

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS.11 & 17 OF 2004

BETWEEN:

[1] **ASTIAN GROUP LIMITED**
[2] **INDIAN OCEAN PETROLEUM SERVICES LIMITED**

Appellants

and

[1] **TNK INDUSTRIAL HOLDINGS LIMITED**
[2] **ALPHA PETROLEUM HOLDINGS LIMITED**
[3] **OIL AND GAS INDUSTRIAL PARTNERS LIMITED**

Respondents

Before:

The Hon. Brian Alleyne, SC
The Hon. Michael Gordon, QC
The Hon. Denys Barrow, SC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Julian Malins, QC with Mr. Michael Fay for the Appellants
Mr. Robert Hildyard, QC with Ms. Tara Frater for the Respondents

2005: January 11; 12; 13;
April 25.

JUDGMENT

[1] **BARROW, J.A.[AG.]:** The Appellants complain that the trial Judge was wrong to stay the proceedings that they brought in this jurisdiction on the ground that Russia was the more appropriate forum in which to litigate their claim. The Appellants further complain that the Judge was wrong to refuse to lift the stay after a Russian court declined to exercise jurisdiction when the Appellants filed in Russia. The Appellants say they are denied any forum in which to litigate their claim.

The parties¹

- [2] The First Appellant (Astian) is a BVI registered company. The second Appellant (IOPS) is a Seychelles registered company. They are minority shareholders in two Russian oil companies called SNG and SR.
- [3] These two oil companies are said to be controlled by another Russian company, which owns the majority of their shares, called Sidanco. It is because of their relationships with Sidanco that the three Respondents, all BVI registered companies, were made the defendants.
- [4] The First Respondent (TNK), a holding company within a group of companies that is known as the TNK Group, owns the majority shares of and controls Sidanco. The Second and Third Respondents (Alfa and OGIP respectively) between them wholly own TNK and also form part of the TNK Group. Through this structure the Respondents are said to effectively control SNG and SR. The Group is said to be a powerful Russian oil interest.

The cause of action

- [5] The Appellants allege that the Respondents conspired to operate SNG and SR in such a way as to benefit only themselves and substantially to prejudice the Appellants. SNG was operated to sell oil to Sidanco, and SR was operated to refine oil supplied by Sidanco, at prices substantially below market value. The crux of the Appellants' claim, therefore, is that the Respondents have acted dishonestly. Russian law, they argue, gives them a cause of action against the three Respondents. Because the Respondents are all incorporated in this jurisdiction the Appellants sued them and served them as of right in the BVI. The Respondents applied to stay the BVI proceedings on the ground of *forum non conveniens*.

¹ The summary that follows draws heavily from the summary contained in the Appellants' skeleton argument. Its accuracy is assumed for present purposes; not found.

- [6] Rawlins J granted a stay in favour of the Courts in Russia until further order and granted liberty to apply (the forum judgment). Within one month of the stay being granted the Appellants issued proceedings in Russia. The day after they were filed a Russian Judge decided that the Russian Court did not have jurisdiction and 'returned' the proceedings. In consequence the Appellants applied to Rawlins J to lift the stay. The Judge refused to lift the stay (the second judgment). The Appellants appeal both judgments in these consolidated appeals.

The appeal against the forum judgment

- [7] The grounds of this appeal were that the Judge was wrong to impose upon the Appellants the burden of proving their allegation, that the Russian forum was not a suitable alternative forum because of the corruption of the Russian Courts, as a **Spiliada**² second stage burden; that the Judge imposed an impossibly high standard of proving such corruption on them; and that the Judge failed to give proper consideration to the evidence that they produced to prove such corruption.

"The Russian judicial system is corrupt"

- [8] The determination of these appeals depends upon the view that this Court takes in relation to what the Appellants correctly state is the central issue of the forum decision and of these appeals: whether the Appellants will be denied justice in Russia. The Appellants say they will be denied a fair hearing in Russia because the Russian judicial system is endemically and systemically corrupt and biased in favour of particular entities (such as the TNK Group). The Judge held that the burden of proving this assertion laid on the Appellants. The Appellants argue that they bore only an evidential burden to show a real

² **Spiliada Maritime Corporation v Cansulex Ltd** [1987] AC 460. In this landmark decision Lord Goff stated the basic principle (at pp. 476C and 477E) that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is clearly and distinctly more appropriate than the English forum for the trial of the action for the interests of all the parties and the ends of justice. The burden of proof rests on the defendant to persuade the court that there is another available and clearly more appropriate forum. That has come to be called the first stage Spiliada test. If the defendant succeeds in so showing then the burden shifts to the plaintiff to show that there are circumstances by reason of which justice requires that a stay should nonetheless not be granted. This is referred to as the second stage Spiliada test.

risk that this was so and thereafter it was for the Respondents to show, as part of the first stage of the Spiliada test, that Russia was an available forum in the sense that justice could be had there. In my view, before considering where the burden laid it is appropriate to examine the allegation to see what the material given in its support establishes.

- [9] The material that the claimants produced³ sought to establish corruption in general as well as in particular. The Judge fully appreciated the tenor and scope of the material. In relation to the material to show generalized corruption the Judge stated:

“[94] The evidence and opinions also seek to establish that members of the Russian judiciary are regularly bribed, intimidated or subject to government pressure, and that there is endemic corruption and inefficiency in the system. The evidence also asserts that there is no effective policing of the judiciary.”

- [10] Beyond generalized corruption and within that context the claimants also presented material to address corruption in relation to the particular defendants. The Judge recognized that this was the major aspect of the claimants’ assertions. He said:

“[96] The main assertion of the claimants is that there are circumstances that establish that they, as the particular claimants, cannot hope to, and will not obtain justice from the courts in Russia against these particular defendants. They insist that those who control the defendants are within a group of extremely powerful oligarchs in Russian society who are, for all practical purposes, above the law. They assert that those who control the TNK group have the ability to, and have previously, corrupted Russian courts. They assert, further, that the appeal process in the Arbitrazh system provides no adequate safeguards, and that the court procedures are inadequate to ensure that practical justice is achieved.”

Criticisms of the treatment of the evidence

- [11] After reviewing the material the Judge chose to rely on the evidence of the defendants’ expert, Mr. Rozenberg, who stated as his opinion that minority foreign shareholders in the position of the claimants can obtain justice in Russia. The Appellants’ argument is that the Judge’s review of their material was brief, that he ignored substantial amounts of evidence that demonstrated a real risk that the Appellants would not obtain justice in Russia, and

³ There was no oral evidence.

that “as regards the evidence that he did review, the weight he attached to that evidence was wrong.”

Alleged brevity

- [12] There was a significant amount of material before the Judge for him to review. I found it helpful that he was able, in eighteen paragraphs, to distil this material and state his conclusions in relation to it. In conducting that review the Judge directly adverted to the opinions of the Appellants’ deponents and the exhibited material from, among other sources, academics and retired Judges. He mentioned specifically the principal supporting declarations and reports that were used to support the opinion evidence for the Appellants. He expressly stated that “nothing arises in the affidavits and opinions that lead me to conclude that, generally, the claimants will not obtain procedural justice in the Russian Arbitrazh Courts”. He commented on and summarized specific testimony. He compared the evidence of witnesses. The Appellants have pointed to nothing to support the allegation that the Judge ignored any evidence. I found his treatment of the evidence more than proper.

Weight given to the evidence

- [13] The other aspect of the Appellants’ criticism was that the Judge failed to give proper weight to the evidence. They argue that the Judge should have analyzed the evidence by starting off from the premise that the Appellants are rational commercial entities, with experience of commercial practice in Russia, and they should be taken to have chosen to litigate in the BVI for good reason. No suggestion has been made, they argued, that this reason was anything other than a genuinely held fear that they would not obtain justice in Russia.
- [14] Mr. Hildyard Q.C., Counsel for the Respondents, controverted this assertion of motive by pointing to the affidavit of Alan Bigman, an officer of the TNK Group. Some three months before the Appellants filed their claim and sought an ex-parte freezing order, a multi-billion

dollar proposed deal between British Petroleum and the TNK Group had been announced. It was scheduled for signing a month after the Appellants filed. Mr. Bigman alleged that the BVI proceedings were brought with the intention of extracting settlement payments based on the inconvenience and embarrassment factor of the claims rather than their underlying merits. I am not clear that this alleged motive speaks to the choice of forum but it does put in issue the good faith of the claim.

[15] The starting point of good reason for the choice of the BVI forum, which Mr. Malins Q.C. claimed for the Appellants, was therefore controverted by the allegation (as to which I make no finding) of ulterior motive in the very act of suing. Even without that allegation it is simply a matter of argument that the Appellants chose to sue in this jurisdiction because they feared judicial corruption in Russia. Courts are aware that litigants sometimes forum shop; they identify the Judge or Court or jurisdiction where they think they stand the best chance of getting the result they desire. There is no presumption that the choice of forum flowed from worthy motives. Equally there is no presumption that the choice of forum flowed from unworthy motives. The proper starting point for the Court to regard a claimant's choice of forum is one of neutrality.

[16] A particular aspect of the Appellants' complaint that the Judge did not give proper weight to their evidence is that their witness, Ms. Kotesova, a senior practicing advocate in Russia, made specific reference to 4 cases that occurred in Russia in which the TNK Group was a party in which the other party was not given a fair hearing and gave details of the basis on which she arrived at this conclusion. They complain that the Judge merely commented that "her affidavit does not take the claimants over the bar necessary to discharge their evidential burden", without explaining the basis for this conclusion.

[17] The premise of this complaint is false. This is what the Judge said:

"Ms. Kotesova listed 4 specific cases that involved TNK. She said that it was following her discussions with lawyers for the non-TNK parties that she formed the opinion that the decisions in the 4 cases were given for TNK on extraneous factors. She confessed, however, that her personal knowledge of the 4 cases is not extensive. In my view, therefore, her affidavit does not take the claimants over the bar necessary to discharge their evidential burden."

- [18] Manifestly, the Judge explained the basis for rejecting the evidence. He should not be made victim of his kindness in not bluntly describing what Ms. Kotesova said as sheer hearsay, if not gossip. The criticism that the Judge did not explain his rejection of the evidence was unfair.
- [19] Another complaint of the Judge's treatment of the Appellants' evidence of corruption is that the Judge simply made no mention of the point that TNK group companies had themselves made clear in their corporate literature that they considered the Russian judicial system to be corrupt.⁴ The Appellants also complained that the Judge simply ignored evidence that had been filed in proceedings in the USA of corruption of the Arbitrazh Courts, including a declaration by a former Judge of that Court.⁵
- [20] The Appellants devoted particular attention to arguing that the testimony of the Respondents' witness, Mr. Rozenberg, who denied that there was endemic corruption in the Russian system was discredited by a letter from one of his former clients who Mr. Rozenberg had advised against appealing a Russian Court decision. That letter stated that Mr. Rozenberg had himself advised the client that the adverse party had obtained judgment because of his undue influence over the Court. The response of Mr. Rozenberg, argued the Appellants, confirmed that local influence and 'home court advantage' were factors in the decisions of Russian Courts. The Judge missed the point, the Appellants said, that here was an admission of corruption.
- [21] How the Judge approached this matter was to identify the client's letter as a mere letter and not evidence. This is where, Mr. Malins said, the Judge went wrong because Mr. Rozenberg's response confirmed "that there is indeed often improper local influence where substantial local firms are being sued by outside interests in Russian Courts". The fact that the letter was not in affidavit form was therefore immaterial, Counsel submitted, because Mr. Rozenberg accepted the letter.

⁴ It was not suggested that any of these defendants made any such comment.

⁵ As to the treatment that this material received in the proceedings in the USA see paragraph 38, below.

- [22] In my view Mr. Rozenberg's response does not go nearly as far as Counsel suggested. Mr. Rozenberg testified that he advised the client in the context of a bankruptcy case initiated against a huge Russian industrial company that employed almost all the residents in the city where it was located. He said that in that particular case the role of the local factors, including administrative influence, was very significant and he warned the client about this. He stated that he believed that any reasonable attorney in any jurisdiction would have warned a client about local influence and 'home court advantage' in such a case. As I see it this is a far cry from confirming any general statement "that there is often improper local influence" or from making any allegation of judicial corruption.
- [23] The view that the Judge took of the general allegations of corruption (and I would think that the alleged admission in TNK group companies' literature falls within this description) is expressed in the following passage:
- "[95] To a great extent, the materials that seek to establish these assertions are anecdotal and generalized. Quite a bit of it is not based on the actual knowledge of the persons who make them. These are quite inadequate for the purpose that they are meant to serve. Quite unlike the circumstances in the **Films By Jove case**⁶, there is no related decision in parallel litigation in Russia between these parties on the case before me, which might occasion my comment."
- [24] There is merit in the argument of the Respondents that this Court is basically being asked to take a different view of the evidence from the Judge and substitute its view. As Lord Goff mentioned in **Spiliada** (at p. 486C), where the Appellate Court simply forms a different view of the weight to be given to the various factors that is an inappropriate case for interfering with the exercise of the Judge's discretion.
- [25] For my part, I do not form a different view of the weight to be given to the evidence; I share the Judge's view. Much of what was relied upon by the Appellants was not evidence. As the Judge said, to a great extent the material was anecdotal, generalized, hearsay and

⁶ The judge had earlier analyzed the American decision in **Films By Jove v Joseph Berov** 2003 U.S. Dist. LEXUS 6233 (E.D.N.Y. 2003) and noted that the judge in that case had found that it was critical that the plaintiffs had provided specific documentary evidence from the file of the High Arbitrazh Court of improprieties in specific proceedings that led to the decision that the U.S. court impeached. The U.S. judge had relied upon an earlier decision that a foreign forum could not be found to be inadequate on the basis of general allegations of judicial corruption and that it was inappropriate to pass judgment on the Russian judicial system on the basis of 'broad brush', hearsay accounts of the plaintiff's opinions and evidence.

incapable of proving anything in a Court of law. Mr. Malins naturally recognized this and sought to argue that it was the best that could possibly be done because there is hardly ever direct proof of corruption.⁷ As Mr. Hildyard argued, that could never justify the proposition that the Court should therefore act on material that is not evidence.

- [26] The Appellants found it significant that the Judge said that the widely divergent evidence as to corruption or no corruption in the Russian judiciary gave him pause. It is easy to see why. Much of the material on which the Appellants rely makes compelling reading. Some parts read like a novel. Some of it comes from reputable and impressive sources. Unfortunately for the Appellants, because most of the material was not evidence it had no probative value in a Court of law.

Justiciability of the allegation of endemic corruption

- [27] On one view, the attempt to prove that the judicial system of a foreign country is corrupt is an impossible one.⁸ In **Jeyaretnam v Mahmood** The Times 21 May 1992 (Transcript) Brooke J concluded after a review of relevant authorities that such a question is non-justiciable.
- [28] In that case a Singapore citizen brought a defamation claim, in England, against (among others) a newspaper company registered in Singapore which had published the offending material at the behest of the Singapore Government. That material constituted the Government's counter to an article that a London newspaper had published about the Government's alleged persecution of the plaintiff. The writ was served on these defendants in Singapore and they applied to set aside the concurrent writ and its service upon them.

⁷ This recognition was even more clearly expressed by Professor Black of Stanford Law School (whose expert declaration was prepared for the Norex proceedings in the United States and so was not evidence in the instant proceedings) who said, in summarizing the contents of his declaration, that he had been as specific and detailed as it was possible for him to have been in a situation where evidence is almost always indirect.

⁸ This view, or something close to it, seems to be settled law in the United States, according to the judgment in the **Films By Jove** case; see footnote 6, above.

[29] The plaintiff had long been an opponent of the governing party in Singapore and he had been convicted of crimes before the Courts in Singapore, imprisoned, deprived of his seat in that country's Parliament and disqualified for a year from practicing as a lawyer. That striking off of the roll of advocates enabled the plaintiff to get before the Judicial Committee of the Privy Council. Although there was no appeal before the Privy Council against the criminal convictions the Privy Council held that there were exceptional circumstances which justified it in regarding the criminal convictions as not being conclusive against the plaintiff in disciplinary proceedings. It decided that the plaintiff had been wrongly convicted and restored his name to the roll. Lord Bridge in delivering the advice of the Privy Council stated that the plaintiff had suffered a grievous injustice and had been fined, imprisoned and publicly disgraced for offences of which he was not guilty. Shortly thereafter Singapore abolished appeals to the Privy Council.

[30] On the defendants' application to set aside service on the ground that England was not the appropriate forum for the trial of the action Brooke J decided that the plaintiff had not clearly proved that it was. He considered the issue of the plaintiff's anxiety that there might not be a fair trial in Singapore. As a preliminary to examining that issue he reminded himself that Singapore was an independent sovereign state. He also considered that the circumstances in which the Privy Council so emphatically expressed itself was 'a most unusual, perhaps unique, situation'.⁹ The fact remained, the Judge observed, that the conviction of the plaintiff stood.

[31] Brooke J opened his consideration of the plaintiff's concern that he would not get a fair trial with this declaration¹⁰:

"There is in my judgment no need for me to have recourse to authorities before concluding that there can be no question of an English judge or jury usurping for itself the function of deciding whether the Plaintiff was justly or unjustly convicted in Singapore. The most elementary principles of judicial comity, which are based on the proposition that the courts of one sovereign state do not seek to question the decisions of the criminal courts of another sovereign state, compel judicial restraint to be exercised. The reasons underlying this policy of restraint will become apparent later in this judgment. It was for this reason that counsel for the

⁹ At p. 10 of the transcript.

¹⁰ At p. 11 of the transcript.

Plaintiff did not seek to adopt his client's contention that the judgment of the Privy Council in the disciplinary appeal was binding so far as his criminal convictions in Singapore were concerned. He adopted instead, as I have said, the submission that because of the events that have occurred I should give weight to his client's perception that if the trial of these issues proceeded in Singapore he would not receive a fair trial there, and that I should find that this perception was based on grounds that were not unreasonable."

- [32] The Judge then reviewed the relevant authorities that showed that the English Court imposes on itself a restraint in relation to executive and legislative acts of a foreign power that extends to a refusal to inquire into the validity of the decisions of authorities in foreign states who have power to declare what are the laws of that state and to give effect to them. There was a line of authority going back to 1674 that established the principle of judicial restraint in this regard. That principle, he thought, extended to the acts of the judicial authorities of foreign states. He stated¹¹:

"The restraint which English courts observe in these matters is not based on an unwillingness to upset judges in other countries or an over-willingness on the part of English judges to draw up their skirts at the suggestion that they might speak out boldly about what they perceive to be injustices in countries overseas. This self-restraint is, as Lord Wilberforce pointed out in **Buttes Gas v Hammer** [1982] AC 888, [1981] 3 All ER 616, inherent in the very nature of the judicial process whenever questions arise whether issues are capable or incapable of determination in the courts of a particular country. Although in that case Lord Wilberforce was not concerned with the rulings of the courts of a sovereign state on questions which fall within the jurisdiction of those courts I found the whole of his speech from p 931 to 936 illuminating in identifying the principles which underlie the policy of judicial restraint which is so evident in all the other cases to which I have referred.

- [33] Brooke J proceeded to examine the decision in the **Abidin Daver** [1984] AC 39 and the speech of Lord Diplock in which his Lordship accepted the possibility that there are still some countries in whose Courts there is a risk that justice will not be obtained by a foreign litigant and indicated that a reasonably held belief that a plaintiff will not receive even-handed justice, if supported by positive and cogent evidence, could justify refusal of a stay. He noted that Lord Diplock's view in this particular regard was unsupported by any of the other members of the panel and that his Lordship did not explain how he squared this obiter dictum with the line of authority which precludes an English Court from inquiring into

¹¹ At p. 13 of the transcript.

the quality of justice in a foreign Court. The Judge distinguished the case before him from the one that was before Lord Diplock and then stated¹²:

“It appears to me that to embark on an inquiry whether the Plaintiff’s grounds for fearing that he will not receive justice in Singapore are not unreasonable would be to embark on an inquiry from which I am precluded by the principles of judicial restraint explained by Lord Wilberforce in **Buttes Gas v Hammer**. I am quite satisfied that the loyal application of those principles prevents me, as an English judge with no jurisdiction in Singapore whatsoever, from expressing my views on the rightness or wrongness, wisdom or unwisdom, or justice or injustice of the treatment the Plaintiff has received from the courts of Singapore, or on the reasonableness or unreasonableness of his views on the quality of that justice.”

[34] Brooke J then concluded¹³:

“I have no doubt whatever that I am precluded by the principles to which I have referred from expressing any views or forming any judgment on any of the events in Singapore ... The fact that I am precluded from taking such matters into account shows how the matters which the plaintiff would wish me to consider on this part of his argument are essentially non-justiciable in an English court. The quality of a country’s system of justice for its citizen, like the fairness of its laws, are qualities which may attract or repel outside observers in the family of states of which that country is a member, but they are not matters on which judges of another country may express any opinion”.

[35] The transcript of **Jeyaretnam v Mahmood** was not available to Rawlins J and he declined to rely on a two-page digest of this case. He therefore did not proceed on the basis that the allegation of endemic corruption is non-justiciable. Instead, he relied on the dicta of Lord Diplock in the **Abidin Daver** case to decide that it was not an impossible task for a claimant to resist a stay on the ground of a genuinely held belief that he would not get justice in a foreign forum but the claimant would have to produce positive and cogent evidence in support of his allegation. It was not an impossible task, he held, but a difficult one.

[36] With the benefit of the transcript of **Jeyaretnam** it seems to me that the authorities establish that the principle of judicial restraint makes non-justiciable in our Court the allegation of endemic or systemic corruption in a foreign Court. That is the basis upon

¹² At p. 15 of the transcript.

¹³ Ibid.

which I would deal with the Appellants' allegations of systemic corruption of Russian Courts. However, even if non-justiciability goes too far or should admit of an exceptional case the position would not be less than the Judge thought. He thought that it would be difficult for a claimant to succeed in supporting such an allegation. In my view the policy of judicial restraint indicates that it would be a wholly exceptional case in which that allegation could be established.

Availability of evidence

- [37] The Judge was criticized by the Appellants for failing to draw a distinction between cases where there had already been, or were in existence, parallel proceedings in which specific evidence could be expected to be produced regarding bias and cases such as the instant one where there were no parallel proceedings in place, and where the allegation of bias and potential injustice is thus generalized. In the absence of parallel proceedings, the Appellants argued, the evidence before the Court will of necessity be anecdotal and generalized. The implication of this argument, which may have taken too much boldness to openly state, was that if what the accuser put forward was the best it could produce in the circumstances then the Court should take that as good enough. It is an argument that is rejected on basic principles. There must be evidence to prove an allegation. What constitutes evidence is determined according to an objective standard. The Appellants are really asking this Court to consider their subjective position.

The approach in the U.S.

- [38] In The **Norex**¹⁴ case the claimant alleged that it could not obtain a fair trial in the Russian Courts because of widespread corruption of judicial officials and the ability of powerful interests to wield undue influence over the Russian Courts. The declarations that were relied upon in the instant case as the foundation of the expert opinion for the Appellants as to Russian corruption were prepared specifically for the **Norex** case. In a judgment dated

¹⁴ **Norex Petroleum Ltd. v Access Industries, Inc** United States District Court Southern District of New York, No. 02 Civ. 1499 (LTS) (KNF) Transcript.

February 18, 2004 (and therefore given subsequently to the forum judgment of Rawlins J) Judge Laura Swain rejected the evidential value of the material on which the plaintiff relied when she stated:

“The sweeping generalizations, competing legal arguments, warnings in investment documentation, and hearsay acknowledgments of some degree of problems in a large court system cannot sufficiently support a finding that the Russian legal system as a whole lacks integrity, nor does Plaintiff’s body of “evidence” warrant rejection on that basis of the Russian legal proceedings that Norex seeks to challenge here.”

- [39] Judge Swain cited the **Base Metal**¹⁵ case which had rejected arguments that Courts in Russia were inherently unfair and corrupt. A similar assessment was made of the evidence in that case by Judge Koetl (at p. 61):

“... These broad and conclusory allegations, founded on multiple levels of hearsay, are insufficient to condemn the entire Russian judiciary as an inadequate alternative forum in which to try this case.”

Judge Koetl had also noted that it was not the business of US Courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation and that considerations of comity played an important role in the Court’s *forum non conveniens* analysis.

Conclusion on the forum appeal

- [40] The view of the Appellants’ “evidence” that the Judge took was clearly right and accorded with basic principles and with persuasive decisions both from England and the United States of America. It does not matter whether the Appellants bore only an evidential burden or bore the probative burden of showing that Russian Courts are not likely to deliver justice to these particular claimants against these particular defendants. They did not discharge the burden.

¹⁵ **Base Metal Trading SA v Russian Aluminum** F. Supp. 2d 2003 (S.D.N.Y., March 27, 2003)

The appeal against the second judgment

[41] At first sight it would seem axiomatic that a Russian Court having refused to exercise jurisdiction the BVI Court would lift the stay. The reason why the Judge refused to follow that course, as the Appellants argued, was because he found that the Appellants had failed to show that they took reasonable steps to invoke the jurisdiction of the Russian Court.

[42] As they argued the appeal, the Appellants said that the Judge based his decision on a finding that Russia would have accepted jurisdiction if Sidanco had been joined and the Judge was wrong to so find. It is illogical to say that Russia is an available forum if Russia will only accept jurisdiction if the claimants were to sue persons that they did not wish to sue, they argued. The Appellant's also argued that the Judge was wrong to take the view that under Article 247 of their **Commercial Procedure Code** the Russian Court should have accepted jurisdiction because this is meaningless in face of the fact that Russia did not accept jurisdiction.

Joinder of another defendant

[43] On the application before the Judge to lift the stay the defendants argued that the claimants set out to fail in Russia so as to show the BVI Court that Russia was not an available forum. In this regard the defendants argued that the claimants deliberately did not join the necessary parties

[44] In fact the Judge rejected as speculation and conjecture the opinions of the experts on both sides as to whether or not the Russian Court would have accepted jurisdiction if SNG, SR and Sidanco had been joined. It is true that the Judge had earlier repeated his firm view that Sidanco would need to be joined if the BVI proceedings were to continue. He also expressed the view that had Sidanco been joined in the Russian proceedings, as he thought should have been done, *this could have provided a basis* for the Russian Court in the Moscow region (where Sidanco was incorporated) to have assumed jurisdiction. But

the Judge was making no finding of fact or of Russian law; he was considering the central issue whether the Appellants took reasonable steps to invoke Russian jurisdiction.

- [45] On the expert evidence before him as to Russian law, as the Judge noted, it had been common ground that a Russian Court would have jurisdiction if there was a close connection between the “disputed legal relationship” and the territory of the Russian Federation. Such a connection, as a matter of logic (whether or not required as a matter of Russian law) would be made by the joinder of Sidanco, a Russian incorporated company.¹⁶ It was for the Appellants to rule out joinder as a reasonable step for them to have taken to found jurisdiction in Russia.
- [46] Joinder, Mr. Malins submitted, was not a matter for the BVI Court to determine, at this stage of the proceedings filed in this jurisdiction. He argued, similarly, that if Russian law required the claimants to make another person a party along with those parties that the claimant chose to sue and it was only upon such joinder that the Russian Court would exercise jurisdiction then it could not be said that the Russian Court was an available forum. He submitted that the test of availability in **Spiliada** is whether *these* claimants have a foreign forum available in which to sue *these* defendants, not some other defendant they have no desire to sue. In oral argument he contended that once another party was joined it was a different action.
- [47] This seems quite wrong, in my respectful view. A claimant has a right to decide who to sue and not to sue but it is not an absolute right. It is the law which determines the class or categories from which the claimant must choose who to sue. If the law says a claimant must sue the Attorney General in a claim against the Crown, an executor in a claim against an estate or the registered proprietor in a claim against the owner of registered land it is not for a claimant to decide that he can do otherwise. Similarly, if the law states that all necessary parties shall be joined in particular proceedings so that the Court may finally

¹⁶ It will be recalled that none of the three defendants that the claimants chose to sue was a Russian company. Neither were any of the claimants.

and effectively adjudicate upon a matter then it is competent for the Court to refuse to exercise its jurisdiction if a claimant refuses to join a necessary party.

[48] The notion that the Court must, in a clear case, wait for the objection to be raised on a separate application before it can take the point is the antithesis of case management. The terms of Part 25 of our **Civil Procedure Rules 2000** could hardly be clearer: The Court must further the overriding objective by actively managing cases and this includes “dealing with as many aspects of the case as is practicable on the same occasion”.¹⁷ Rule 26.2 (1) expressly permits the Court to exercise its powers of its own initiative without an application having been made.

[49] If it were the case (as to which I make no finding) that a Russian Court would only exercise jurisdiction if a Russian defendant were joined I would regard that as no basis for saying that the Russian forum was not available. A litigant cannot refuse to satisfy jurisdictional preconditions and be heard to complain that the forum is not available because he has chosen not to do what is required.

[50] It seemed possible to the Judge that the joinder of Sidanco would have satisfied Russian law jurisdictional requirements. It was for the Appellants to show that this was not so. They did not do so. Instead they argued that such joinder was not mandatory under Russian law. That was not the issue that the Judge decided. He decided that the Appellants failed to show that they took all reasonable steps to invoke the jurisdiction of the Russian forum including showing that they complied with the jurisdictional requirements of the Russian Court.

Should the Russian Court have accepted jurisdiction?

[51] As to the other argument, that the Judge was wrong to consider that the Russian Court should have accepted jurisdiction, it cannot matter if he did so consider because that consideration had no impact on his decision to refuse to lift the stay. The Judge made his

¹⁷ Rule 25.1 (c) of CPR 2000

decision to refuse to lift the stay before he considered the argument that the Russian Court ought to have accepted jurisdiction.

- [52] His consideration of that argument, it should be noted, was not directed to a determination of whether the Russian Court was right or wrong to have refused jurisdiction; it was directed to a consideration of the argument that if the claimants had properly invoked jurisdiction, by doing what they ought properly to have done, the Russian Court would have exercised jurisdiction. This is how he proceeded:

“[94] In my view, the claimants have not satisfied this Court that they took all reasonable steps to invoke the jurisdiction of the Russian Arbitrazh Court. I shall consider briefly, however, the contention by the defendants that even as the claim was improperly constituted, the Arbitrazh Courts are empowered to assume jurisdiction under Article 247 of the **Commercial Procedure Code**. They said that the claimants did not call this provision in aid in their proceedings in the Irkutsk Court.”

- [53] It was, clearly, after he had determined that the Appellants had not satisfied the Court that they had done what they ought to have done that the Judge went on to consider Article 247 and other provisions of the Code. He noted that both sides had previously stated that an Arbitrazh Court could take jurisdiction under the Code, that neither side had explained why what they both said could happen did not happen, and he repeated his conclusion that the claimants had not satisfied him that they took reasonable steps to invoke the jurisdiction of the Russian Arbitrazh Court.

Conclusion

- [54] The Appellants did not argue the ground that they filed that the Judge was wrong in holding that the burden was on the Appellants to satisfy the Court that they took all reasonable steps to invoke the jurisdiction of the Russian Arbitrazh Court. On the unchallenged basis, therefore, that the burden was on the Appellants I find that the Judge properly considered the evidence before him as to what the Appellants did and did not do to invoke the jurisdiction of the Russian Court. He formed a view of the evidence and came to a conclusion. It was a conclusion to which he could properly come. There was no flaw in

the process of his consideration. None of the criticisms that the Appellants have advanced is made out. I find no basis upon which to interfere with his decision.

[55] In the circumstances, I would dismiss the appeals with costs in the sum of \$73,296.26 to the Respondents, calculated in accordance with the judgment given by this Court on 7th June 2004 in the application for security for costs.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal