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High Court Delivers a Landmark Ruling Confirming the Tort of "Violation of Rights in a Judgment Debt" *– Otherwise Known as the* "Marex" *Tort*

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In the recent decision of *Lakatamia Shipping v Nobu Su and Others*,[1] the High Court has set out for the first time the parameters of the tort of *"interference in a judgment debt"* or *"violation of rights in a judgment debt"*.

The elements of the tort, which was first acknowledged as a potential cause of action in *Marex Financial Services Ltd v Sevilleja*[2] (and is therefore referred to as the *"Marex"* tort), were developed in the present case by analogy with the tort of inducing a breach of contract. The Court considered that there would be *"no compelling reason"* why the law should protect against interference with contractual rights, but not equally protect against intentional interference with rights established by court judgments.

This newly recognised form of tortious wrongdoing is to be welcomed as it will provide an additional avenue of redress in circumstances where a judgment creditor suspects that a judgment debtor has enlisted the assistance of others in order to dissipate assets and avoid enforcement of the judgment.

In this article, we reflect on the High Court's decision and set out the elements of the cause of action that the Court considered should constitute this novel tort.

The Underlying Proceedings

Shortly before the death of his father in 2001, the first defendant, Mr Nobu Su ("**Mr Su**"), was appointed as Chief Executive Officer of the family business, Taiwan Maritime Transport Co Ltd ("**TMT**"). The second defendant, Madam Su (Mr Su's mother), retained a role in the family business, mainly by managing the accounts and authorising payments. After succeeding his father, Mr Su made sweeping changes and embarked on hugely speculative trading in the market in forward freight rates, namely via derivative instruments purchased through a group company, TMT Co Ltd, Liberia ("**TMT Liberia**"). In the summer of 2008, TMT Liberia was unable to meet the margin calls being made by the Royal Bank of Scotland and Mr Su was in desperate need of liquidity. Accordingly, Mr Su sought assistance from various wealthy ship owners in Greece, including Mr Polys Haji-Ioannou, the principal of the claimant, Lakatamia Shipping Co Limited ("**Lakatamia**").

Mr Haji-Ioannou and Mr Su agreed that Lakatamia would buy Forward Freight Agreements ("**FFAs**") from TMT Liberia at a fixed price of 100.65 worldscale points, and that a month later Mr Su would buy the position back at a fixed price of 101.65 worldscale points (the "**FFA Contract**"). Had the FFA Contract been performed in accordance with its terms, Lakatamia would have earned a guaranteed USD1.8 million from the contract. However, a month after Lakatamia purchased the massive FFA position, the market fell and Mr Su did not buy the position back. Over the following

weeks, Mr Su bought back part of the position, and offered Lakatamia discounts on chartering TMT vessels as compensation. These payments and discounts eventually dried up and the loss suffered by Lakatamia on the unwanted FFA positions equated to c. USD37.8 million.

Lakatamia issued proceedings against Mr Su and various TMT entities on 24 March 2011, and applied *ex parte* for a worldwide freezing order over Mr Su's assets on the basis that Mr Su and the other defendants would seek to dissipate their assets to frustrate judgment. A worldwide freezing order was duly granted in August 2011 (the "**Freezing Order**"). In November 2014, Mr Su was found personally liable for breach of the FFA Contract and Lakatamia was awarded the sum of USD37,854,310.24 in damages. Subsequently, a further judgment of USD9,852,200.50 was entered against Mr Su. Mr Su pursued an appeal, and the Court of Appeal granted permission on the condition that Mr Su provide security of USD22 million in respect of the judgment debts. Mr Su failed to put up the security and so the appeal did not proceed.

Enforcing the Judgment and the Present Proceedings

Mr Su failed to discharge any of the judgment debts voluntarily and claimed that he was bankrupt. Lakatamia pursued enforcement against Mr Su and his associated entities. As part of its enforcement efforts, Lakatamia had Mr Su's passport confiscated following attempts to abscond, and Mr Su was committed to prison for contempt of court on multiple occasions. Mr Su was cross-examined about his assets in February 2019 under CPR 71, during which he implicated his mother, Madam Su, and the third to sixth defendants (companies beneficially owned by Mr Su or Madam Su respectively—the "**Corporate Defendants**") in the dissipation of certain assets.

Following Mr Su's testimony, Lakatamia initiated the present proceedings, in which it advanced claims against Madam Su and the Corporate Defendants, alleging that Mr Su conspired with Madam Su to orchestrate the dissipation of: (i) the proceeds from the sale of two villas in Monaco, which were beneficially owned by Mr Su (the "**Monaco Sale Proceeds**"); and (ii) the proceeds of the sale of a private jet owned by Mr Su (the "**Aeroplane Sale Proceeds**"), via a number of BVI entities (including the Corporate Defendants) that Madam Su beneficially owned or controlled.

By the time the present proceedings were heard by the High Court, with interest and costs, the total judgment debt owed by Mr Su to Lakatamia exceeded USD60 million (the "**Judgment Debt**").

Lakatamia's two causes of action were:

1. Unlawful means conspiracy—it was alleged that the defendants, including Madam Su and Mr Su, conspired together to injure Lakatamia by the dissipation of the assets of Mr Su in breach of the Freezing Order; and

2. The "*Marex*" tort—it was alleged that the defendants intentionally violated the rights of Lakatamia in respect of the Judgment Debt.

The key factual determinations for the Court were whether Madam Su and the Corporate Defendants knew that Mr Su was subject to the Freezing Order and, if so, did they combine to dissipate the Monaco Sale Proceeds and Aeroplane Sale Proceeds in breach of the Freezing Order thereby giving rise to tortious liability?

However, there was also a significant legal question for the Court to consider—what were the parameters/elements of the novel, so-called *"Marex"* tort which Lakatamia needed to prove?

The Factual Findings

The main thrust of Madam Su's defence was that she did not know about the Freezing Order and therefore could not be said to have tortiously interfered with Lakatamia's rights in the Judgment

Debt or be said to have been involved in the conspiracy. Madam Su argued that she had stepped back from the TMT business, did not know about the activities of her son, and had no real grasp of finance or banking. Madam Su also denied that she beneficially owned or controlled the Corporate Defendants who had received the Monaco Sale Proceeds, or the Aeroplane Sale Proceeds. She further denied that she was the ultimate recipient of the funds once the Corporate Defendants transferred them on to their final destinations, stating that the beneficiaries were companies owned by family friends to which Mr Su owed personal debts.

The Court was unimpressed with Madam Su's evidence, finding her not to be a credible witness of fact, but rather a consummate and repeated liar. In particular, Madam Su gave evidence that she had never heard of Lakatamia prior to these proceedings. However, the Court found that Madam Su continued to be involved with the TMT business, authorising payments and holding the "key" for the major company bank accounts (and had made several payments to Lakatamia as part of the settlement of liabilities under the FFA Contract in 2008). In addition, she was in regular contact with TMT employees, including the in-house legal team, and so must have been informed of the ongoing proceedings with Lakatamia, including the existence of the Freezing Order and the Judgment Debt.

Madam Su also gave evidence that she knew nothing of the Monaco Villas, and that she had not received the Monaco Sale Proceeds or Aeroplane Sale Proceeds personally, as she had no involvement with the Corporate Defendants. The Court also found these statements to be untrue. Madam Su had known about the Monaco Villas as she had contributed funds of EUR5 million to their refurbishment. Madam Su was also found to be the beneficial owner of the Corporate Defendants through whom the Aeroplane Sale Proceeds (USD857,329.73) and the Monaco Sale Proceeds (EUR27,127,855.01) passed before making their way to other entities linked to her and TMT.

Accordingly, the Court considered that Madam Su's knowledge of the relevant facts was sufficient to ground both the claims in conspiracy and the "*Marex*" tort.

The Unlawful Means Conspiracy Claim

The Court did not make any novel statements in respect of the unlawful means conspiracy claim. It simply noted that, in order to make its claim, Lakatamia needed to show that: (i) there was a combination, agreement or understanding between the defendants and another person or persons; (ii) to injure Lakatamia by unlawful means; (iii) regardless of whether it was their predominant purpose to do so; and (iv) it had suffered loss or damage as a result.

In respect of the Aeroplane Sale Proceeds, Madam Su wanted the plane sold as she considered it to be a frivolous expense diverting money from the family business. She encouraged Mr Su to sell the jet, which he then did. The Court was satisfied that, in circumstances where Madam Su knew about the Freezing Order and Judgment Debt, she combined with Mr Su to ensure that the Aeroplane Sale Proceeds were paid to a company under her control, the fifth defendant, and then on to her personally via various methods. Madam Su knew her conduct would injure Lakatamia and therefore Lakatamia's claim in unlawful means conspiracy in respect of the Aeroplane Sale Proceeds was made out.

In respect of the Monaco Sale Proceeds, the Court considered that the fact that the parties had already conspired in respect of the Aeroplane Sale Proceeds reinforced Lakatamia's case that a similar conspiracy had occurred in relation to the Monaco Sale Proceeds. The Court ruled that there was also a combination, arrangement or understanding to conceal the Monaco Sale Proceeds from Lakatamia for the benefit of the family business, deliberately and with full knowledge of the Freezing Order and Judgment Debt, with intent to injure Lakatamia. Accordingly, Lakatamia's claim in unlawful means conspiracy in respect of the Monaco Sale Proceeds was also made out.

The "*Marex*" Tort

In respect of the second cause of action, the "*Marex*" tort, in view of its novelty the Court rehearsed its limited history and provided context as to Lakatamia's deployment of it.

In overview, the "*Marex*" tort derives its name from the judgment of Robin Knowles J in *Marex Financial Services Ltd v Sevilleja* in which he held that there was (at least) a good arguable case that English law recognised a tort of inducing or procuring a violation of rights under a judgment. His reasoning was that, given that inducing a breach of contractual rights is actionable, it would be counterintuitive if it were not also tortious to procure a violation of rights in a judgment debt that was founded upon a contract.

The decision of Robin Knowles J was appealed, but the Court of Appeal refused permission to appeal against the part of the judgment that related to the existence of the "*Marex*" tort, with the eventual appeal concerning issues of reflective loss, which had no bearing on the conclusions expressed on the "*Marex*" tort itself. In the appellate process, neither the Court of Appeal nor the Supreme Court made any adverse comment on the "*Marex*" tort. Although passing reference has been made to the comments of Robin Knowles J in subsequent cases, until this point there has been no direct application of the tort and therefore no need to opine on its constituent parts.

Although this would represent a novel tort, the Court recognised that the English courts continue to acknowledge and develop new forms of tortious wrongdoing. In particular, "interference with a judgment debt" was conceived of as a development of the existing economic tort of "inducing a breach of contract" and so its elements could stand to be identified by analogy to that already existing tort. On this basis, Lakatamia submitted that the elements of the "*Marex*" tort should be:

1. The entry of a judgment in the claimant's favour;
2. A breach of the rights existing under that judgment;
3. The procurement or inducement of that breach by the defendant;
4. Knowledge of the judgment on the part of the defendant; and
5. Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed to the claimant under the judgment.

The High Court agreed that these principles represented the constituent elements of the "*Marex*" tort, and considered that the following additional principles should apply:

1. It suffices that the defendant intended to violate the claimant's rights under the judgment – the defendant does not need to also intend to cause damage to the claimant.
2. It is not essential that the defendant had actual knowledge of the contents of the judgment; instead, it is sufficient for the defendant to know that the judgment existed.
3. In this regard, "*blind-eye*" knowledge is sufficient, i.e. it is enough for the claimant to show that the defendant acted knowingly or recklessly "*indifferent [as to] whether it is a breach or not*".
4. As with inducing a breach of contract, there must be procurement or inducement by the defendant of the breach of rights existing under the judgment, by persuading, encouraging or assisting the judgment debtor in the breach. Such encouragement, assistance, or persuasion etc. must influence the choice or "*operate on the mind and will*" of the judgment

debtor in order to have a sufficient causal connection with the breach to render the defendant as an accessory to the breach.

5. There is no need to establish "*spite, desire to injure, or ill will*" on the part of the defendant.

6. Justification, which is recognised as a defence to inducing a breach of contract (although of narrow scope and restricted ambit), has no equivalent in the "*Marex*" tort as there cannot ever be sufficient justification for interfering with rights enshrined in a court judgment.

In applying these principles to the present case, in respect of both the Aeroplane Sale Proceeds and Monaco Sale Proceeds, the Court considered that Lakatamia's cause of action against Madam Su and the Corporate Defendants, for inducing and/or facilitating a violation of the Judgment Debt, must succeed. In particular:

1. There was the entry of a judgment in Lakatamia's favour (the Judgment Debt);

2. Madam Su and the Corporate Defendants knew about the Judgment Debt;

3. Madam Su and the Corporate Defendants procured and/or induced Mr Su to make the transfer of the Aeroplane Sale Proceeds and Monaco Sale Proceeds to the Corporate Defendants and/or facilitated their making;

4. Such conduct breached the rights of Lakatamia under the Judgment Debt;

5. Madam Su and the Corporate Defendants knew that such conduct would breach the rights owed under the Judgment Debt.

Accordingly, in addition to liability for unlawful means conspiracy, the defendants were also found liable for interference in a judgment debt or the "*Marex*" tort.

The Court considered that the principles governing the award of damages for the "*Marex*" tort would be the same as for the tort of inducing breach of contract, i.e. establishing what loss has been suffered by the violation of the interest in the Judgment Debt. Lakatamia had suffered loss as a result of non-payment of the Judgment Debt represented by the sums of USD857,329.73 (in respect of the Aeroplane Sale Proceeds) and EUR27,127,855.01 (in respect of the Monaco Sale Proceeds). Lakatamia was therefore entitled to compensatory damages in those amounts in satisfaction of its claims.

Lakatamia asked the Court to award exemplary damages in light of the deceitful conduct of the defendants, but the Court declined to do so. In the Court's view, exemplary damages are anomalous and an exception to the general rule. The defendants' conduct in this case was not so egregious as to justify a punitive response, and the award of compensatory damages was sufficient in the circumstances.

Comment

The "*Marex*" tort provides a welcome addition to the armoury of the judgment creditor and may provide numerous advantages to the judgment creditor when faced with difficulties enforcing a judgment debt.

In particular, where the involvement of parties other than the judgment debtor is suspected, the "*Marex*" tort may be easier to establish than other causes of action, such as unlawful means conspiracy, as the third party who interfered in the judgment debt can be pursued separately to the judgment debtor, with no need to show a conspiracy between the two parties. The defendant must

know of the judgment in order to procure the interference with it; however, this would also be true in pursuing other causes of action (such as conspiracy) for similar conduct.

Interestingly, the Court did not consider that there was any scope for a "*justification*" defence in relation to the "*Marex*" tort, though the tort of inducing breach of contract does recognise a limited justification defence. Conceptually, this distinction makes sense, as although it may (in limited circumstances) be reasonable to induce a breach of contract (for example, in furtherance of a moral obligation), it is difficult to conceive of any circumstances where it would be justified to interfere with rights "*established by due process and enshrined in a judgment*". Again, this is advantageous to the judgment creditor as there is no defence to the tort once all of the elements of the cause of action have been established.

Only time will tell whether the "*Marex*" tort will be taken up enthusiastically by judgment creditors and their advisers. However, at the very least, this decision has provided clarity on what exactly the judgment creditor will need to demonstrate in order to pursue such a claim.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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[1] [2021] EWHC 1907 (Comm).

[2] [2017] EWHC 918 (Comm).