Neutral Citation Number: [2020] EWCA Civ 999

Case No: A3/2020/0650

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Morgan
[2020] EWHC 1837 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2020

Before :

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

- -

Between:

ORGANIC GRAPE SPIRIT LIMITED	**Appellant (Defendant)**
- and -	
NUEVA IQT, S.L.	**Respondent (Claimant)**

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Mr Tom Weisselberg QC and Mr Peter Head (instructed by **Mishcon de Reya LLP**) for the **Appellant**
Mr James Potts QC and Mr Christopher Lloyd (instructed by **Howard Kennedy LLP**) for the **Respondent**

Hearing date: 14 July 2020

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Approved Judgment

Lord Justice Newey:

1. This appeal, from a decision of Morgan J ("the Judge") dated 30 March 2020, raises a question as to when, if ever, a company against which a freezing order is made should be permitted to pursue a fledgling business.

Basic facts

2. The respondent, Nueva IQT, S.L. ("Nueva"), is a Spanish company ultimately owned by members of the Bertolino family. Mr Michele Gulino Bertolino ("Michele") and his sister Mrs Maria Giovanna Gulino Bertolino ("Giovanna") each hold 2.439% of Nueva's shares. The remainder are owned by Finanziaria Chimica Valenzana, SpA, a company registered in Italy whose shareholders are Michele, Giovanna and their mother, Mrs Antonina Bertolino ("Antonina"). Michele and Giovanna both have 768,000 shares in the Italian company, while the other 1,664,000 shares are held by their mother, but in large part in usufruct for Michele and Giovanna.

3. The appellant, Organic Grape Spirit Limited ("OGSL"), is a British company incorporated on 21 May 2019. Its only issued shares are held by Mr Federico Gulino Camerero ("Federico"), whose father is Michele. Federico is also OGSL's only registered director. Michele was named as a director when the company was formed, but he is recorded as having resigned on 13 September 2019.

4. Between 23 September and 11 October 2019, sums totalling €12 million were transferred to OGSL from Nueva pursuant to a contract by which Nueva purportedly agreed to lend OGSL up to €20 million. The contract was signed on behalf of Nueva by Michele, who was at the time one of the company's two managing directors, and purportedly ratified at a meeting of Nueva's board on 14 October 2019. Giovanna, who was the other managing director, opposed ratification, but she was outvoted by Michele and the third director, a Mr Morata.

5. According to Federico, he wished (and wishes) to use the €12 million to pursue a business opportunity. "The main idea," he said in a witness statement dated 26 March 2020, "is to produce spirits with tailored flavours that can meet the standard of different markets by, first producing the desired aromatic compounds in the fermented wine and then to separate them with extreme precision and to blend them subsequently into the final product". Federico prepared a business plan for OGSL in, it seems, September 2019 and he explained in his witness statement that he had "pretty much followed my business plan although I have changed a few points to increase production and profitability". He also detailed expenditure which OGSL had undertaken to date. In total, he said, some €1.6 million had been spent on setting up a plant and purchasing machinery. The outlay had largely been on the purchase of three warehouse units in Kent, but there had also been expenditure (often by way of deposit) on items such as distillation columns, fermenters, a yeast inoculator, a centrifuge and storage and buffer tanks. OGSL had further paid a deposit to enable it to participate in a food fair that was scheduled to take place in November 2020.

6. Nueva stresses Federico's youth: he is, we were told, only 24 years of age. On the other hand, he has a degree in chemical engineering from Loughborough University and an MSc in business with accounting and finance from Warwick Business School. By his own account, he has also gained experience from working in a bioethanol plant in

Belgium, and in September 2019 he attended a four-day "iStill" University course in the Netherlands on distilling.

7. At the behest of Antonina and Giovanna, Michele and Mr Morata were both removed from Nueva's board at a general meeting on 20 December 2019 and new directors, including Antonina, were appointed. Since then, Nueva has issued proceedings against OGSL in Spain challenging the validity of the loan contract. It alleges that Michele did not have authority to enter into the contract, that the contract required approval from Nueva's shareholders, that Michele acted in bad faith and that the contract lacked "causa". It is common ground that under Spanish law the claim is not proprietary in nature.

8. On 13 March 2020, Nueva issued a claim for a worldwide freezing order to be made under section 25 of the Civil Jurisdiction and Judgments Act 1982 in aid of the proceedings which it was to bring in Spain. The matter came before Nugee J on 16 March on a without notice basis. He acceded to the application, granting an injunction until 30 March, but it was stated in the order that it did not prohibit OGSL from dealing with or disposing of any of its assets in the "ordinary and proper course of business" and Nugee J explained in his judgment that the order was not intended to prevent expenditure on the business Federico was seeking to develop. In the course of his judgment, Nugee J said the following:

> "6. I should make it clear that I do not regard spending money on developing a start-up business, if that is genuinely what is being done, as dissipation, and I do not think there is anything in the point that because it is a start-up it cannot be said to have an ordinary course of business. There is effectively here a fairly stark choice between whether this is a genuine attempt to finance a business to be run by Federico along the lines that the business plan suggests, in which case I think that such matters as buying warehouses, buying distilling equipment, spending money on marketing, setting up a website and getting the business up and running cannot be characterised as dissipation. Dissipation, as I understand it, means – this is not a definition but a paraphrase of what is found in the authorities – an unjustified removal or disposing of your assets in order to avoid (or with the effect of avoiding) a judgment debt.
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> 7. If you are genuinely trying to develop a new business, I do not regard that as dissipatory, even if the business may be imprudent, even if the business plan may be sketchy and somewhat shaky. Trying to develop a business is not the same as avoiding a judgment.
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> …
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> 12. … I am prepared to accept that there is a sufficient risk of dissipation to justify a short-term injunction at least

> until the return date, when the respondent can give their side of the story.
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> 13. However, … such an injunction will not prevent Organic Grape from spending money in the ordinary course of its business and, for reasons that I have already made clear, I regard spending money on the continued development of its business, if that is what is genuinely being done, as not a dissipation that should be restrained by this injunction. The intention behind it is to stop the reaction to being sued in Spain being one of taking any cash assets that are still available to Organic Grape and moving them in such a way as to make them more difficult to recover in the event that the claim is successful. It is not intended to strangle at an early stage this new start-up business which, if it is a genuine business, is entitled to pursue its business in the way that it wants to without the court stopping it."

9. The matter came before the Judge on 30 March 2020. He continued the freezing order which Nugee J had granted but, unlike Nugee J, barred OGSL from pursuing the project which Federico had outlined in the business plan and his witness statement. Thus, paragraph 4(4) of the order provided that OGSL must not:

> "In any way deal with, dispose of or diminish the value of any of its assets so as to develop any new business or enterprise including but not limited to the business of producing alcohol and related products as described in the 'Business Plan' … and/or the first witness statement of Federico Gulino …".

Likewise, paragraph 10(2) of the order stated:

> "This Order does not prohibit the Respondent from dealing with or disposing of any of its assets in the ordinary and proper course of business, but the Respondent must give the Applicant's solicitors 7 days' notice of its intention to do so in respect of any transaction exceeding € 10,000 in value. For the avoidance of doubt, the Respondent is not permitted to rely on this paragraph in order to deal with, dispose of or diminish the value of any of its assets so as to develop any new business or enterprise including but not limited to the business of operating a business of producing alcohol and related products as described in the 'Business Plan' … and/or the first witness statement of Federico Gulino …".

10. In his judgment, the Judge noted that an applicant need not show that a respondent is attempting to evade successful enforcement of a judgment to obtain a freezing order. One asks, he said, whether the effect of the relevant dealing is liable to be that the assets available for execution are reduced. On the other hand, "some dealings, which may have the effect of reducing the respondent's assets, are regarded as justified and not to be restrained" (paragraph 22). The Judge considered it helpful "to consider whether it

is just and appropriate to make a Freezing Order in the present circumstances" (paragraph 31). In that context, he referred to the approach taken by Brereton J in *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225, (2005) 225 ALR 369, a New South Wales case, which he saw as "good sense and a proper appreciation of where justice may lie" (paragraph 34). The judge reckoned that the second-hand value of OGSL's equipment would be less than its purchase cost and that its improvements to the warehouses were "specialist" and so unlikely to add value to the premises. Accordingly, "there will immediately be a depletion of the respondent's assets if there is no Freezing Order" (paragraph 37). Turning to OGSL's "intended business", the Judge said that he was "not in a position to assess its prospects of success but there are certainly question marks about those prospects" and that, while he was "not in a position to say what the situation is here", "there must be, certainly in the language of risk, a real risk that the business may fail" (paragraph 38). The Judge continued in paragraph 39:

> "It seems to me that it is proper to call the business speculative and bearing in mind the comments made in the *Harrison Partners* case, this is a case where expending what remains of the €12 million on developing this business runs a substantial risk that the assets will be significantly reduced between today's date and the time when there might be a judgment to enforce."

The Judge commented that OGSL had obtained what was "obviously a soft loan" and that he could not "envisage a commercial lender offering that loan to this respondent on those terms" (paragraph 42). "If," he said, "Federico's business is one which would attract commercial lending in the ordinary way, then I would not wish to stop him pursuing a business funded in that way" (paragraph 42).

11. The Judge concluded that "it is not right to impose on the applicant the risk of non-recovery" (paragraph 42). He said in paragraph 43 that he had decided that "the just and appropriate order here is to make a Freezing Order which prevents the remainder of the €12 million being expended in the way in which the respondent wishes to expend it on developing his business".

12. In the course of his judgment, the Judge noted that the business which OGSL wished to pursue "is an entirely new one" (paragraph 38), that Federico "is a 24 year old who is relatively new to the world of business" (paragraph 38) and that "[o]ne would think that this is not the time to lay out substantial capital sums on developing a business" given the Covid-19 pandemic (paragraph 40). He also recorded that counsel for Nueva had said that OGSL "does not have an ordinary course of business", but not that there was anything improper about it (paragraph 30).

13. OGSL now challenges the Judge's decision in this Court. It does not, however, contend that the freezing order which the Judge made should be set aside in its entirety. It asks, rather, for the deletion of paragraph 4(4) and the word "not" in the second sentence of paragraph 10(2) of the order. On that basis, OGSL would be free to pursue the business outlined in the business plan and Federico's witness statement. Mr Tom Weisselberg QC, who appeared for OGSL with Mr Peter Head, said that OGSL considered that an order amended in that way would be manageable from its point of view and that, taking that "pragmatic" approach, it was prepared to accept that the Court should proceed on

the basis that there is a sufficient risk of dissipation to justify a freezing order. OGSL has not, moreover, sought to dispute that Nueva has a good arguable case against it.

Freezing orders and business transactions: some principles

14. In the case from which "*Mareva*" injunctions took their name, *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213, Lord Denning MR spoke at 215 of the Court having jurisdiction to grant an injunction if "there is a danger that the debtor may dispose of his assets so as to defeat [a debt] before judgment". Such statements tended to suggest that injunctive relief was available only where there was what was termed in one case "nefarious intent". However, in *Ninemia Maritime Corp v Trave Schiffahrts GmbH (The Niedersachsen)* [1983] 1 WLR 1412, the Court of Appeal held at 1422 that "the test is whether … the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied". As Christopher Clarke J said in *TTMI Ltd v ASM Shipping Ltd of India* [2005] EWHC 2666 (Comm) at paragraph 25, "it is not necessary to establish that the defendant is likely to act with the *object* of putting his assets beyond reach".

15. However, the Court will not restrain all conduct which could prejudice a defendant's ability to satisfy a judgment. Absent a proprietary claim, a defendant's assets belong to him and a freezing order is not even intended to give a claimant security for what he alleges to be due to him. The Court's concern is with *unjustified* disposals. In *Perry v Princess International Sales & Services Ltd* [2005] EWHC 2042, Christopher Clarke J said that, to his mind, "[d]issipation implies some use of his assets by the person sought to be enjoined, in a manner which is, in the circumstances, improper or unjustifiable". Likewise, in a passage approved by the Court of Appeal in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 at paragraph 34, Popplewell J said in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) at paragraph 86, "What must be threatened is *unjustified* dissipation".

16. Consistently with that approach, a defendant will not be prevented from spending on ordinary living expenses. The fact that such expenditure will reduce a defendant's assets does not matter. The prospect of a defendant's assets being depleted in this way will not justify the making of a freezing order and, where a freezing order is granted because there is other evidence of a risk of dissipation, the order should expressly exempt payments in respect of living expenses. In *Vneshprombank LLC v Bedzhamov* [2019] EWCA Civ 1992, [2020] 1 All ER (Comm) 911, Males LJ concluded in paragraph 67 that "[a] defendant should be permitted to spend by way of ordinary living expenses in accordance with his actual past standard of living".

17. Expenditure on business need not be regarded as unjustified, either. A freezing order against a trading company should normally include a provision stating that it does not prohibit dealing with or disposing of assets in the "ordinary and proper course of business". In *Halifax plc v Chandler* [2001] EWCA Civ 1750, the Court of Appeal approved at paragraphs 19 and 20 a passage from what is now Gee on Commercial Injunctions, 6th ed., in which it is said that "there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value". Clarke LJ observed in paragraph 18:

> "In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment."

In a similar vein, Christopher Clarke J said in *Perry v Princess International Sales & Services Ltd* at paragraph 28:

> "The court will not restrain a person from dealing with his assets in the usual or ordinary course of business, provided of course that that business is a lawful one. I do not think that the position is different because that business involves a degree, even a substantial degree, of risk or speculation. Each case must of course depend on its own facts. I can envisage circumstances in which the use to which a defendant's assets might well be put is so speculative or so different from his ordinary or usual activities that a freezing order should be made. If it should transpire that transactions are being entered into, whose apparent purpose is to ensure that funds are not available to satisfy any judgment, an order would equally be made in those circumstances."

18. Slade LJ had expressed himself in somewhat comparable terms in *Normid Housing Association Ltd v Ralphs and Mansell* [1989] 1 Lloyd's Rep 274. In that case, the plaintiffs were seeking to restrain defendants from compromising a claim against insurers and there was an issue as to whether the proposed settlement would be a transaction in the ordinary course of business. Slade LJ said at 278:

> "Of course it can be said that in one sense professional men who settle a claim against their professional indemnity insurers are not effecting a transaction in the ordinary course of business. Their business does not consist of settling such claims and it is to be hoped, at least, that in practice they will rarely, if ever, be faced with the necessity to make such a claim. Nevertheless, it seems to me that the bona fide settlement of such a claim for what the insured believes to be its fair value falls entirely within the spirit of what was said in the two judgments to which I have referred. To invoke the *Mareva* jurisdiction to prevent the bona fide settlement of such a claim in this manner would, it seems to me, be to stretch it beyond its original purpose so that, instead of preventing abuse of assets, it would rather prevent professional men from conducting their practices as they are entitled to do.
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> If in the present case the evidence had shown that the proposed settlement was so disadvantageous to the architects that no reasonable person could have believed that it represented the fair value of their claim, the position would have been quite different. This might well have been evidence of bad faith. It might well

> have constituted evidence of a concerted plan to cheat the plaintiffs. On this basis I think that the court might well have been entitled to intervene by way of *Mareva* relief. However, no doubt advisedly, this is not how the plaintiffs have put their case."

19. In *JSC BTA Bank v Ablyazov (No 3)* [2010] EWCA Civ 1141, [2011] Bus LR D119, the Court of Appeal pointed out that business transactions can be authorised either under the standard exception in respect of dealings and disposals "in the ordinary and proper course of business" or on a case-by-case basis. Protection for the claimant, the Court explained at paragraph 75, "is achieved by prohibiting all disposals of assets except those permitted by the express exceptions to the order and by giving the defendant a general liberty to apply in respect of any particular intended disposal" and "[t]ransactions can therefore be sanctioned by the court and if found to be unobjectionable then permitted". The Court went on in paragraph 76:

> "This format points, in our view, to the standard exception about disposals in the ordinary course of business being given a narrower rather than a wide meaning. Transactions in the ordinary course of business in the case (e.g.) of a trading company will include all its usual purchases and disposals and the payment of its trade and other liabilities as they fall due. A regulated investment company which acquires and sells shares and other securities on behalf of its clients would be treated in the same way. But we do not consider that the concept of the ordinary course of business would, as a general rule, comprehend alterations in investments by a private investor however wealthy he may be. For them to qualify it would be necessary to show that the investor was himself running a business by making the changes in his holdings rather than merely re-organising his investments to obtain a better outcome."

The Court further explained in paragraph 74:

> "the standard exception … provides a limitation on the scope of the injunction thereby enabling routine business transactions to be conducted without reference to the court. But dealings or disposals which are not part of the ordinary business of the defendant in that sense do not necessarily fall foul of the purpose of the freezing order. They merely require the approval of the court or the claimant before they are carried out and so enable the court to scrutinise what, on its face, may not appear to be a routine or regular transaction."

20. In *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028, Lewison LJ pointed out in paragraph 19 that, to fall within the standard "ordinary and proper business" exception, a disposal must be both in the *ordinary* course of business and in the *proper* course of business and that these are "separate and cumulative requirements". *Koza Ltd v Akcil* [2019] EWCA Civ 891, [2020] 1 All ER (Comm) 301 suggests that, to be "proper", a course of business must be "in accordance with

acceptable standards of commercial behaviour in conducting that business" (to use words of Floyd LJ in paragraph 66; see too paragraph 27(iii)).

21. When should the Court sanction dealings or disposals which are not part of the ordinary business of the defendant? Plainly, it should not do so if the claimant shows that the defendant is not acting in good faith. More specifically, the Court should decline to bless transactions if it appears that the defendant wishes to undertake them with the *object* of putting his assets beyond reach or, to quote Christopher Clarke J in *Perry v Princess International Sales & Services Ltd*, where the "apparent purpose is to ensure that funds are not available to satisfy any judgment". To grant permission in such a case would obviously fall foul of the purpose of the freezing order. It seems to me that the Court should also decline to authorise a defendant to carry on a business which can be seen to have no reasonable prospect of success or even prospects so poor that trading would in the circumstances evidence a director's unfitness for the purposes of the Company Directors Disqualification Act 1986 (as to which, see e.g. *Re Synthetic Technology Ltd* [1993] BCC 549 at 562): the proposed trading would not be proper. In the *Perry* case, Christopher Clarke LJ said that he could envisage circumstances in which the use to which a defendant's assets might be put is "so speculative" that a freezing order should be made. So can I. Failure to meet "acceptable standards of commercial behaviour" in some other respect could also justify the Court in refusing to permit business transactions.

22. On the other hand, I do not think that a transaction or business should be prohibited merely because it involves "a degree, even a substantial degree, of risk or speculation" (to use words of Christopher Clarke J once again). Nor, provided that the risk attaching to an enterprise is not such as described in the previous paragraph, is it in my view for the Court to consider whether a business venture is reasonable. Nor again is the Court's task to try to balance the risk of harm to the claimant if no freezing order is granted against that to the defendant if an order is made. Where something is in the ordinary course of a defendant's business, he is allowed to pursue it even if it carries substantial risk (*Perry v Princess International Sales & Services Ltd*), without consideration of whether it is reasonable (*Halifax plc v Chandler*) and without a balancing exercise being undertaken (*Halifax plc v Chandler*). It seems to me that, consistently with the basis of freezing orders, similar principles must apply where the Court is considering proposed business transactions outside the ordinary course of business.

23. As I have mentioned, the Judge found *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* of assistance. In that case, a defendant wished to pursue a new business venture in respect of which there was, Brereton J said in paragraph 27, "a bona fide, albeit undeveloped, business plan". Brereton J dismissed the application, concluding in paragraph 47 that:

> "notwithstanding that I am not satisfied that there is a risk of dealing with intent to produce the result that Jevena be judgment proof, I am satisfied both that there is a real risk of dealing *liable* to produce that result, and that the voluntarily [sic] investment of Jevena's sole asset in a speculative venture when faced with a substantial claim which if successful would exceed its assets, would be an abuse of its power of disposition in the relevant sense".

Earlier in his judgment, Brereton J said that it was "difficult to see … why honest blundering in dealing with assets by a defendant should be permitted to the detriment of a plaintiff's ability to achieve and the court's ability to do justice" (paragraph 40) and that "[i]t will suffice to establish that there is a real risk that the defendant will deal with the assets in a manner calculated, or liable, to produce the result that a judgment in the favour of the plaintiff would not be satisfied" (paragraph 43). Brereton J continued:

> "44 That test, in my opinion, is plainly met in the present case. There is a real risk that, if granted access to the funds in court, Jevena will deal with them by investing in the proposed business, albeit bona fide, and that that business would fail, resulting in Jevena having insufficient assets to satisfy any judgment which Harrison might recover.
>
> 45 And, to the extent that the touchstone of the jurisdiction is an abuse of the defendant's power of disposition, I would hold that the investment of a defendant's sole remaining significant asset in a speculative venture at a time when it is facing a significant claim for an amount which exceeds the defendant's available funds, which has been found to be seriously arguable, in circumstances where there are no other creditors or obligation on the defendant, is indeed an abuse of the power of dispossession. In this respect the case is far removed and distinguishable from a case in which it is proposed to use funds to pay creditors or employees or even in the course of an ongoing existing business. Rather, this proposal involves putting funds which are currently safe in jeopardy, in a speculative venture. Though the analogy is not perfect, support for this view can be drawn from the cases that hold that a person who, being about to embark on a speculative venture, alienates his or her assets to an associate, thereby defrauds creditors within the meaning of the *Conveyancing Act* 1919 (NSW), s37A and the *Bankruptcy Ac*t 1966 (Cth), s 121: see, for example, *Ex parte Russell; Re Butterworth* (1882) 19 Ch D 588, particularly in the judgment of Lord Jessel MR, who said: 'The principle is that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss".'"

24. It will be apparent from what I have already said that I do not consider Brereton J's approach to accord with the law of England and Wales. It does not in my view "suffice to establish that there is a real risk that the defendant will deal with the assets in a manner calculated, or liable, to produce the result that a judgment in the favour of the plaintiff would not be satisfied". Further, I do not think that cases dealing with transactions defrauding creditors are of any help. For a transaction to be vulnerable as one defrauding creditors under the current provision, section 423 of the Insolvency Act 1986, it must both be "at an undervalue" and "entered into … for the purpose (a) of putting assets beyond the reach of a person who is making, or may at some time make,

a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make". In a case such as I am postulating, in contrast, the defendant is not proposing to enter into a transaction at an undervalue and is not aiming to prejudice the interests of a claimant.

The present case

25. The present appeal appears to me to give rise to two main issues:

    i) Would pursuit of the business outlined in OGSL's business plan and Federico's witness statement be in the "ordinary and proper course of business"?

    ii) If not, should the Judge nonetheless have sanctioned dealings and disposals in pursuit of that business?

"Ordinary and proper course of business"

26. The key question in the context of the first issue is whether the proposed expenditure would be in the "ordinary" course of business.

27. Mr Weisselberg argued that it would. By the time the matter was before the Judge, OGSL had been trading for more than five months. True it is that the company had not yet undertaken any production, but it had already spent some €1.6 million in transactions the earliest of which dated back to November of last year. By 30 March of this year, when the Judge made his decision, OGSL had an "ordinary" course of business and the transactions which it wishes to undertake are in pursuance of that.

28. In contrast, Mr James Potts QC, who appeared for Nueva with Mr Christopher Lloyd, maintained that OGSL had and has no "ordinary" course of business. OGSL may wish to set up a business and have taken preliminary steps in that regard, but no business has thus far been established. The company has no employees and its warehouse premises are empty. Not only has it not produced anything, but it has not even acquired the means to do so. For a company to have an "ordinary" course of trading, there must be a pattern of previous conduct against which transactions can be judged. Thus, in *Avant Petroleum Inc v Gatoil Overseas Inc* [1986] 2 Lloyd's Rep 236 Neill LJ spoke at 243 of a purpose being one for which "those or similar assets had been used by him in the course of his ordinary trading", in *JSC BTA Bank v Ablyazov (No 3)* the Court referred in paragraphs 74 and 76 to "routine business transactions" and "usual purchases and disposals", in *Fundo Soberano de Angola v dos Santos* Popplewell J made reference in paragraph 86 to an "existing way of handling … assets" and in *Koza Ltd v Akcil* Floyd LJ said in paragraph 42 that it is "necessary to examine the existing business of the company". Here, in contrast, OGSL has no "existing way of handling … assets", there are no "routine business transactions" or "usual purchases and disposals" and assets cannot be said to have been "used … in the course of … ordinary trading". Further, *JSC BTA Bank v Ablyazov* shows that "ordinary and proper course of business" is to be given a "narrower rather than a wide meaning".

29. On balance, I agree with Mr Potts that the proposed expenditure would not be in the "ordinary" course of business. OGSL could be described as having "commenced business" and it has spent substantial sums on acquiring equipment for its venture. As yet, however, it has not progressed as far as either sales or manufacture and it is some

way off even having everything that it would need to start production. Perhaps it could be said that it is possible to discern a pattern of past *expenditure* but, given that "ordinary and proper course of business" has a "narrower rather than a wide meaning", Mr Weisselberg has not in the end persuaded me that there is an "ordinary … course of business". The better view, I think, is that a defendant in OGSL's position, which has not established a pattern of *trading*, cannot simply rely on the "ordinary and proper business" exception to a freezing order but must specifically ask the Court to authorise pursuit of its fledgling business. That conclusion seems to me to make sense. The protection afforded by a freezing order could be significantly eroded if the defendant could claim that transactions fell within the "ordinary and proper business" exception when there was no benchmark against which the activities could be assessed.

Should the Judge nonetheless have sanctioned dealings and disposals in pursuit of the intended business?

30. Citing *Hadmor Productions Ltd v Hamilton* [1983] AC 191 at 220 and *JSC Commercial Bank Privatbank v Kolomoisky* [2018] EWCA Civ 3040 at paragraph 24, Mr Potts stressed the limited circumstances in which this Court is entitled to interfere with an exercise of discretion. In the present case, he argued, there is no basis for doing so. The decision under appeal involved no error of law or principle and was one that the Judge was entitled to reach.

31. It seems to me, however, that the Judge's approach did not accord with the principles outlined in paragraphs 21-24 above. The Judge did not suggest that OGSL was acting in bad faith or seeking to pursue its venture with the object of putting its assets beyond reach. In fact, not only was there no finding of impropriety, but Nueva had not claimed that there was anything improper about OGSL's plans. It was evidently fundamental to the Judge's decision that the business had risk attached to it. He saw as "good sense" *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* where Brereton J said that it would "suffice to establish that there is a real risk that the defendant will deal with the assets in a manner calculated, or liable, to produce the result that a judgment in the favour of the plaintiff would not be satisfied" and, as regards the case before him, the Judge said that there were "certainly question marks" about OGSL's prospects, that there must be "a real risk that the business might fail", that "it is proper to call the business speculative" and that "expending what remains of the €12 million on developing this business runs a substantial risk that the assets will be significantly reduced". However, the Judge did not find that the business had no reasonable prospect of success nor even that its chances of success were poor. To the contrary, he considered that he was "not in a position" to assess the prospects of success or "what the situation is here". In the circumstances, the Judge ought, in my view, to have permitted OGSL to pursue its fledgling business. As I have said earlier in this judgment, I do not think that a business should be prohibited merely because it carries even a substantial degree of risk and I do not see the *Harrison* case as representing the law in this jurisdiction. "Question marks", "real risk" and the fact that the business could be described as "speculative" do not provide adequate reasons for preventing trading.

32. The Judge referred in his judgment to OGSL's business being "an entirely new one", to Federico's relative youth and inexperience and to the implications of the Covid-19 pandemic. The fact remains, however, that the Judge did not conclude that OGSL was doomed to fail. Understandably enough, his view was, as I say, that he was unable to assess the prospects of success.

33. Having adverted to the second-hand value of equipment and to the chances of specialist improvements adding value, the Judge observed that there would be an immediate depletion of OGSL's assets in the absence of a freezing order (see paragraph 10 above). However, the fact that a start-up company might have liabilities in excess of its assets cannot of itself mean that it should be barred from pursuing its business. Further, prohibiting OGSL from developing its business could surely be expected to crystallise a depletion of its assets rather than to avoid one.

34. In all the circumstances, it seems to me that the Judge approached matters on an incorrect basis and that, on the basis of his findings, he should have allowed OGSL to deal with and dispose of assets in pursuit of its intended business.

Conclusion

35. I would allow the appeal. In my view, it is appropriate to delete from the order of 30 March 2020 both paragraph 4(4) and the word "not" in the second sentence of paragraph 10(2). Since, however, we have been concerned exclusively with the business outlined in the business plan and Federico's witness statement, the words "any new business or enterprise including but not limited to" should also, I think, be omitted from paragraph 10(2).

Lord Justice Arnold:

36. I agree.

Lord Justice David Richards:

37. I also agree.