumstances of the parties that could materially affect the assessment of the real risk of dissipation after the trial.

40 The overarching test remains the same as to whether there is objectively a real risk that a judgment may not be satisfied because of a risk of an unjustified dealing with assets: Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 6th Ed, 2016) at para 12-028. The plaintiff must produce "solid evidence" to demonstrate this risk, and not just bare assertions of fact: *Bouvier* ([31] *supra*) at [36], citing the Court of Appeal's decision in *Guan Chong Cocoa Manufacturer Sdn Bhn v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [18]. A well-substantiated allegation that a defendant has acted dishonestly can and often will be relevant as to whether a real risk of dissipation may be found, but it depends on the precise nature of the dishonesty alleged and the strength of the evidence relied on in support of the allegation (*Bouvier* [31] *supra* at [94]).

Issue 2: Good arguable appeal

41 Having set out the relevant legal principles governing the grant of Mareva relief pending an appeal, we now turn to apply them to the present application with reference to the evidence before the court and the findings/inferences made by the Judge.

42 As we observed earlier, the present application does not turn upon findings of fact which the Judge had resolved against JTA. In fact, it would appear that the findings were instead largely resolved against the respondents,

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such as the findings pertaining to the suspicious and undoubtedly unusual nature of the GLH Loans (Judgment at [14] and [19]). Insofar as the inferences drawn by the Judge are concerned, the appellate court would be as competent and in as good a position as the Judge to draw any necessary inferences of fact from the undisputed circumstances of the case and conduct a *de novo* review where inferences of fact are concerned: *Sandz Solutions* ([34] *supra*) at [38].

43 The present application by JTA is primarily premised on two broad arguments: (a) the Judge made errors of law; and (b) the Judge's inferences were wrongly drawn from the facts. Applying the test as articulated above at [36]–[38], for the purposes of satisfying the threshold, JTA must show that it has a good arguable appeal in respect of the errors of law made by the Judge and the inferences wrongly drawn by the Judge.

44 In our judgment, JTA satisfies the threshold of a good arguable appeal for the Mareva injunctions to be maintained pending appeal. We first explain that a good arguable appeal has been made out by JTA with reference to the findings/inferences made by the Judge. We next examine the impact of the evidence which the Judge did not appear to have considered in the Judgment and how that might have a bearing on the merits of the appeal.

Findings and inferences made by the Judge

No dishonest intention

45 It would appear arguable that the Judge's finding that GLH's financial statements were not prepared with the requisite dishonest intention was against the weight of the evidence before the court.

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46 First, it may well be, as found by the Judge, that GL Thailand's financial statements were prepared for the purpose of GL Thailand's listing requirements on the Thai stock exchange. However, that does not, in and of itself, exclude a finding of dishonest intention on the part of MK and GLH in fraudulently misrepresenting to a class of potential public investors including JTA. The Judge appears to have erroneously adopted a binary approach instead.

47 A representation made to a third person is actionable so long as it was communicated to a class of persons whom the plaintiff is one, or even if it is made to the public generally, with a view of being acted on: *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]; *Thode Gerd Walter v Mintwell Industry Pte Ltd and others* [2009] SGHC 44 ("*Thode*") at [32]. So long as JTA, as one of the members of that class of persons to whom the representation was communicated, acts on the representation and suffers damage as a result, that would suffice and the representation need not be made directly to JTA: *Thode* at [32]; *Richardson v Silvester* (1873) LR 9 QB 34 at 36 citing with approval the judgment of the court in *Swift v Winterbotham* LR 8 QB 244 at 253; *Chitty on Contracts* (Vol 1) (Sweet & Maxwell, 33rd Ed, 2008) at para 7-028.

48 Similarly, it is indeed arguable that MK and GLH objectively intended for the false representation of GLH's financial information, which was indisputably incorporated in GL Thailand's financial statements, to be directed at the general public. The dishonest intention would have extended to the class of potential investors who would reasonably be expected to rely on these financial statements before making any potential investment decision. Moreover, JTA was also the biggest and most prominent institutional investor of GL Thailand and was publicly announced as GL Thailand's "strategic partner" on 9 March 2015. It would therefore appear implausible that MK and

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GLH did not know or intend for JTA to rely on the information contained in GL Thailand's financial statements for their investment decisions. Besides, there was an express warranty in respect of the accuracy of GL Thailand's financial statements in each of the investment agreements. We note that the Judgment made no reference to the express warranty. In our judgment, it is certainly arguable that the Judge had erred in finding that the falsehoods in the financial statements could not have been directed at investors like JTA simply because they were prepared for the purpose of GL Thailand's listing requirements.

49 Further, JTA correctly pointed out that the Judge did not address the dishonesty of MK's own representations to JTA. From the evidence before the court, it appears that representations were personally made by MK to Fujisawa and Asano on (a) the genuine profitability and good financial health of GL Thailand and GLH; and (b) the use of JTA's investments for the projected growth of GL Thailand's retail financing business in Southeast Asia. Besides, in finding that JTA's willingness to take MK's words at face value and its lack of due diligence bordered on negligence (Judgment at [11]), the Judge implicitly accepted that MK did make the representations as alleged by JTA and that JTA had relied on them. More significantly, the representations were made prior to each investment by JTA in GL Thailand. These representations suggested that MK had intended for JTA to review GL Thailand financial statements. For instance, MK told Asano through an email on 6 May 2016 that GLH was their "biggest profit earner" and that the profits did not stop growing in Cambodia, Laos and Indonesia. This was before JTA's entry into the 2nd IA on 6 June 2016, which was confirmed by MK in cross-examination. It appears arguable that MK's dishonest intention can be inferred as his representations were targeted at JTA.

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50 The Judge also held that since GL Thailand was a listed company with its own board of directors, its decisions and that of GLH could not be solely attributed to MK (Judgment at [9]). However, the fact the GLH Loans were approved by GLH's board every year should mean that if the loans were indeed shams, any such dishonest intention should be attributable to GLH's board of directors including MK. The Judge's reasoning appears to contradict his own finding that MK was "in charge" at both GL Thailand and GLH (Judgment at [9]). Besides, it is not clear why it was even necessary for GLH's decisions to be solely attributed to MK since JTA's claim against MK was also based on MK's personal representations, over emails, LINE messages and over the telephone. Contrary to Mr Teh's submissions, JTA's reliance on MK's assurances that GL Thailand and GLH were genuinely profitable companies in good financial health with expected profitability was in fact pleaded. If anything, MK's representations only served to reinforce the impression of expected growth and profitability of GLH and GL Thailand from the consolidated financial statements.

No reliance by JTA

51 We observe that it is fairly settled law that a misrepresentation need not be a sole inducement as long as it was a real and substantial inducement: *Panatron* ([47] *supra*) at [23]. The Judge found that the requirement of reliance on GL Thailand's financial statement was not satisfied as JTA was content on relying on a general impression of GL Thailand's profitability and it was more likely that JTA was satisfied with the performance of its investment (Judgment at [10]).

52 However, it is no defence to the tort of deceit that the plaintiff acted incautiously and failed to take steps to verify the truth of the representations that

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a prudent investor would have taken: *Panatron* at [24]. It is no answer that Asano and Fujisawa failed to examine the consolidated financial statements in detail. While an investor may not have fully appreciated the specific details in a financial statement, he is nonetheless entitled to rely on the "general impression of profitability" disclosed in GL Thailand's financial statements. If indeed the loans were shams and the interest earned was derived from round-tripping, it is plainly difficult to understand how it could be said that JTA did not rely on the reported profitability of GL Thailand before entering into each of the investment agreements. The plain fact of the matter is that but for the GLH Loans, the quarterly and full-year net profits of GL Thailand would have been much lower thereby impacting on the profitability of GL Thailand. This would be entirely consistent with the downward revisions of GL Thailand's profits by Ernst & Young (see [21] above).

53 The Judge also took into consideration the fact that JTA could not claim that there were fraudulent misrepresentations in GL Thailand's financial statements that were published prior to the 1st IA since the GLH Loans were only made after the 1st IA. The Judge found that this substantially diluted the force of JTA's submission that it had relied on GL Thailand's later financial statements when it made the second to fourth investments and converted the convertible debentures under the 1st IA (Judgment at [10]). The Judge then concluded that it seemed more likely that JTA was satisfied with the performance of its investment thus far and was prepared to continue investing money into GL Thailand. We make three brief observations in this regard.

54 First, we observe that the Judge did not elaborate on how else JTA could have been "satisfied with the performance of its investment", which in our judgment could only be either on the basis of the revenue, assets and profits as

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reported in GL Thailand's financial statements or MK's personal representations of the current and expected profitability of GL Thailand.

55 Second, JTA's case in the Suit was that it suffered losses when it *exercised its option under the 1st IA for the conversion of the convertible debentures into GL Thailand shares* and it did so in reliance upon GL Thailand's deceptive financial information that was communicated to JTA by MK and GLH through GL Thailand's financial statements. Multiple representations were made by MK, which emphasised to JTA that GL Thailand was a genuinely profitable company in good financial health enjoying real returns from expanding business operations in Cambodia, prior to JTA's entry into the 1st IA and its conversion of the convertible debentures. It appears that the Judge also omitted to consider JTA's evidence that the 1st IA was made on the basis of MK's representations as regards GL Thailand's *expectation of further profit growth in 2015* due to the performance of GL Thailand's Cambodia portfolio.

56 Third, during the negotiations in respect of the 1st IA, JTA agreed to a limited due diligence based on publicly available information and GL Thailand's consolidated financial statements as of 9 March 2015 because GL Thailand agreed to provide an express warranty that its financial statements were accurate and were prepared in accordance with the applicable accounting standards. This express warranty was included in all three investment agreements. It is therefore arguable that JTA relied on *both* MK's representations of the current and expected profitability of GL Thailand, as well as GL Thailand's consolidated financial statements whose accuracy had been contractually guaranteed in JTA's investment agreements.

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The undoubtedly unusual and suspicious nature of the GLH Loans

57 The Judge found that the GLH Loans were "unusual" and "suspicious", but were somehow insufficient to establish fraud. For present purposes, JTA submitted that this court should draw a different inference from the Judge in that the loans were shams and improperly accounted for in GL Thailand's financial statements.

58 We first refer to the Judge's own findings that the GLH Loans were indeed "undoubtedly unusual" and "suspicious". This finding was in turn arrived at based on other material findings of fact made by the Judge which we summarised at [25] above.

59 In our judgment, it appears to us that JTA has demonstrated a good arguable appeal that the GLH Loans were shams and not *bona fide*, independent, arm's length transactions by virtue of the round-tripping scheme.

60 First, as found by the Judge, the GLH Loans had little or no commercial rationale. No evidence was adduced that the Borrowers had legitimate commercial activities which would justify taking on or servicing the repayments of US$95m worth of loans at high interest rates. The Borrowers were also incorporated barely a few months before the GLH Loans were disbursed.

61 Second, the Cyprus Borrowers demonstrated an ostensible inability to service the GLH Loans as they used the GLH Loan monies to purchase the following low-yielding assets:

(a) Cypriot government bonds with a coupon rate of 2 to 3.5% per annum, a stark comparison to the relatively higher interest rates of 14.5 to 17% per annum payable on the GLH Loans;

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(b) Real estate in Cyprus, *inter alia* Villa No. 2 which was allegedly used by the alleged beneficial owners of the Cyprus Borrowers, the Kiasrithanakorn family (referred to by the Judge as the Honda Family), as the basis for their Cyprus citizenship application and Villa No. 9 was for MK's personal use; and

(c) US$5.2m invested in shares in three Cypriot companies, whose financial statements reveal that two were loss-making and one made modest profits totalling €84,376 between 2016 and 2018.

In this connection, it also appears that contrary to MK's representations to JTA, JTA's investments had not been used to drive the growth of GL Thailand's retail financing business in Southeast Asia but had instead been utilised for other purposes.

62 Third, the Judge found that the loan documentation was prepared only after the GLH Loans had been advanced and money was disbursed to allegedly unrelated parties with no documentation whatsoever (Judgment at [14]). The deputy chief financial officer of GL Thailand only found out about the 2016 loans to the Cyprus Borrowers in 2017 and instructed Mr Savvas Pogiatzis from Fidescorp to prepare the loan documents via email. Mr Pogiatzis was a director of one of the Cyprus Borrowers, but also performed custodial services for GLH, and had control of the same bank accounts that the GLH Loans were disbursed from. Such an arrangement is odd to say the least by any standard.

63 The Judge also found that by early 2017, JTA was aware of the use of the Singapore and Cyprus Borrowers for tax reasons (Judgment at [18]). It is not clear how this finding impacts on his other finding of the "undoubtedly unusual" and "suspicious" nature of the GLH Loans. Besides, the disclosure in

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early 2017 only came up during MK's clarifications with Fujisawa and Asano in relation to GL Thailand's auditors' remarks on GL Thailand's financial statements for FY2016 and the disclosure was, in any event, accompanied by MK's further reassurances that the GLH Loans were ultimately still for the purposes of GL Thailand's financing business in Cambodia.

64 Furthermore, while JTA might well have learned about the GLH Loans by early 2017 through the remarks of GL Thailand's auditors on GL Thailand's financial statements for FY2016, there is no evidence that it was equally aware and condoned the "undoubtedly unusual" and "suspicious" nature of the GLH Loans. In fact, even after JTA learned about the GLH Loans, MK reassured Asano and Fujisawa that the loans were still for the purposes of the Cambodian retail financing. Finally, by early 2017, JTA had by then already invested US$210m in GL Thailand (see [16] above). It is therefore unclear how the early 2017 discovery of the GLH Loans could have had any impact on JTA's earlier decisions to enter into the three investment agreements.

Goodwill defence

65 Confronted with his finding that the GLH Loans were "undoubtedly unusual" and "suspicious" which we agree with, the Judge nonetheless accepted GLH's and MK's defence that the GLH loans were not shams but were extended to the Borrowers on a "goodwill" basis (Judgment at [19]). In our view, it is clearly arguable that the acceptance of the "goodwill" defence was premised on an inference wrongly drawn by the Judge without any evidential basis.

66 GLH's and MK's defence is that the alleged beneficial owners of the Borrowers (meaning, the Kuga family and the Kiasrithanakorn family), were known to GL Thailand and the GLH Loans were effectively underwritten by these beneficial owners who GL Thailand knew had the means to repay. The

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Judge accepted that the GLH Loans, though suspicious, could be explained as GLH maintained that they were advanced on a goodwill basis between MK and the Borrowers. MK testified that he had repaid the loans to GLH on behalf of Cougar because it had in turn paid him first or through other sources (Judgment at [19]). However, no documentary evidence was adduced by MK to support this assertion. We note that such assertions are typically capable of being proved by objective documentary evidence and yet the Judge appeared to have accepted MK's unsupported evidence.

67 However, we agree with JTA that the Judge's finding and the respondents' acceptance that the GLH Loan monies had passed through other companies before it was used to purchase shares in GL Thailand thereby artificially increasing GL Thailand's share value with the shares so purchased used as collateral for the loans, would appear to be inconsistent with the "goodwill" defence.

68 In any case, it would appear that the Judge might have misapplied the legal and evidential burdens of proof. The facts which were relied upon by the Judge in finding the GLH Loans to be suspicious and undoubtedly unusual coupled with Mr Iain Potter's ("Potter") expert evidence should be sufficient *prima facie* evidence that the GLH Loans were shams and not properly accounted for in GL Thailand's financial statements. We agree with JTA that this necessarily called for a reasonable explanation by GLH and MK for the GLH Loans. The evidential burden therefore shifted to GLH and MK to provide a reasonable explanation supported by evidence to show that the GLH Loans were genuine commercial transactions: *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [19]–[24]. As JTA rightly submitted, the true nature of the GLH Loans lies especially within the knowledge of GLH and MK and the legal burden of proving that the GLH Loans were effectively loans

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given to the supposed beneficial owners of the Borrowers lies with them – see s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). It appears to us that it was insufficient for the Judge to be satisfied that the GLH Loans *could have been* advanced on a goodwill basis and that the explanations by GLH and MK *were not impossible*. That, in our view, would constitute an impermissible reversal of the burden of proof.

69 The "goodwill" defence also appears to be unsupported by any evidence. First, the identities of the beneficial owners remain a mystery and no witnesses with direct knowledge of the events (such as from the Kiasrithanakorn family) were called to prove the "goodwill" defence. We would observe that the failure of the Cyprus Borrowers to call any witnesses at the trial should effectively have led to the rejection of the "goodwill" defence. Second, as admitted by TK in cross-examination, none of the alleged beneficial owners were the Borrowers on record, nor were there any contracts or agreements with GLH for these persons to indemnify or guarantee the GLH Loans. Third, the absence of disclosure of GLH's internal minutes to show how and why its directors came to the view that the GLH Loans were in the best interest of GLH is equally telling and highly suspicious. We also observe that it is extremely odd that no correspondence whatsoever with the Borrowers on the negotiations of the GLH Loans were disclosed. This would be in line with the Judge's finding that the GLH Loans were indeed "suspicious". GLH's explanation that no such documents existed because the discussions relating to the purpose, assessment and approval of the GLH Loans "were done verbally, in person and in an informal setting" is also highly questionable, especially given the size of the GLH Loans. Fourth, TK also admitted on the stand that he had knowledge of the profiles of the Cyprus Borrowers as well as their financial status. Objectively, it made no commercial sense to extend US$95m to the Borrowers

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who had no discernible commercial activities and had only been incorporated merely a few months before the GLH Loans were disbursed.

Evidence which the Judge appeared not to have considered

Round-tripping of the GLH Loans

70 It is apparent that the focal point of JTA's claims for the tort of deceit and conspiracy against the respondents is the GLH Loans. In essence, JTA's case is that the GLH Loans presented a false and misleading picture of the financial health of GLH and consequently GL Thailand. In support of JTA's case, evidence was led at the trial that a round-tripping scheme was perpetrated by the respondents to artificially inflate GL Thailand's reported financial results and which resulted in the GLH Loans being used for purposes to benefit MK and not for the financial growth of GH Thailand, contrary to MK's personal representations on the use of JTA's investments to drive the growth of GL Thailand's retail financing business in Southeast Asia. However, the Judge made no finding as regards the round-tripping scheme notwithstanding the evidence before him. He merely made a fleeting reference to JTA's "round-tripping" argument and no more (Judgment at [5] and [12]).

71 JTA's case is that the "round-tripping" scheme was perpetrated at two levels.

(a) First, GL Thailand advanced funds to GLH which were used for the GLH Loans, the proceeds of which flowed directly or indirectly to APF Thailand and APF BVI and were subsequently used by Showa, Wedge, Engine and Cougar to exercise GL Thailand warrants and obtain further GL Thailand shares in order for MK to maintain control over GL Thailand for MK's benefit and not for the benefit of GL Thailand.

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(b) Second, the interest payments made by the Singapore Borrowers and the Cyprus Borrowers to GLH were in reality made fully or partly paid out of the capital advanced to them by GLH, and were therefore falsely accounted for by GL Thailand and GLH as income instead of as repayments of capital. The financial data provided by GLH was consolidated into GL Thailand's financial statements and inflated GL Thailand's revenues, net assets and profits, giving the appearance of a growing financial performance by GL Thailand.

72 These two levels of round-tripping serve to prove, *inter alia*, that the GLH Loans were shams which were designed to misrepresent the profitability of GL Thailand and were ultimately used for the personal benefit of MK and not for GL Thailand. At the hearing, Mr Teh claimed that the round-tripping was not pleaded. We disagree. While "round-tripping" could arguably have multiple definitions as a term of art, it was expressly qualified by Potter in his report and under cross-examination that in the present context, "round-tripping" was used to describe "two circular flows of money" at both levels whereby the GLH Loans were routed in a circuitous manner through various companies under MK's control in order to present a false and misleading picture of the financial health of GLH and GL Thailand and that ultimately the GLH Loans were used for the personal benefit of MK and not GL Thailand. This case theory was amply pleaded by JTA.

73 There can be no dispute that GL Thailand's financial statements incorporated these loans. Equally it cannot be denied that objective evidence was adduced by JTA to establish that a round-tripping scheme was designed to give an appearance of legitimate loans earning profitable returns. The documentary evidence also reveals the involvement of GLH, Cougar and the 5th respondent Adalene Ltd ("Adalene") in both levels of the round-tripping

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scheme. The evidence in relation to the round-tripping scheme is particularly relevant to the conspiracy claim because it seeks to demonstrate the following.

(1) First level round-tripping

74 The majority of the funds disbursed under the loans advanced to the Singapore Borrowers were channelled to entities controlled by MK to acquire shares in GL Thailand and round-tripped through a series of back-to-back and related party transactions back to GL Thailand in order to purchase GL Thailand shares for MK's benefit. A flowchart provided by Potter summarising the various round-tripping series of transfers was adduced at the trial. It is set out below at Annex A.

75 We should observe here that although the Judge found several aspects of Potter's analysis to be questionable, he did not examine the crux of Potter's evidence in relation to the round-tripping and the objective evidence that Potter's opinion was premised upon. In addition, we should add that no contrary evidence was adduced by the respondents to challenge Potter's flowchart and the supporting documentary evidence. For completeness, we should observe that JTA's case on the round-tripping scheme for the purposes of SUM 21 is based on the objective documentary evidence before the court and no longer premised on the Commission's report which was not proved at the trial. In any case, it appears to us that in finding several aspects of Potter's analysis to be "questionable", the Judge might have misunderstood the tenor of Potter's analysis. For example, the Judge stated that Potter's analysis that the loans were suspicious because of the high interest rates was contradicted by JTA's own witnesses who admitted that interest rates were not unjustifiable in the context (Judgment at [17]). However, it seems to us that the fact that the GLH Loans were suspicious is beyond doubt as was found to be so by the Judge.

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Furthermore, Potter's analysis that the loans were suspicious was not solely on account of the high interest rates *per se* but rather because the Borrowers had no legitimate commercial activities which would justify taking on or servicing the repayments at high interest rates coupled with their ostensible inability to service the loans.

76 We also observe that the proper forum to examine and evaluate the weight of the round-tripping evidence should be at the appeal proper in CA 21 and it suffices for present purposes to examine a sampling of the round-tripping evidence which the Judge appears to have overlooked. In that connection, we turn to examine the US$14.5m loan in the period of October to November 2015 which appears to be supported by objective documentary evidence.

77 Pursuant to the facility agreement dated 1 October 2015 between GLH and Cougar, GLH transferred US$14.5m in GLH Loans to Cougar on 9 November 2015. The US$14.5m was transferred out on the same day from Cougar to APF BVI, pursuant to a loan agreement between Cougar and APF BVI, which was signed by MK.

78 Showa's public announcement dated 16 November 2015 disclosed that on 12 November 2015, APF BVI transferred US$9.3m as a loan to Showa, and of that amount, Showa advanced US$8.9m to Wedge, which then transferred the same sum to Engine, which used the sum to exercise warrants and acquire shares in GL Thailand. In fact, MK admits to the transfers from APF BVI to Showa, Wedge and Engine, but testifies that it was entirely legitimate for Engine to exercise its warrants to increase its shareholding in GL Thailand.

79 Obviously, there is nothing illegitimate in itself for Engine to exercise its warrants. The significance of this evidence serves to identify the *source* of

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the funding for the exercise of the warrants. It appears that the evidence demonstrates that the GLH Loans were used for a purpose other than for the growth of GL Thailand's retail financing business in Southeast Asia (meaning, the purchase of GL Thailand shares), contrary to MK's representations.

(2) Second level round-tripping

80 The second level of round-tripping in JTA's case pertains to GLH financing the payments of interest back to itself on existing GLH Loans by advancing new GLH Loans. The interest repayments which the Borrowers purportedly paid to GLH appears to have been made from the capital that had been advanced by GLH to the Borrowers in the first place.

81 The round-tripping thus created the false appearance that loans were made to *unrelated parties* on an arms' length basis who agreed to pay high rates of interest with the loans fully secured over valuable assets. This allowed GL Thailand and GLH to report increasing profits from the GLH Loans. However in reality, funds were transferred to the related parties who were unable to generate the returns necessary to repay either the interest that was due on the loans or the principal when it became due. No value was actually created and no profits should have been recognised. Since the Borrowers were incurring expenses in addition to interest on GLH Loans, they were expending the loan principal to repay the GLH Loans and GLH was in fact *incurring unreported losses.*

82 JTA's case is that the Cyprus Borrowers transferred the GLH Loan monies to the Singapore Borrowers to enable the Singapore Borrowers to make interest payments to GLH under earlier GLH Loans.

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83 By way of an example, pursuant to a loan agreement between GLH and Adalene dated 29 September 2016 at an interest rate of 15% per annum, GLH transferred US$3m to Adalene. On the same day, pursuant to a loan agreement between Adalene and Cougar at an interest rate of 7% per annum, there was a back-to-back transfer of US$3m from Adalene to Cougar.

84 On 30 September 2016, Cougar transferred approximately US$2.8m to GLH with the description: "Transfer ... to GROUP LEASEHOLDINGS ... As per loan agreement dd 2 11 15". The balance in Cougar's bank account prior to the transfer indicates that Cougar was only able to make the interest-related payment to GLH out of the monies loaned from Adalene. This payment corresponded with an invoice from GLH to Cougar dated 1 August 2016 which included interest on loans for the period of April 2016 to June 2016 totalling approximately US$2.5m.

85 It appears that the objective evidence demonstrates that a large proportion of the loan advanced to Adalene on 29 September 2016 was immediately transferred to Cougar to repay interest on GLH Loans. US$2.5m in interest payments were made out of funds advanced under another GLH Loan. Since the use of the loan principal to pay interest would reduce the assets of the Borrowers below the level required to repay the loan principal at the end of the loan's term, it should not have been recognised as income by GL Thailand. Yet, the interest income was reported as revenue and GLH's net profits were hence artificially inflated. GLH's financial information was subsequently incorporated into GL Thailand's financial statements.

86 In our judgment, there appears to be sufficient objective documentary evidence, for present purposes, to support the two levels of round-tripping. There appears to be sufficient evidence to enable the court to draw the inference

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that (a) the GLH Loans were shams created to disguise the true nature of the transactions and were not legitimate transactions earning proper profits; and (b) JTA's investments were not used for the purpose of driving growth of GL Thailand's retail financing business as was represented by MK to JTA.

Exclusion of GL Thailand as a party

87 The Judge noted that the exclusion of GL Thailand for "reasons unknown unfortunately made it difficult to understand the dynamics between the parties" (Judgment at [9]). However, we find that the Judge placed undue weight on this factor.

88 We first note, as was recognised by the Judge (Judgment at [7]), that there is no rule that every alleged conspirator must be made a defendant for a conspiracy action to succeed. Liability for the tort of conspiracy is joint and several, and a plaintiff is entitled to sue whomever he wishes: *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 at [20]. Of course, if the party omitted from suit is a protagonist in the alleged conspiracy, then the plaintiff will find it difficult, as a matter of evidence, to prove his case in the absence of the court hearing from that party: see *Fornet Enterprise Co Ltd v Howell Universal Pte Ltd and others* [2006] 2 SLR(R) 349 at [62]–[64]. Unless a good reason is provided for that party's omission as a defendant, the trial judge will have difficulty finding that the alleged conspiracy was proved: *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 at [20]–[21].

89 Second, it appears that MK was the main protagonist in the alleged conspiracy. The Judge found that MK was in charge of both GLH and GL Thailand (Judgment at [9]). The board of directors of GLH, as well as that of GL Thailand, were nearly identical at the material times. Unless it can be demonstrated how the omission to add GL Thailand as a party to the Suit

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constrained MK from adducing certain evidence, which we note was not even argued before the Judge, we fail to see how it would have made any evidential difference if GL Thailand had been added as a party to the Suit. The closing submissions of the respondents in the Suit made multiple references to the evidence given by "[w]itnesses from the management of GL [Thailand] and GLH" (meaning, MK, TK and Mr Tashiro). There is simply no evidence before the court that *additional* material witnesses would have been called to testify had GL Thailand been added as a party. In any case, it was entirely open to MK to call witnesses from GL Thailand for his defence even if GL Thailand was not a party to the Suit. There is no rule that witnesses are somehow limited to persons who are employed by the parties in the action.

90 In any event, as we previously observed in *JTrust (CA)*, the exclusion of GL Thailand was neither critical nor fatal to JTA's claim (at [49]–[50]):

> … If Mr Konoshita were omitted as a defendant, perhaps that would have a critical negative bearing on the viability of the Conspiracy Action but, in our view, not so with Group Lease Thailand's omission.
>
> In any event, [JTA] has *a good reason* for not including Group Lease Thailand as a defendant. The investment agreements are governed by Thai law and provide for disputes to be subject to the jurisdiction of the Thai courts. It is therefore entirely legitimate for [JTA] to pursue its claim in contract on the debentures against Group Lease Thailand in Thailand, as it has done, and to pursue a separate claim in tort in Singapore against those entities which are part of the alleged conspiracy to defraud it.
>
> [emphasis added]

Nothing occurred at the trial which rendered this observation outdated.

Issue 3: Real risk of dissipation

91 We now turn to the second requirement – whether there is a real risk that GLH, MK and Cougar will dissipate their assets to frustrate the potential

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enforcement of an anticipated judgment should JTA succeed in its appeal in CA 21. This inquiry should be examined in the light of the *current* state of the evidence before the court.

The relevant factors

92 In *JTrust (CA)* (at [65]), we enumerated a number of factors which the court generally considered relevant in assessing whether there is a real risk of dissipation. The factors would include the nature of the assets which are to be the subject of the proposed injunction, and the ease with which they could be disposed of or dissipated; the nature and financial standing of the defendant's business; the length of time the defendant has been in business; the domicile or residence of the defendant; if the defendant is a foreign entity, the country in which it is registered and the availability of reciprocal enforcement of local judgments or awards in that country; the defendant's past or existing credit record; any intention expressed by the defendant about future dealings with his local or overseas assets; connections between a defendant and other companies which have defaulted on awards or judgments; the defendant's behaviour in respect of the claims, including that in response to the claimant's claims; and good grounds for alleging that the defendant has been dishonest.

MK and GLH

93 The material facts which warranted the granting of the Injunctions in *JTrust (CA)* remain largely unchanged, given our observations in *JTrust (CA)* as regards MK's dishonesty which remain valid as no contrary finding was made by the Judge at the trial (at [66]–[74]), the nature of the respondents' assets (at [75]–[78]) and the domicile and place of registration of MK ([79]–[81]).

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94 MK and GLH argued that since JTA's claim of deceit against GLH and MK has been dismissed (Judgment at [19]), it should follow that there is no evidence of dishonesty on the part of GLH and MK that points to the conclusion that their assets would be dissipated. For the reasons set out at [45]–[90] above, as matters stand, it appears to us that JTA has a good arguable appeal against the Judge's dismissal of its claim of deceit and conspiracy. We therefore do not agree that GLH and MK can rely on the dismissal of JTA's claim as evidence that no risk of dissipation of assets exists.

95 In fact, the present evidence before us appears to suggest that there is a heightened risk of dissipation on the part of both MK and GLH. MK's conduct in the BVI proceedings from the Eastern Caribbean Supreme Court ("ECSC") (as found in the judgment delivered on 18 December 2018 after the Injunctions were reinstated by this court on 1 June 2018), demonstrated his clear unwillingness to comply with the disclosure obligations in the BVI worldwide Mareva injunction by breaching them continuously over several weeks. The ECSC also observed that the position taken by MK in the proceedings was "very close to the deliberate type of obtuseness that the Court commonly sees from those who are intent on obstructing substantive justice against them" and that MK could not "be left to police himself". The ECSC also saw it fit to appoint a receiver over APF BVI (the personal investment vehicle of MK) despite having the BVI Mareva injunction already in place. MK's dishonest intention to dissipate his assets appears to be borne out by his conduct in connection with related proceedings in other jurisdictions.

96 As for GLH, JTA was notified by one of GLH's banks on 29 November 2019 that GLH intended to make a withdrawal of US$1.3m in favour of GL Thailand, without informing JTA as required by the worldwide Mareva injunction. In this regard, GLH submitted that the transfer was never actually

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made but it was merely an *intended* transfer which GLH was discussing with its bankers. However, the fact that the said transfer was detected and stopped by the bank does not alter the fact that GLH nonetheless attempted to circumvent the worldwide Mareva injunction albeit unsuccessfully.

Cougar

97 Cougar submitted that its change in management, namely its sole shareholder from Mr Rithivit to "a neutral third-party professional", Saronic, as well as its new directors and solicitors have remedied the underlying risk of dissipation. On 29 June 2018, Cougar's former directors, Mr Khith Sipin and Mr Sivagnanaratnam Sivanesan were replaced by its current directors, Mr Wong Tai Ping and Mr Gwynn Hopkins.

98 We note the Judge's finding that Cougar is now under the control, indirect or otherwise, of J Trust Japan, which had funded Saronic's role in the litigation and that after Saronic acquired control of Cougar, the company capitulated to JTA's demands (Judgment at [22]).

99 This finding of the Judge is consistent with Cougar's claim that since the Current Directors' appointment, it has diligently complied with all aspects of the worldwide Mareva Injunction. JTA's case against Cougar in SUM 21 is premised on the conduct of Cougar's *former* directors who are no longer in control of Cougar.

100 Our task is to evaluate the risk of dissipation with reference to the present circumstances *after* the trial and not the circumstances as they stood prior to the trial. In this regard, we agree with Cougar that with the change in its management, there is no evidence before the court to show that there remains a real risk of dissipation, which Mr Chan fairly conceded. Mr Chan, however,

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submitted that there is still a tussle over the control of Cougar. That may well be so but it is purely speculative and does not address the question as to whether there exists a real risk of dissipation under the current management of Cougar.

101 In our judgment, we agree that there is a real risk of dissipation of assets on the part of MK and GLH under the *current* circumstances, but not Cougar.

102 Before we conclude, we should mention that Mr Teh also argued that the application should be denied on account of a finding of unclean hands by the Judge. He submitted that JTA had failed to come to court with clean hands as the Judge "found for a fact that JTA had orchestrated the takeover of [Cougar] in these proceedings, that it funded the new owner of [Cougar] and that [Cougar] "capitulated" to JTA's demands". We do not agree. Mr Teh omitted to refer to the Judgment at [23] where the Judge observed that "*even if JTA was so motivated as Mr Teh suggests*, its conduct does not rise to the level where striking out its entire claim is justified" [emphasis added]. We fail to see how the finding by the Judge could be used to support the "unclean hands" argument given his conclusion that it did not even amount to an abuse of process.

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Conclusion

103 For the above reasons, we allow SUM 21 in part and reinstate the domestic Mareva injunction against MK and the worldwide Mareva injunction against GLH, but dismiss the application to reinstate the Mareva injunction against Cougar. In the circumstances, we order that costs of SUM 21 be costs in the appeal in CA 21.

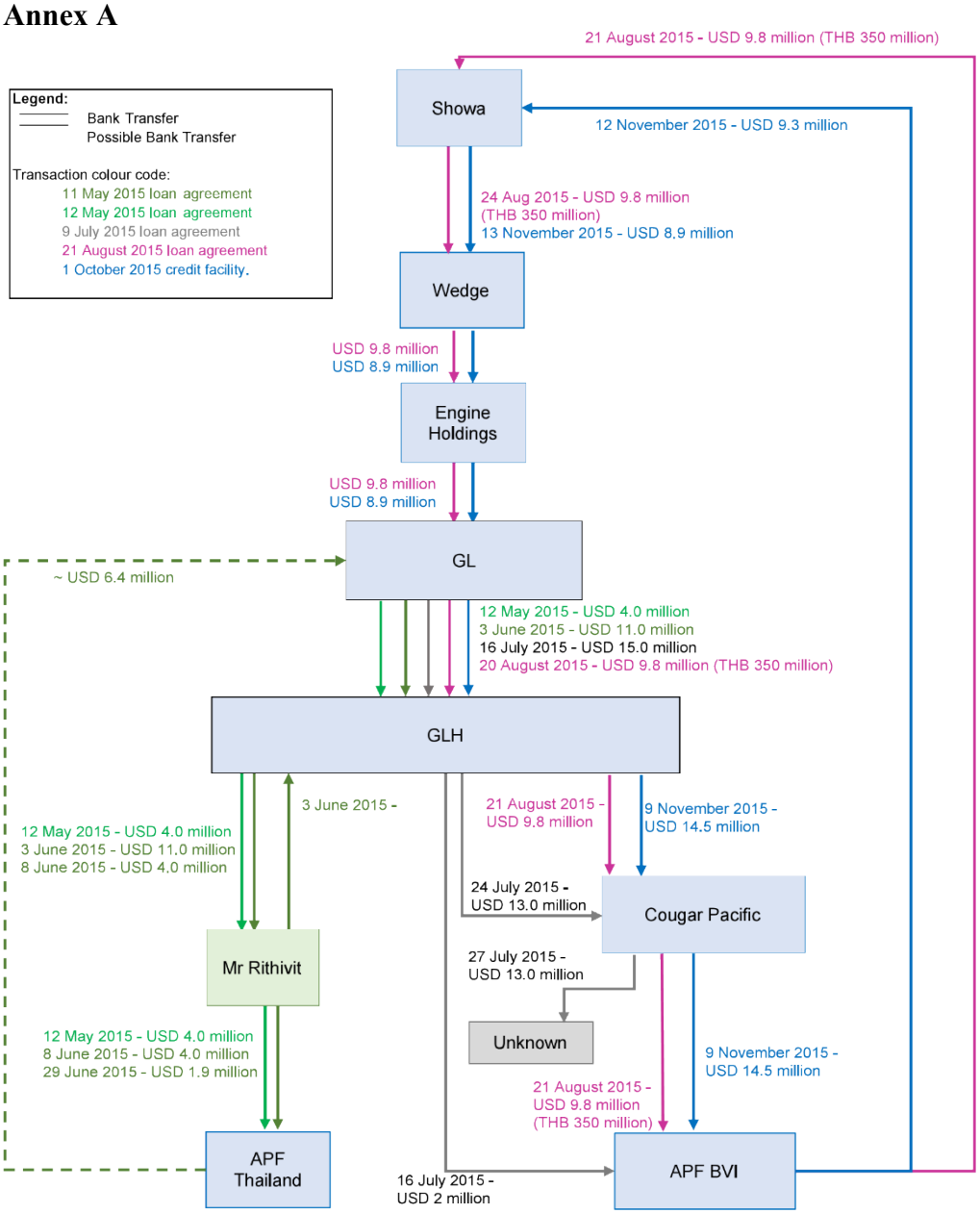
Steven Chong
Judge of Appeal

Quentin Loh
Judge

Chan Leng Sun SC (instructed counsel), Shirleen Low, Danitza Hon Cai Xia, Lee Zhe Xu and Yiu Kai Tai (Wong & Leow LLC) for the appellant;
Teh Kee Wee Lawrence, Pan Xingzheng Edric, Chia Huai Yuan and Elias Benyamin Arun (Dentons Rodyk & Davidson LLP) for the first and second respondent; and
Daniel Tan Shi Min and Abhinav Ratan Mohan (Shook Lin & Bok LLP) for the third respondent.

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Annex A



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Annex B

Date	Event
20 March 2015	**JTA enters into the 1st IA**
13 May 2015	GL releases its financial statements for Q1 2015
22 May 2015	**JTA completes its subscription for USD 30,000,000 of GL's convertible debentures pursuant to the 1st IA**
13 August 2015	GL releases its financial statements for Q2 2015
10 November 2015	GL releases its financial statements for Q3 2015
30 December 2015	**JTA converts the debentures that it had acquired under the 1st IA to GL shares**
15 February 2016	GL releases its financial statements for FY 2015
12 May 2016	GL releases its financial statements for Q1 2016
6 June 2016	**JTA enters into the 2nd IA**
1 August 2016	**JTA completes its subscription for USD 130,000,000 of GL's convertible debentures pursuant to the 2nd IA**
15 August 2016	GL releases its financial statements for Q2 2016
14 November 2016	GL releases its financial statements for Q3 2016
1 December 2016	**JTA enters into the 3rd IA**
28 February 2017	GL releases its financial statements for FY 2016
13 March 2017	**JTA purchases 8,116,900 units of GL warrants in the open market**
20 March 2017	**JTA completes its subscription for USD 50,000,000 of GL's convertible debentures pursuant to the 3rd IA**
15 May 2017	GL releases its financial statements for Q1 2017
15 August 2017	GL releases its financial statements for Q2 2017
28 April 2017 – 11 September 2017	**JTA purchases 24,063,100 GL shares in the open market**

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