SUPREME COURT OF NEW SOUTH WALES
DIVISION: EQUITY
COMMERCIAL LIST

No. 2020/00246363

CHINA INSURANCE GROUP FINANCE COMPANY LIMITED
Plaintiff

PHILLIP JAMES KINGSTON
Defendant

DEFENDANT'S RESPONSIVE SUBMISSIONS

1. This is an application for a freezing order and ancillary orders.

2. The plaintiff is a part of a corporate group that is owned and controlled by the Chinese government and based in Hong Kong. The defendant (**Mr Kingston**) is an Australian businessman, based in Melbourne.

3. In this proceeding, the plaintiff sues to recover loans it alleges were made to Mr Kingston in 2017 and 2018. On its case: the loans went into default in September and October 2019, after interest payments were missed; in December 2019, the plaintiff demanded repayment of the missed amounts; and on 20 January 2020, it demanded Mr Kingston pay all outstanding principal and interest.

4. But it was not until 24 August 2020, that is, almost a year after the alleged defaults and more than seven months after the demand for full payment, that the plaintiff commenced this proceeding. And within days of doing so, it applied – on an urgent basis – for freezing orders over Mr Kingston's assets.

5. Remarkably, the plaintiff "accepts that it cannot point to any imminent threat of dissipation or to any other special feature" that merits a freezing order. Instead, its application is based on an apparent "concern" that Mr Kingston "may have dissipated his assets, may yet dissipate his assets… and has otherwise taken steps to obscure his assets in order to frustrate the Plaintiff's recovery".[1]

6. The plaintiff does not identify any such "dissipation", whether historic or prospective. It does not even identify the "steps" said to "obscure" Mr Kingston's assets. Instead, it raises on a blancmange of assertions about how Mr Kingston has structured his affairs and difficulties that receivers (appointed by another company in the Chinese group to other companies associated with Mr Kingston) have apparently had in tracing funds.

7. But none of these matters is sufficient to justify a freezing order. In short, the plaintiff has not identified **any** conduct or proposed conduct of Mr Kingston that is (or could be said to) be calculated to have the effect of frustrating enforcement of any judgment the plaintiff obtains.

A. PROCEDURAL BACKGROUND

8. The present application was brought by a motion dated 10 September 2020. It was supported by two affidavits, made respectively as follows:

   (a) on 9 September 2020 by the plaintiff's solicitor, Wen-Ts'ai Lim (**Lim affidavit**); and

   (b) on 9 September 2020 by one of the receivers, Shaun Fraser (**Fraser affidavit**).

---

[1] Plaintiff's written submissions dated 11 September 2020, 42

9. The plaintiff's substantive proceeding was commenced by a summons filed on 24 August 2020. Its claim is set out in a Commercial List Statement, also dated 24 August 2020.

10. On 4 September 2020, the Court (Hammerschlag J) made orders for substituted service of the summons and Commercial List Statement. Those orders provided for the material to be sent by email to solicitors (HWL Ebsworth) acting for Mr Kingston in the public examinations and by post to Mr Kingston's residential address. The orders provide that service is to be taken to be affective "three clear business days" after those steps were completed.

11. The application for a freezing order came on for hearing on 11 September 2020 before Stevenson J. His Honour adjourned the application and made programming orders for the provision of further material by the plaintiff and submissions by the parties.

12. On 11 September 2020, the plaintiff filed an affidavit, made by the other receiver, Jason Preston (**Preston affidavit**).

13. Mr Kingston has filed an affidavit, made by his solicitor, Richard Mereine of HWL Ebsworth, on 14 September 2020.

14. Mr Kingston has not yet had the opportunity to put on a defence to the plaintiff's claim.

B. FACTUAL BACKGROUND

15. The factual background is set out in the plaintiff's written submissions dated 11 September 2020, and was outlined in the plaintiff's oral submissions given at the first return. It is necessary therefore to provide only a summary.

16. The plaintiff is a part of the "China Taiping Insurance Group", a corporate group owned and controlled by the Chinese government and based in Hong Kong. Mr Kingston is an Australian businessman, based in Melbourne.

17. Mr Kingston was the founder and CEO of the "Sargon Group" of approximately 39 companies. Its business involved providing technology and infrastructure to build and grow investment funds. The Sargon Group also conducted a series of financial planning, corporate trustee, responsible entity, superannuation and related financial services businesses.[2] The parent company of the group was Sargon Capital Pty Ltd (**Sargon Capital**).[3]

18. Mr Kingston was a director of Sargon Capital. Another director was Zhen Wang.[4]

Loan from Taiping Trustees Ltd

19. In February 2018, Taiping Trustees Ltd (**Taiping**) (another company in the "China Taiping Insurance Group") loaned money to a company associated with Mr Kingston, Trimantium Taiping Investment Management Pty Ltd (**TTIM**).[5] That loan was secured over the assets of Sargon Capital, TTIM and a third company, Trimantium Capital Funds Management Pty Ltd (**TCFM**). Under the terms of the loan, Taiping was entitled to nominate a director and an observer to the board of Sargon Capital.[6] That person was Zhen Wang.

---

2 Fraser affidavit, 15
3 Fraser affidavit, 17
4 An ASIC search for Sargon `capital is a pages 16-42 of the exhibits to the Fraser affidavit
5 Fraser affidavit, 26. The loan was made under "promissory note" dated 5 February 2018: see pages 257 to 270 of the exhibits to the Fraser affidavit
6 See clause (m) of the promissory note, at page 260 of the exhibits to the Fraser affidavit

20. Or about 20 February 2018, TTIM drew down AUD50,000,100 under the loan from Taiping.[7] On about 20 May 2018, it drew down a further AUD31,001,715.64.[8]

21. On 29 January 2020, Taiping appointed Messrs Fraser and Preston as receivers and managers to each of Sargon Capital, TTIM and TCFM.[9] Subsequently, it appointed voluntary administrators to each of those companies as well[10] and, on 8 April 2020, they went into liquidation.[11]

22. As receivers and managers, Messrs Preston and Fraser have assumed control over the property and assets of Sargon Capital, TTIM and TCFM. They have investigated the companies' examinable affairs.[12] They have also applied for public examinations to be conducted in this Court, under Part 5.9 of the *Corporations Act,*[13] which are listed to commence on 19 October 2020 in Sydney. Mr Kingston is one of the people scheduled to be examined.

Amounts advanced by the plaintiff to Mr Kingston

23. The plaintiff's case against Mr Kingston is pleaded in its Commercial List Statement. In summary, it alleges:

    (a) In 2017 and 2018, the plaintiff made loans to Mr Kingston.[14]

    (b) In September and October 2019, Mr Kingston failed to make interest payments under the loans.[15]

    (c) In December 2019, the plaintiff demanded repayment of the amounts that had not been paid.[16]

    (d) At the end of December 2019, Mr Kingston failed to make a further interest payment.[17]

    (e) Each of the foregoing matters constituted and "Event of Default" under the relevant loan agreements.

    (f) On 20 January 2020, the plaintiff demanded that Mr Kingston pay all outstanding principal and interest under the loan.[18]

24. As explained above, on 24 August 2020 (that is, only last month and some seven months since it demanded repayment), the plaintiff commenced this proceeding to recover the amounts advanced, together with interest.

25. The same firm of solicitors (Ashurst) is acting for each of the plaintiff, Taiping, and the receivers appointed by Taiping. As well as conducting this proceeding, those solicitors are acting for the receivers in the public examinations.

---

7 Fraser affidavit, 27
8 Fraser affidavit, 28
9 Fraser affidavit, 8
10 Fraser affidavit, 12
11 Fraser affidavit, 13
12 Fraser affidavit, 14
13 Fraser affidavit, 19
14 Fraser affidavit, 55; Lim affidavit, 5
15 Lim affidavit, 7(a) and (b)
16 Lim affidavit, 7(c)
17 Lim affidavit, 7(d)
18 Lim affidavit, 7(e)

C. PRINCIPLES

26. The matters that must be demonstrated to justify a freezing order are well-known. They were summarised recently and conveniently by Williams J, as follows:[19]

> [10] It is well established that an applicant for a freezing order is required to demonstrate:
>
> (a) a prima face case, or good arguable case, against the defendants against whom the freezing order is sought, in the sense that the case is more than barely capable of serious argument, albeit not necessarily one which the court considers to have a better than fifty per cent chance of success: see, for example, *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321 (Gleeson CJ) and 326 (Meagher JA); *Samimi v Seyedabadi* [2013] NSWCA 279 at [69] per McColl JA, citing *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG 'The Niedersachsen'* [1983] 1 WLR 1412; [1984] 1 All ER 398 at 404 per Mustill J; and
>
> (b) a danger that any judgment obtained by the plaintiff against the defendant will be wholly or partly unsatisfied because the defendant's assets might be disposed of, dealt with or diminished in value. This danger must be established by evidence, rather than being merely asserted. The evidence may take a number of forms, including direct evidence that the defendant has previously acted in a way which shows that its probity is not to be relied on. However, it is not necessary for a plaintiff to show that the defendant has a positive intention of evading a judgment. It is sufficient if the defendant's conduct or proposed conduct is, objectively speaking, calculated to have the effect of frustrating the enforcement of any judgment that the plaintiff may obtain: Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 25.11; *Samimi v Seyedabadi* [2013] NSWCA 279 at [72] – [74] per McColl JA, citing *Frigo v Culhaci* [1998] NSWCA 88 at pages 6 and 8 per Mason P, Sheller JA, Sheppard AJA and *Finn v Carelli* [2007] NSWSC 261 at [4] per Brereton J (as his Honour then was).
>
> [11] Assuming that these matters are established, discretionary considerations must also be taken into account, including whether the plaintiff has proceeded diligently and expeditiously in applying for the freezing order: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; [1999] HCA 18 at [53] per Gaudron, McHugh, Gummow and Callinan JJ; see also *Samimi v Seyedabadi* [2013] NSWCA 279 at [75] per McColl JA.
>
> [12] As the Court of Appeal said in *Frigo v Culhaci* [1998] NSWCA 88 at page 6 per Mason P, Sheller JA, Sheppard AJA, in a passage subsequently approved in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; [1999] HCA 18 at [51] per Gaudron, McHugh, Gummow and Callinan JJ, a freezing order:
>
> > … is a drastic remedy which should not be granted lightly … if granted, [it] imposes a severe restriction upon a defendant's right to deal with his or her assets. It is granted at the suit of a plaintiff whose status as a creditor is in dispute … Its purpose is to preserve the status quo, not to change it in favour of the plaintiff. The function of the order is not to provide a plaintiff with security in advance for a judgment that he hopes to obtain and that he fears might not be satisfied…

---

19 *Axis Medical & Rehabilitation Pty Ltd (as trustee for Axis Trust t/as Astir Australia) v Tuantab* [2020] NSWSC 486

D. ANALYSIS

D.1 Bases for the plaintiff's application

27. Mr Kingston contends that the plaintiff has not discharged the burden of identifying the danger that any judgment will be wholly or partly unsatisfied because his assets might be disposed of or diminished in value.

28. As explained above, the plaintiff "accepts that it cannot point to any imminent threat of dissipation or to any other special feature" that merits a freezing order. Instead, its application is based on its "apprehension"[20] or "concern"[21] that Mr Kingston "may have already, or may yet dissipate or hide his assets in such a way as to frustrate [its] claim".[22]

29. The plaintiff advances four bases for its application:[23]

    (a) first, in recent months, investigations undertaken by receivers have raised a "concern that funds may have been misappropriated or misdirected" and "suggests that the defendant may have caused companies to misappropriate substantial sums of money", causing a transfer of funds to a Marshall Islands company;

    (b) second, following the receivers' appointment, Mr Kingston "took steps… to obstruct their investigations and obscure the true nature of the dealings" by replacing TCFM as trustee and not "acceding fully" to their requests for delivery of books and records;

    (c) third, Mr Kingston "may have structured his affairs in such a way as to avoid ready identification of his legal or beneficial interest in assets";

    (d) fourth, Mr Kingston "appears to have evaded service of these proceedings".

30. Thus, the plaintiff does not identify any conduct or proposed conduct that has, or could be said to have, the effect of frustrating enforcement of any judgment. Its argument does not rise above assertion and speculation: its submissions teem with references to "may" and "appears" and "suggests". Further, the plaintiff focuses on conduct that dates back years, more so, conduct that the receivers are still investigating.

31. The plaintiff's failure to identify any conduct that would have the effect of frustrating any judgment means the application should be dismissed.

32. In any event, none of the bases on which the plaintiff relies can be sustained to justify a freezing order. Each is dealt with each below.

D.2 Analysis of the plaintiff's bases

(1) "Misappropriation or misdirection"

33. The plaintiff contends that the evidence supports an inference that "the Defendant is a person who has in the past misappropriated funds, or caused companies he controlled to misappropriate funds".[24] That contention is based on investigative work the receivers have undertaken. Their concern is "that funds may have been misappropriated or misdirected"[25] (note, "concern" and "may have been") because of four matters, namely:[26]

---

20 Plaintiff's written submissions, paragraph 5
21 Plaintiff's written submissions, paragraph 42
22 Plaintiff's written submissions, paragraph 5
23 See plaintiff's written submissions, paragraphs 4 and 40
24 Plaintiff's written submissions, paragraph 25
25 Fraser affidavit, 29
26 Ibid

(a) money advanced by Taiping to TTIM "appears to have been disbursed amongst the broader Sargon Group in ways which were inconsistent with the purposes stated in the drawdown requests";

(b) bank accounts opened in the names of TTIM and TCFM had low cash balances;

(c) Mr Kingston has not "acceded fully" to requests for books and records; and

(d) Mr Kingston caused the trustee to be changed after the receivers were appointed.

34. None of these matters are indicative of "misappropriation" or "misdirection" of funds.

35. The fact that money advanced by Taiping was distributed amongst the broader Sargon Group does not bespeak misappropriation or misdirection. First, the receivers' investigations are incomplete, as they (and the plaintiff) concede. Further, their public examinations are listed for next month. Second, Taiping authorised the drawdown and application of funds that it advanced. Third, Taiping had a representative (Mr Wang) on Sargon Capital's board. He ceased being a director only after the receivers were appointed. Thus, almost all the transactions to which the plaintiff (and the receivers) point occurred "on his watch". Yet there is no suggestion that Mr Wang identified anything untoward about the transactions, whether at the time or subsequently.

36. In its written submissions, the plaintiff identifies five matters relating to the suggested "misappropriation". Dealing briefly with each:

(a) The **first** matter concerns the use of $50,000,100 advanced by Taiping. The purpose of that advance was for TTIM to purchase 333,334 shares in Sargon Capital.[27] Taiping approved the relevant drawdown.[28] Now, some eight months after their appointment, the receivers' position is that they have not been able to identify the flow of funds. But that does not demonstrate misappropriation or misdirection of the funds. As the plaintiff accepts, the flow of funds is complex. Further, despite having "conducted multiple telephone and in-person conferences with Phillip Kingston and his representatives",[29] the receivers have never raised the issue with Mr Kingston (presumably, it will be explored during the forthcoming public examinations). It is difficult, therefore, to see how the receivers' inability to identify the flow of funds demonstrates that Mr Kingston misappropriated funds or caused them to be misappropriated.

(b) Similar observations can be made about the **second** matter the plaintiff raises, namely, the funds the plaintiff advanced to Mr Kingston in April 2018. The plaintiff's complaint that there is no explanation as to what happened to these funds is difficult to understand. It contends that the funds were advanced for "the stated purpose of funding a call for capital".[30] But that it not what the relevant agreement says: as the plaintiff records (fn 33), additional preference shares in Sargon Capital, to be issued to TCFM, were to comprise **security** for the advance. Further, notwithstanding what the plaintiff says now about this advance, the fact is that, in October 2018, it advanced a **further** HKD253 million to Mr Kingston.[31] The suggestion that there was something amiss with the earlier advance (made in April 2018) or the use of

27 A copy of the drawdown request is at page 397 of the exhibits to the Fraser affidavit
28 See executed "Drawdown Approval" at page 400 of the exhibits to the Fraser affidavit
29 Fraser affidavit, 18(c)
30 Plaintiff's written submissions, paragraph 28
31 Fraser affidavit, 60.

the funds advanced defies credulity. if something had been amiss, the plaintiff would hardly have advanced even more money six months later. Furthermore, the October transaction occurred at a time when Mr Wang was a member of Sargon Capital's board. Again, he appears to have raise nothing about it.

(c) The **third** matter concerns a transfer of AUD28,512,028 from Sargon Capital's bank account. In its oral submissions on 11 September 2020, the plaintiff placed great store in the fact that these funds were transferred to a company located in the Marshall Islands – as if that fact alone calls for suspicion and further enquiry. What the plaintiff has failed to address is that (1) the relevant transaction documents (including the unit sale agreement dated 13 July 2018, under which the money was paid to the Marshall Islands company – SC Opportunities Finance Co Ltd) are available to the receivers, (2) the relevant funds were transferred through the trust accounts of two reputable firms of solicitors: first, Maddocks (who were acting for TCFM), then King & Wood Mallesons (who were acting for the Marshall Islands company), and (3) the issue raised in the receivers' material is that they "do not currently have sufficient information to determine whether King and Wood Mallesons transferred the purchase price to SC Opportunities".[32] (Curiously, the receivers made enquiries of Maddocks and Mallesons only on 16 and 17 July 2020.[33]) It is strange that an attempt to misappropriate or misdirect company funds should deploy trust accounts of not just one but **two** national firms of solicitors. And, once again, the relevant transactions occurred at a time when Mr Wang was on Sargon Capital's board. Also, in the context of this transaction, the plaintiffs contend the receivers "have been unable to investigate this matter" since, at around the time of their appointment, Mr Kingston replaced TCFM as trustee of the Trimantium Sargon Investment Trust. That contention is addressed in more detail below. But, at present, it suffices to observe that (1) the contention is wrong (TCFM was removed as trustee long before the receivers were appointed) and (2) Mr Kingston has provided the receivers with documents relating to that trust. Further, the receivers' evidence is that their difficulty lies in not being able to determine whether King & Wood Mallesons transferred the purchase price. It is difficult to see how that can be visited on Mr Kingston, for whom Mallesons did not act.

(d) The **fourth** matter "concerns apparently misleading representations that were made to the plaintiff about the market value of preference shares in Sargon Capital". It is difficult to understand the relevance (if any) of this matter. First, if the plaintiff was the victim of "misleading representations", it would presumably take action about them. But such a claim forms no part of its claim against Mr Kingston. Second, and more fundamentally, the fact that a person (here, TCFM) is able to acquire shares for less than their market value does not bespeak misleading conduct, particularly so for shares acquired under a share issue or placement. There is nothing that requires shares to be issued at a market price.

(e) The **fifth** point is that Mr Kingston used the amounts advanced by the plaintiff to invest "through companies of which he has no known legal or beneficial interest,

---

32 Fraser affidavit, 54

33 See chronology in the Preston affidavit

and with whom he has no documented legal relationship."[34] This is no more than restatement of the "structure of his affairs" complaint, dealt with below.

37. The fact that TTIM and TCFM's bank accounts had low balances is not evidence of misappropriation. The funds advanced by Taiping were for the purpose of enabling the Sargon Group to make acquisitions, including acquisitions of shares. Following those acquisitions, the shares and companies acquired with the money advanced formed part of the security held by Taiping. Given the purpose of the loans, and that (as the plaintiffs have complained) money advanced by Taiping was distributed amongst the broader Sargon Group, it is hardly surprising that TTIM and TCFM's accounts had low balances.

38. The contentions that Mr Kingston has not "acceded fully" to requests for books and records and caused TCFM to be replaced as trustee of a trust after the receivers were appointed are addressed under heading (2) below.

39. To summarise, none of matters on which the plaintiff relies demonstrate any "misappropriation" or "misdirection" of funds.

(2) Mr Kingston's alleged failure "to accede fully" to requests for books and records

40. The plaintiff contends that Mr Kingston has failed to "accede fully`" to the receivers' requests for the books and records of Sargon Capital, TTIM and TCFM. In that context, the plaintiff also refers to Mr Kingston having changed the trustee of a particular trust following the appointment of the receivers.

41. But it is difficult to see how either of these complaints can found the plaintiff's apprehension about dissipation, let alone a freezing order.

42. The contention that Mr Kingston has failed to "accede fully`" to requests for documents is based on a statement in Mr Fraser's affidavit.[35] However, Mr Fraser does not explain or particularise how Mr Kingston has "not acceded". Mr Fraser refers to having made requests for documents in January and February 2020,[36] but says nothing about requests since then. He also refers to correspondence with ASIC about Mr Kingston.[37] But most of that is – again – old, dating from February, March and April 2020. ASIC did issue a notice to Mr Kingston, reminding him of his obligation (under section 429 of the Corporations Act) to provide a report about TCFM's affairs[38] (which report Mr Kingston provided in April 2020[39]). But there is no suggestion that ASIC took action against Mr Kingston about inadequacies in documents he provided to the receivers.[40]

43. Further, by April 2020, solicitors were acting for Mr Kingston in relation to the documents requested by the receivers. In his chronology, Mr Preston asserts that, on 17 April 2020,

---

34 Plaintiff's written submissions, paragraph 35

35 Fraser affidavit, 29(c)

36 Fraser affidavit, 18(f)

37 Ibid.

38 See page 496 of the exhibits to the Fraser affidavit

39 See page 495 of the exhibits to the Fraser affidavit: "*As an update Phillip Kingston provided the ROCAP for Trimantium Capital Funds Management Pty Ltd on Tuesday 28 April 2020*." Mr Kingston had already provided a report about the other companies.

40 If anything, ASIC chided the receivers for overreaching, reminding them that their statutory power was to inspect documents, rather than request delivery of them: see the email dated 27 March 2020 from Josephine Yazbek of ASIC to the receivers (pages 497-498 of the exhibits to the Fraser affidavit "Section 431 of the Act states that a controller is entitled to **inspect** Company books and records. Please be advised that for ASIC to be able to assist with this matter, the Receiver and Manager will need to send a new notice to Mr Kingston reflecting this rather than requesting for delivery of books and records" (emphasis in original)

those solicitors (HWL Ebsworth) responded to the receivers, "providing copies of some but not all documents requested by the receivers". Mr Preston does not explain the alleged shortcomings in what Mr Kingston provided. He does not explain, for instance, what documents were missing. Further, there is nothing to suggest that the alleged shortcomings were raised with Mr Kingston's solicitors. For instance, neither Mr Fraser nor Mr Preston refer to or exhibit any correspondence on the issue. Nor has the issue been raised elsewhere, despite Mr Fraser's evidence that he and his staff have "conducted multiple telephone and in-person conferences with Phillip Kingston and his representatives".[41] Participating in "multiple telephone and in-person conferences" is hardly the conduct of someone seeking to hide, obstruct or obscure assets or past transactions. Finally, the evidence is that the receivers have never asked Mr Kingston about the transactions referred to in the Fraser affidavit.

44. The plaintiff's contention about the change of trustee cannot be sustained. The plaintiff contends that the change of trustee occurred **after** the receivers were appointed: "Instead of assisting the receivers following their appointment to TCFM, the defendant removed TCFM as trustee and appointed a different company".[42] Mr Fraser says the same (emphasis added):[43]

> TCFM was the trustee of a trust called the Trimantium Sargon Investment Trust. **After Mr Preston and I were appointed**, Phillip Kingston caused the trustee to be changed to a company called Fintech Investments Australia Pty Ltd (pages 501.1 to 501.10). This has made it difficult for us to investigate that trust.

45. The difficulty, however, is that TCFM was replaced as trustee of the trust **before** the receivers were appointed. The change was made by a "Deed of Retirement and Appointment of Trustee" executed on 19 November 2019, a full two months before the receivers' appointment.

46. The chronology puts paid to the plaintiff's contention that Mr Kingston's replacement of the trustee was a step to "obstruct" the receivers' investigations and "obscure" the true nature of dealings. To the extent that the plaintiff's "apprehension" of dissipation is based on the replacement of the trustee, it too falls away.

47. The issue of the change of trustee is important for other reasons too. By an email dated 17 April 2020 from his solicitors (HWL Ebsworth), Mr Kingston provided the receivers with the "Deed of Retirement and Appointment of Trustee", together with a number of other documents relating to the "Trimantium Sargon Investment Trust".[44] The email to which the documents were attached was copied to each of Mr Fraser and Mr Preston.

48. Given that the receivers received the actual instrument that effected the change of trustee, it is difficult to see how they can have been so certain – and so wrong – about the event's timing. Neither Mr Fraser nor Mr Preston (who says he read Mr Fraser's affidavit and

---

41 Fraser affidavit, 18(c)

42 Plaintiff's written submissions, 4(b). see also 31 ""At around the time of their appointment, the defendant removed TCFM as trustee of the "Trimantium Sargon Investment Trust" and 40(b)

43 Fraser affidavit, 29(d)

44 The documents included (a) the certificate of registration of Fintech Investments Australia Pty Ltd; (b) the constitution of Fintech Investments Australia Pty Ltd; (c) the "Deed of Retirement and Appointment as trustee of the Trimantium Sargon Investment Trust"; (d) the trust deed for the Trimantium Sargon Investment Trust;(e) the unit register of the Trimantium Sargon Investment Trust; (f) the asset register of the Trimantium Sargon Investment Trust, as at 19 November 2019; (g) the financial report for TCFM as trustee for the Trust for the year ended 30 June 2017; and (h) the financial report for TCFM as trustee for the Trust for the year ended 30 June 2018

agrees with his account) refer to the email from HWL Ebsworth or the "Deed of Retirement and Appointment of Trustee". Presumably, they did not intend to give inaccurate evidence. It is conceivable that they overlooked the deed, or did not realise they had it, or did not appreciate its significance, or simply did not read it.

49. But any such explanation undermines the plaintiff's contentions on this application. First, it undermines the argument that Mr Kingston has not "acceded fully" to requests for information: rather, the receivers appear to have overlooked what he did provide. Second, it undermines – fatally – the contention that he has sought to obstruct the receivers' investigations and obscure the true nature of his dealings: contrary to the plaintiff's assertion, he did not change the trustee after the receivers' appointment. Further, he provided them with the document by which he made the change. Third, it demonstrates shortcomings in the investigations the receivers have undertaken. If they can have been mistaken about so straight-forward an issue as when the trustee was changed (despite having had the key transaction document provided to them), what else they have overlooked or failed to appreciate, or not read, during their investigations?

50. In circumstances where the plaintiff does not point to any threat of dissipation but relies on matters said to arise from the receivers' investigations, shortcomings in those investigations are particularly important and serve to undermine the basis of the plaintiff's application.

(3) Structure of defendant's affairs

51. The plaintiff contends that Mr Kingston has "structured his affairs in such a way as to avoid ready identification of his legal or beneficial interest in [his] assets".[45]

52. There are several difficulties with this contention. First, the relevant "structure" is not identified. Second, the plaintiff has not explained how the "structure" (whatever it might be) avoids "ready identification" of Mr Kingston's assets. Third, and perhaps most importantly, the plaintiff does not point to any relevant **change** in the structure – whether recent or otherwise.

53. The entitlement of a businessperson like Mr Kingston to arrange – indeed to "structure" – his affairs cannot be gainsaid. There are a myriad of commercial or personal reasons someone might do so. Neither the plaintiff (nor the receivers, for that matter) contend there is anything improper or illegal about Mr Kingston's "structure".

54. At the highest, the plaintiff's point is that some of the transactions by which Mr Kingston used the money advanced to him are (in its view) "unusual". But that does not provide a basis for a freezing order, particularly where – as the plaintiff (properly) concedes – it knew that Mr Kingston would use the funds in the manner he did.[46]

55. An application for a freezing order is not a vehicle or opportunity for a plaintiff to explore a defendant's financial circumstances or personal arrangements, particularly where that same defendant is shortly to undergo public examination on the application of receivers appointed by companies related to the plaintiff.

56. Whatever complaints or curiosity the plaintiff might have about Mr Kingston's "structure", that structure has existed prior to the events the subject of its proceeding. There is no suggestion that his "structure" is or was improper. There is no suggestion that it has been

45 Plaintiff's written submissions, 40(d)(iii)
46 See plaintiff's written submissions, 37

changed or altered. It is difficult to see, therefore, how his "structure" can support the plaintiff's apprehension of dissipation.

(4) Alleged evasion of service.

57. The plaintiff submits that Mr Kingston has "evaded service". That submission appears to be based on two elements: first, that a process server was not able to effect personal service on Mr Kingston; second, that HWL Ebsworth did not have instructions to accept service on behalf of Mr Kingston.

58. The submission is remarkable. As the plaintiff accepts, the Melbourne is currently the subject of a stringent "lockdown" as a result of the COVID-19 pandemic. As is notorious, people are confined to their homes for most of the day. The fact that the process server was not able to serve the defendant does not mean Mr Kingston was seeking to "evade" service. There could be any number of reasons the process server was unable to deliver the documents. It might be noted, for instance, that the address given to the process service included the incorrect postcode for the suburb for which Mr Kingston lives.[47]

59. The plaintiff also advances the remarkable contention the fact that HWL Ebsworth did not have instructions to accept service on behalf of the defendant somehow constitutes an "evasion" of service. A defendant is under no duty to accept service, or to assist a plaintiff to effect it.

D.3 Other matters going to discretion

60. There are other matters going to the Court's discretion whether to make a freezing order.

61. The first is the time that has elapsed since (a) the defaults alleged by the plaintiff and (b) it demanded repayment. The alleged defaults occurred last year, and the demand for repayment was made in January this year. There has been no explanation why it has taken the plaintiff so long to commence this proceeding or to apply for a freezing order.

62. Second, Mr Kingston is a defendant to several proceedings arising from the collapse of Sargon Capital and related companies. Those proceedings include this proceeding, other proceedings in the Supreme Court of Victoria, defamation proceedings in New Zealand, and the public examinations. At the same time, he is attempting to rebuild his life and to explore new business opportunities. He needs to be able to deploy his assets towards those commitments, and a freezing order will impose a severe restriction on his ability to do so.

63. Mr Kingston's position is made more difficult by the fact that, although he is resident in Victoria, this proceeding and the public examinations will be conducted in New South Wales. It is not clear why the plaintiff, which is based in Hong Kong, has commenced this proceeding in New South Wales. The only connection with New South Wales appears to be that it is where the plaintiff's solicitors are based. Mr Kingston reserves the right to apply to transfer this proceeding to the Supreme Court of Victoria.

---

47 According to the ASIC searches, the postcode for Carlton, where Mr Kingston lives, is 3053. Yet, the plaintiff's solicitor provided the process server with an address that recorded the postcode as 3035: see email dated 26 August 2020, at page 12 of the exhibits to Mr Lim's affidavit made on 31 August 2020, in support pf the substituted service order

Conclusion

64. Almost a year after it alleges Mr Kingston defaulted, and some seven months after it demanded repayment, the plaintiff (a company owned by the Chinese government) has commenced recovery proceedings against Mr Kingston. Its delay in commencing the proceeding is unexplained.

65. Having got around to bringing the proceeding, the plaintiff now seeks – as a matter of urgency – a freezing order. Yet, it concedes that it can point to no "imminent threat of dissipation" or any conduct (or proposed conduct) that would or could have the effect of frustrating enforcement of any judgment. Instead, it fastens on historical conduct, by reason of which it says it is "concerned" or "apprehends" that a judgment might be frustrated. The plaintiff's argument does rise above assertion and speculation. The conduct to which it points dates back years, and is still being investigated by the receivers. Further, almost all of it occurred, if not with the plaintiff's knowledge, then with the knowledge of a director (Mr Wang) appointed by its related company.

66. The plaintiff has not established a danger that any judgment will be frustrated because Mr Kingston's assets will be dissipated, disposed of or diminished. For that reason, its application for a freezing order should be dismissed, with costs.

DATED 14 September 2020

C.T. MOLLER

HWL Ebsworth
Solicitors for the defendant