

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0029

Consolidated with:

BVIHCMAP2021/0043

BETWEEN:

SERGEY TARUTA

Appellant

and

VTB BANK

Respondent

Before:

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mde. V. Georgis Taylor-Alexander

Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Francis and Mr. Scott Tolliss for the Appellant

No appearance for the Respondent

2024: February 12;
October 31.

Commercial appeal – Recognition of foreign judgment – Breach of natural justice in foreign proceedings - Evidential burden in breach of natural justice cases – Curing of breach of natural justice – Substantial justice - Whether the learned judge was correct in finding that there was breach of natural justice at the Russian Court - Whether the judge erred in law in finding that the breach of natural justice was cured by the proceedings before the Russian Appeal Court– Expert evidence on foreign law

The appellant, Mr. Sergey Taruta, a Ukrainian, and Mr. Alexander Katunin were involved in Enieseiksy Plywood Mill Limited (“the Mill”), a company registered in the Russian Federation. A contract of guarantee (“the guarantee”) was executed between the respondent as lender

and the appellant and Mr. Katunin (or “the defendants”) as guarantors of two loans to the Mill given in 2008 and 2011 respectively. The appellant’s registered address on the guarantee was given as ’23 Chkalova Street, Apartment 20, Mariupol, Ukraine (“the registered address”). Pursuant to the guarantee, the appellant and Mr. Katunin gave a guarantee not exceeding US\$30,000,000.00.

In or around 2013, the respondent commenced proceedings in the Meshchansky District Court, Moscow (“the Russian Court”) against the defendants claiming in substance that they violated their obligations under the guarantee as well as joint recovery of their indebtedness in the sum of US\$30,000,000.00. The defendants were not present at the hearing and on the 28th February 2014, the Russian Court gave judgment in favour of the respondent (“the Russian judgment”) and subsequently, on 24th March 2014, issued a decree to correct a clerical error in the Russian judgment (“the decree”).

The appellant at all material times claimed that he had never been served with the originating process or a notice of hearing. The appellant thereafter appealed averring that he had not received proper notification of the proceedings and that he was not served in accordance with the Minsk Convention as he ought to have been. The Judicial Panel on Civil Cases of the Moscow City Court (“the Russian Appeal Court”) found that a telegram setting out the notice of the court session scheduled for 28th February 2014 was personally delivered to the appellant and that the appellant was not prevented from exercising his right to apply in court for a different form of notification. This decision was upheld by the Presidium of the Moscow Court.

On 23rd May 2014, the respondent commenced proceedings in the High Court of Justice (Commercial Division) in the Territory of the Virgin Islands (“TVI”) for the enforcement of the Russian judgment. On 15th June 2021, the judge made an order in favour of the respondent and on 19th October 2021, gave his written judgment setting out the reasons for deciding to enforce the Russian judgment in the TVI (“the recognition judgment”). On 25th November 2021, the judge, determined the quantum of the Russian judgment and on 29th November 2021 the judge, made a receivership order to facilitate the enforcement of the Russian judgment (“the quantum and receivership orders”). In essence, the learned judge agreed with the appellant that there was a breach of natural justice as the appellant was never served with originating process and that mere notification of the hearing was inadequate. The learned judge then however considered whether the breach was cured by the appellate process.

On 3rd November 2021, the appellant filed a notice of appeal against the recognition judgment, advancing nine grounds of appeal, and on 16th December 2021, appealed against the quantum and receivership orders. On 25th January 2023, this Court allowed the appellant’s appeal against the receivership order and by order of Court dated 19th December 2023, the appeal against the recognition judgment and the appeal against the quantum order were consolidated.

On 18th November 2021, the respondent's then counsel filed a counter notice of appeal which sought to point out that the learned judge fell into error in finding that there was a breach of natural justice that needed curing at the appeal level.

The main issue on appeal against the recognition judgment is whether the judge erred in law in finding that the breach of natural justice was cured by the proceedings before the Russian Appeal Court. The issue in relation to the cross appeal is whether the learned judge was correct in finding that there was breach of natural justice at the Russian Court.

Held: allowing the appeal in part, dismissing the counter appeal, setting aside the order of court dated 15th June 2021 for enforcement of the foreign judgment, discharging the injunction over the appellant granted on 26th May 2014, and continued and amended by orders dated 28th July 2014 and 12th August 2014 and continued until further order of the court, is discharged, awarding costs in the court below and in the Court of Appeal including the quantum appeal to the appellant and directing the respondent to return any monies paid by the appellant pursuant to the order for a payment on account of costs made by the court on 29th June 2021, that;

1. The general common law rule is that a judgment *in personam* of a foreign court of competent jurisdiction could be sued on in TVI as creating a debt between the parties provided it is a judgment for a debt or definite sum of money and is final and conclusive. The propriety of the proceedings in the foreign court that are final and conclusive are not usually investigated, unless the proceedings in which the judgment was obtained were opposed to natural justice. Where there has been an allegation of breach of natural justice, the court must ensure that the proceedings align with the English notion of substantial justice. The court is required to evaluate whether the overall process was fair, not just whether the specific procedural rules were followed. In this case, the judge's decision to find a breach of natural justice due to the appellant's lack of notice was justified. The breach rendered the appellant unable to properly defend himself in the Russian proceedings, leading to fundamental unfairness in the process and there is no reason to interfere with the decision on this issue.

Jacobson v Frachon (1927) 72 Sol Jo 121, 138 LT 386, 44 TLR 103 applied; **Adams v Cape Industries Plc** [1990] Ch. 433 applied; **Pemberton v Hughes** [1899] 1Ch 781 applied; **Taruta v JSC VTB Bank** BVIHCMAP 2021/0002 BVIHCMAP 2021/0008 BVIHCMAP 2021/0012 (delivered 2nd June 2021, unreported) applied.

2. There was no obligation on the appellant to pursue an available remedy to the alleged breaches of natural justice in Russia, however as the appellant did pursue a remedy in the appellate court, it was obligatory on the judge to consider all the proceedings conducted in Russia to determine whether in the proceedings that ultimately resulted in the judgment, the appellant received substantial fairness. There was no error of law in the judge's obligation to consider the effect of the appellate process on the fairness of the proceedings.

Calvin v Carr [1980] AC 574 applied; **Adams v Cape Industries Plc** [1990] Ch. 433 applied.

3. The main focus of the court when faced with a defence to enforcement, should be on whether substantial justice was done in the foreign jurisdiction. The burden on a respondent in such circumstances where curing is alleged, would be to show how the subsequent proceedings effectively cured the breach, such that a TVI court could conclude that substantial justice was done. In this case, the respondent's pleadings, especially the reply to defence, lacked the necessary depth in addressing the specific allegations of a breach of natural justice.

Halsbury Vol 11(2020) applied; **Adams v Cape Industries Plc** [1990] Ch. 433 applied.

4. A judge does not generally need expert assistance in order to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law. Generally however, whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. Given the active disputes over the implications of the appeal, it was inappropriate for the judge to independently interpret the provisions of the Russian Code of Civil Procedure and make conclusions about the appellant's appeal limitations. Independent expert guidance on the application of the Russian Code was essential in this case. This failure to seek such guidance has rendered the judge's conclusions regarding the appeal's curing effect unsafe. Therefore, the appeal on this ground should be allowed.

Macmillan Inc v Bishopsgate Investment Trust Plc (no. 4) [1999] C.L.C 417 applied; **R (KV) v Secretary of State for the Home Department** [2018] EWCA Civ 2483 applied; **FS (Nile Plaza) LLC v Brownlie** [2021] UKSC 45 applied; **Perry v Lopag Trust** [2023] UKPC 16 applied.

JUDGMENT

- [1] **TAYLOR-ALEXANDER JA [AG.]:** These are two appeals which have been consolidated. In short, appeal no. BVIHCMAP2021/0029 is an appeal against the order of the learned judge dated 15th June 2021 that the Russian judgment obtained by the respondent in Civil Case No. 2-1929/2014 in the Meshchansky District Court, Moscow, Russia be recognised in the Territory of the Virgin Islands and for the injunction over the appellant granted on the 26th of May 2014 and continued until further order of the court, be discharged.; and appeal no. BVIHCMAP2021/0043 is

an appeal against the order of the learned judge dated 25th November 2021 determining the quantum of monies owed in the said Russian judgment.

Background

- [2] The appellant, Mr. Sergey Taruta, is a Ukrainian citizen, businessman and politician. He and Mr. Alexander Katunin were involved in Eniseisky Plywood Mill Limited (“the Mill”), a company registered in the Russian Federation and a manufacturer of softwood veneer and plywood. A contract of guarantee (“the guarantee”) was executed between the respondent as lender and the appellant along with Mr. Katunin jointly as guarantors of two loans to the Mill given in 2008 and 2011. The appellant’s registered address on the guarantee was given as, ‘23 Chkalova Street, Apartment 20, Mariupol, Ukraine’ (“the registered address”). Pursuant to the guarantee, the appellant and Mr. Katunin (together, “the defendants”) jointly gave a guarantee not exceeding US\$30,000,000.00.
- [3] In or around 2013, the respondent commenced proceedings in the Meshchansky District Court, Moscow (“the Russian Court”) against the defendants claiming in substance that the defendants violated their obligations under the guarantee as well as joint recovery of their indebtedness in the sum of US\$30,000,000.00. The defendants were not present at the hearing of the matter before the Russian Court. On 28th February 2014, the Russian Court gave judgment in favour of the respondent (“the Russian judgment”) and subsequently, on 24th March 2014 issued a decree to correct a clerical error in the Russian judgment (“the decree”).
- [4] The appellant at all material times claimed that he had never been served with the originating process or a notice of hearing, and therefore, he could not appear to defend himself. On 10th June 2014, which the appellant says is 19 days after learning about the existence of the Russian judgment, he filed an appeal. His first ground of appeal was that he had not received proper notification of the proceedings, and that

he was required to be served in accordance with the Minsk Convention¹ and had not been so served. The Minsk Convention is a treaty signed in 1993 to which both Russia and Ukraine are parties that amongst other things, governs service of process on persons in civil proceedings in either of the two countries.

- [5] The Judicial Panel on Civil Cases of the Moscow City Court (“the Russian Appeal Court”) was not persuaded by the submissions of the appellant. That court found that a telegram setting out the notice of the court session scheduled for 28th February 2014 was personally delivered to the appellant at the registered address. The Russian Appeal Court further found that upon receiving the said notice of the court session, the appellant was not prevented from filing an application in court for a different form of notification, but he did not exercise that right. The appellant pursued a further appeal to the Presidium of the Moscow City Court, but that court by virtue of judgment dated 25th February 2015, upheld the Russian Appeal Court’s decision.

Proceedings in the TVI

- [6] On 23rd May 2014, the respondent commenced proceedings in the High Court of Justice (Commercial Division) in the Territory of the Virgin Islands (“TVI”) to enforce the Russian judgment and the decree and was successful in doing so. On 15th June 2021, the judge made an order in favour of the respondent and on 19th October 2021, the judge gave his written judgment setting out the reasons for deciding to enforce the Russian judgment in the TVI (“the recognition judgment”). On 25th November 2021, the judge, determined the quantum of the Russian judgment and on 29th November 2021 the judge, made a receivership order to facilitate the enforcement of the Russian judgment (“the quantum and receivership orders”).
- [7] I will now set out the salient points of the recognition judgment. The judge narrowed the issue to be whether the Russian judgment was enforceable in the TVI. He noted that the principles governing the enforcement is set out in the common law. The main

¹ Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, adopted in Minsk on 22nd January 1993.

point put forward by the appellant was noted by the judge to be that there was a breach of natural justice. The judge found that in determining this question, there were two issues which arose: (1) whether the appellant was served in sufficient time for him to defend himself at the hearing before the Russian Court; and (2) if he was not so served, whether the breach of natural justice was cured by the appellant's appeal to the Russian Appeal Court.

- [8] The judge noted that on 9th January 2014, under the applicable Russian Court procedure, the Russian Court accepted the application for proceedings by the respondent. The Russian Court issued directions for the pre-trial preparation on 17th January 2014. On even date, the Russian Court decided that the civil case against the defendants should be heard on 28th February at 3:30 pm. The judge noted that the court file showed that a telegram was despatched to Mr. Katunin and then the appellant. That telegram stated: "Meshchansky District Court of Moscow calls you as a respondent against the Claimant Bank VTB to you on recovery of debt at half past 3:00 on 28th of the 12th, 2014 at Moscow." The judge noted that the telegram sent to Mr. Taruta said: "Telegram sent by you as of receipt", and gave a reference number, the address of Chkalova Street, and said the telegram to Mr. Taruta was delivered personally, on 22nd February at 2:00 pm and then it was signed OM Dudkin, who the judge assumed was the post office employee. Counsel for the respondent argued that the telegram, meant what it said, in that it was delivered personally, and counsel for the appellant argued that it was hearsay, not true and ambiguous.

- [9] The judge accepted the evidence of the appellant that he was not served in Maripol on 22nd February 2014. The judge noted that the 22nd February 2014, was a memorable date in Ukrainian history. He noted that popular pressure had grown against the government of President Victor Yanukovich in Kiev, known as the Maiden Revolution. On 22nd February 2014, President Ynukovych fled Ukraine. He accepted that the appellant who was already active in politics and was the Chairman of the Industrial Union of Donbass was in Kiev at the material time attending a high-powered meeting of politicians.

- [10] What the judge says as to there being a breach of natural justice can be found at paragraphs 17-18 of the judgment and it is useful to set it out in full:

“[17] Turning to the first question of breach of natural justice, in my judgment it is obvious that there was a breach of natural justice. Mr. Taruta was never served. Even if he had been served on 22nd February 2014, the six days’ notification of the hearing on 28th February 2014 would have been inadequate for him to properly defend himself in any event. Even if the six days had normally been adequate, and I do not think it would have been in the circumstances of the Ukraine at this time. With both a revolution and various military uprisings occurring, the six days would have been rendered inadequate. Now it is true that by accepting Russian law and jurisdiction under the guarantee, Mr. Taruta thereby submitted himself to the rules on service of the Russian Federation: see **Vallee v Dumergue** (1849) 4 Ex 290, 154 ER 1221. In the current case, however, service was not effected under the Minsk Convention. Under clause 4.13 of the guarantee the only relevant deeming provisions would be clause 4.13(b) which provides for deem delivery ten days after sending, inter alia, a telegram. That would be after the 28th of February 2014 hearing date in any event.

[18] Mr. Taruta was never served with the originating process at all. Mere notification of a hearing is inadequate, in my judgment, unless the party served knows what the hearing is about...”

- [11] In short, the judge agreed with the appellant that there was in fact a breach of natural justice as the appellant was never served with originating process and that mere notification of the hearing was inadequate. This however, to the judge’s mind, was not the end of the matter as he then considered whether the breach was cured by the appellate process.

- [12] At paragraph 19 of his judgment, the judge firstly considered that the appellant failed to apply for a retrial under article 330.5 of the Russian Code of Civil Procedure (“the Russian Code”) and that the appellant failed to apply to adduce fresh evidence under article 327.1 of the Russian Code. The judge then referred to **Minmetals (Germany) GmbH v Ferco Steel Limited**,² where Colman J set out the principles concerning curing a breach of natural justice. Those principles in the judge’s view, were followed

² [1999] CLC 647.

by Bannister J in **Grand Pacific Holdings Ltd v Pacific China Holdings Ltd**³. At paragraph 31 of his judgment, the judge, in considering **Grand Pacific** posed the question as, whether the breach impacted upon the outcome. The judge found an important consideration to be that the putative judgment debtor must show what argument or evidence he wished to produce, which he was unable to, then the Court must decide whether that would have affected the outcome; if it does, then the breach of natural justice is material, if not then it is immaterial.

- [13] The judge again relying on **Grand Pacific** noted that the appellant did not show what the substantive defence would have been before the Russian Appeal Court. From paragraphs 35 to 38 of his judgment, the judge briefly considered the appellant's grounds, finding that he was only successful on ground one which concerned the issue of non-service. The judge concluded that the appellant failed to show any matter on which he would have been able to rely, or wished to rely, which he could not rely on in his appeal in Russia. In the words of the judge, "it is incumbent, in my judgment, on a putative judgment debtor to satisfy Bannister J's test by showing what material factors he could have put before the Russian court but was unable to do so. That, the defendant has in my judgment failed to do so".

The Notice of Appeal

- [14] The appellant lodged two appeals: on 3rd November 2021, the appellant filed a notice of appeal against the recognition judgment; and on 16th December 2021, the appellant filed a notice of appeal against the quantum and receivership orders. This Court in a judgment dated 25th January 2023 allowed the appellant's appeal against the receivership order only, and it was indicated to counsel that the appeal against the quantum order would be addressed in the proceedings concerning the appeal against the recognition judgment. On application by the appellant, the appeal against the recognition judgment and the appeal against the quantum order were consolidated by order of Court dated 19th December 2023.

³ Claim No. BVIHCV 2009/389 (delivered 3rd December 2010, unreported).

[15] I note that if this Court allows the appeal against the recognition judgment, there would be no need to address the quantum appeal as it would axiomatically be allowed.

[16] The appellant advanced 9 grounds of appeal in his notice of appeal against the recognition judgment, which are summarised as follows:

- (i) the Russian judgment emanated from proceedings which involved a breach of natural justice as the appellant had not been given notice of those proceedings;
- (ii) in the absence of expert evidence on foreign law, the judge erred in law in interpreting Russian law and concluding that the Russian appeal cured the said breach of natural justice;
- (iii) the respondent did not aver in the pleadings that the Russian appeal procedure cured the breach of natural justice;
- (iv) having concluded that there was a breach of natural justice, the judge erred in law in finding that there was any obligation upon the appellant to pursue any available remedy in the Russian courts;
- (v) in the absence of expert evidence on foreign law, the judge erred in law in concluding that appellant failed to avail himself of the remedy of applying to adduce fresh evidence in the Russian Appeal court proceedings;
- (vi) the judge misapplied **Grand Pacific** and consequently erred in finding that a breach of natural justice is capable of being immaterial and, further, by speculating on the potential or likely impact of the breach of natural justice with reference to the merits of the underlying claim;
- (vii) in the absence of evidence, the Judge erred in speculating that, if the appellant had obtained a rehearing in the Russian proceedings, "it was very likely that [VTB] would have closed these evidential gaps."

- (viii) in the absence of expert evidence on foreign law the judge erred in finding that the appellant did not apply to the Russian appeal court for a rehearing of the claim. A rehearing was a prescribed consequence upon finding that the appellant had not been duly notified of the proceedings before the Russian Court;
- (ix) insofar that the judge was exercising a discretion in determining that the Russian Appeal Court cured the breach of natural justice, he erred by considering an irrelevant factor that being, the merits of the appellant's defence, and he further erred by failing to take into account:
 - 1) that the appellant was not given notice of the proceedings before the Russian court;
 - 2) the failure of the Russian Appeal Court to remedy or acknowledge the breach of natural justice which had occurred;
 - 3) the failure of the Russian Courts to apply the Minsk Convention as the appellant was entitled to expect them to do; and
 - 4) the reasonableness of the appellant's expectation that Russian law would be applied by the Russian Appeal Court, and in placing reliance upon that expectation, that his appeal would be allowed; and
 - 5) all surrounding circumstances which impacted upon the reasonableness of any failure to invoke an available remedy.

The Counter Appeal

- [17] On 18th November 2021, the respondent's then counsel filed a counter notice of appeal. Their cross appeal sets out that while they agree with the overall conclusion of the recognition judgment, they believe that the judge fell into error in some of his findings. Their intention, they stated, was not to "overturn the order but draw the Court's attention to those errors." The essence of the cross appeal is that the judge

fell into error in finding that there was a breach of natural justice that needed curing at the appeal level.

- [18] I note that on 8th September 2022, the Court granted the then legal practitioners for the respondent's application to be removed as counsel on record. The respondent had been unrepresented since then. At the hearing of the appeal on 12th February 2024, there was no appearance on behalf of the respondent. Mr. Francis informed that Court that while dealing with the receivership appeal, this Court put in place a process to deal with the issue of lack of representation, so that the respondent could be kept informed of the developments in the appeal. Mr. Francis informed the Court that the respondent was aware of the proceedings, and they have made the choice to not appear.

Issue

- [19] I squarely frame the main issue in the appeal against the recognition judgment as follows: whether the judge erred in law in finding that the breach of natural justice was cured by the proceedings before the Russian Appeal Court. From this main issue, the following sub-issues and the applicable grounds of appeal can be culled, as follows: (1) whether it was open to the judge to investigate the appeal process before the Russian Appeal Court and interpret Russian law, to determine whether it had a curative effect on the breach of natural justice – grounds 2, 3, 4, 5, 7 and 8; and (2) whether the judge misapplied the **Grand Pacific** case in finding that a breach of natural justice was capable of being material or immaterial – grounds 1, 6 and 9.
- [20] In relation to the cross appeal, I consider the issue to be whether the judge was correct in finding that there was breach of natural justice at the Russian Court. I will deal with this issue first.

Whether the judge was correct in finding that there was a breach of natural justice

- [21] In their cross appeal, the respondent's position was that the judge should not have dealt with the issue of service of process as this was a matter of Russian law which had already been determined at the Russian Court and the Russian Appeal Court. The respondent contended that though the judge correctly found that on 22nd February 2014, a telegram was delivered to the registered address of the appellant, the judge erred in his failure to conclude that the appellant was consequently validly served. The respondent further stated that the judge erred in concluding that the respondent's position was that the appellant was served personally. Lastly, they contended that the judge attributed insufficient weight to the fact that the appellant was served at the contractually agreed address contained within the guarantee and attached too much weight to his finding that the appellant was in Donetsk at the time service was made.
- [22] Mr. Francis contended that a foreign judgment may be impeached if the proceedings in which the judgment was obtained were contrary to natural justice. Mr. Francis at all material times maintained that the appellant was not served with the originating process and this constituted a fundamental breach of natural justice.

Discussion

- [23] It is not in dispute that in the TVI there is no formal enforcement regime of judgments of a Russian Court, and as such the application of the respondent for enforcement of the Russian judgment was brought under the common law. The general common law rule is that a judgment in personam of a foreign court of competent jurisdiction could be sued on in TVI as creating a debt between the parties provided it is a judgment for a debt or definite sum of money and is final and conclusive.⁴ Such foreign judgments are ordinarily conclusive as to any matter adjudicated upon, and the propriety of the proceedings in the foreign court that are final and conclusive are not usually investigated, unless the proceedings in which the judgment was obtained

⁴ Dicey, Morris and Collins on Conflict of Laws, 15th edition, 2012, Rule 42(1).

were opposed to natural justice.⁵ In **Jacobson v Frachon**⁶ Lord Atkin explained how such principle of natural justice is engaged. He said:

“Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.”

[24] In **Adams v Cape Industries Plc**⁷ the English Court of Appeal reviewed earlier decisions including **Jacobson v Frachon** and held that, whilst the most common concern will be whether the foreign court has given notice that it is about to determine the rights between the parties and has given the defendant an opportunity of substantially presenting his case, the exception is not limited to such cases. The ultimate question is whether there has been a procedural defect that constitutes a breach of the English court's view of substantial justice.

[25] The appellant has challenged the enforcement of the judgment on grounds that he was never served with the Russian proceedings duly or at all; that he was not notified whether at all or in accordance with the Minsk Convention of the time and place of the hearing that resulted in the Russian judgment; as a consequence he submits that the hearing before the Russian court took place in his absence and without his interest being represented. Accordingly, he submits that he was deprived of the opportunity to be heard.

[26] The judge made three findings: (1) having heard the evidence of the appellant and accepting that he was not in Maripol at the time of service of the notice of hearing, he found that there was a breach of natural justice owing to the failure by the respondent to serve the notice of hearing on the appellant personally; (2) the appellant had submitted himself to the rules of service of the Russian Federation but that originating process and the notice of hearing was not served in accordance with

⁵ Dicey Collins and Morris on The Conflict of Laws (16 Ed) Rule 52.

⁶ (1927) 72 Sol Jo 121, 138 LT 386, 44 TLR 103.

⁷ [1990] Ch. 433.

the Minsk Convention which governs service of legal process between Russia and Ukraine; and (3) the respondent did not comply with the contractual provision under clause 4.13 of the guarantee executed by the appellant with the respondent, which provided for deemed delivery 10 days after sending of the telegram. That deeming provision resulted in the effective date of delivery of notice of the proceedings being after the date of the hearing.

[27] The respondent in his cross appeal did not challenge two of the judge's findings namely the finding that service of the notice of hearing was not in compliance with the Minsk Convention, nor was there a challenge to the finding that the deemed date of delivery of the notice was after the date of the hearing, any one of which, would result in the conclusion that there was a breach of natural justice according to the principles of natural justice identified by Lord Atkin in **Jacobson v Frachon**.

[28] The obligation of the court where a defence of breach of natural justice is raised, was framed by Lindley J in **Pemberton v Hughes**⁸ in this way:

"If a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a manner with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against the English views of substantial justice. Where no substantial justice according to English notions is offended, all that the English courts look to is the finality of the judgment and the jurisdiction of the court in this sense and to this extent-namely, its competence to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial justice, according to English notions, has been committed".

[29] In the 2021 case of **Taruta v JSC VTB Bank**⁹ Webster JA giving the reasons for decision of the Court said this:

"We agree that the commentary in Dicey allows the BVI Court, when dealing with natural justice issues in a recognition of foreign judgment

⁸ [1899] 1Ch 781 at 780.

⁹ BVIHCMAP 2021/0002 BVIHCMAP 2021/0008 BVIHCMAP 2021/0012 (delivered 2nd June 2021, unreported).

application, to consider issues in the foreign court other than failure to give notice and an opportunity to be heard. The cases cited by the learned editors of Dicey support this position. In **Adams v Cape Industries Plc**, the defendant was aware of the pending default judgment procedures and chose not to attend. The Court of Appeal in England found that the breach of his natural justice rights was the judge's assessment of the damages without a formal hearing in breach of the procedural rules in Texas. The breach in **Masters and others v Leaver**¹³ was that the damages were assessed by a judge contrary to the court's prior order that the defendant had the option to decide whether the damages be assessed by a judge or jury. We do not think that these cases establish any broader principle than that the recognising court (BVI) can consider issues of alleged breaches of natural justice that go beyond failure to give notice to the defendant and an opportunity to be heard."

- [30] The above reasoning satisfies me that where there has been an allegation of breach of natural justice the court is required to assess proceedings not only in terms of the core principles highlighted in **Jacobson v Frachon** but also to ensure that the proceedings align with the English notion of substantial justice. This means the court must evaluate whether the overall process was fair, not just whether the specific procedural rules were followed. The central issue is whether the appellant had a proper opportunity to defend himself in the foreign proceedings.
- [31] After reviewing the service of process procedures between Russia and Ukraine, the judge determined that the notice of hearing was not personally delivered to the appellant and that the hearing occurred before the deemed date of service. He also found that the originating process was not served according to the service of process procedures that governed the Russian Federation. This led to his conclusion that the proceedings were fundamentally unfair, as proper notice is essential for ensuring fairness in judicial proceedings. The lack of notice not only compromised the appellant's ability to participate but also undermined the integrity of the entire process, regardless of whether the foreign procedural rules were followed.
- [32] The judge's decision to find a breach of natural justice due to the appellant's lack of notice was justified. This breach rendered the appellant unable to properly defend himself in the Russian proceedings, leading to fundamental unfairness in the

process. I find no reason to interfere with the decision of the judge on this issue, and the cross appeal fails.

Whether it was open to the judge to investigate the appeal process before the Russian Court of Appeal and interpret Russian law, to determine whether it had a curative effect on the breach of natural justice – grounds 2, 3, 4, 5, 7 and 8

[33] In addition to not being served with the originating process, Mr. Francis stated that no copy of the Russian judgment was served on the appellant. It was not until 22nd May 2014, that he first heard about the Russian judgment, when Ukrainian and Russian media published articles stating that his assets in Cyprus were frozen. At that stage the appellant was the Governor of Donetsk Oblast. Mr. Francis stated that on 10th June 2014, 19 days after learning about the existence of the Russian proceedings and the Russian judgment, the appellant sought to appeal. One of his grounds which he considered to be indefeasible was that he had not received proper notification of the Russian proceedings pursuant to the Minsk Convention.

[34] Mr. Francis recalled the judge's finding at paragraph 17 of the recognition judgment that there was an obvious breach of natural justice. He contended that this ought to have been the end of the matter, and the Russian judgment ought to have been found to be unenforceable. Mr. Francis relied on **Adams v Cape Industries** which held that where a breach of natural justice occurs in the foreign proceedings, a court should not give any consideration to the underlying merits of the claim which gave rise to the foreign judgment. Quoting from **Adams v Cape Industries**:

"The defendant may have no answer on the merits to the plaintiff's claim, and the judgment as entered in default may be in amount wholly in accordance with substantial justice. Yet if, through no personal fault of the plaintiff, the defendant can point to a sufficient breach of our principles of natural justice simply in the procedure by which the judgment was obtained, the plaintiff can recover nothing on the judgment."

[35] However, the judge then turned to consider whether the breaches of natural justice were cured by the appeal in Russia. That in Mr. Francis's view was not relevant, but even if the judge had been entitled to consider that question, the respondent bore

the burden of proof in respect of it, and on the pleadings the only issue raised was what occurred at the Russian Court, there were no issues raised as to the appeals process to determine whether there had been a breach of natural justice.

Discussion

[36] The judge's analysis on this issue is contained at paragraphs [19]-[25] of his judgment, and his assessment of the law and his conclusions are at paragraphs [26]-[39].

[37] In coming to the decision that the breaches of natural justice were cured by the appeals process, the judge firstly relied on the authority of the editors of **Dicey Morris and Collins** at paragraph 14-167 where the authors summarise the approach of the English courts on the availability of remedies for instances of breach of natural justice before a foreign court:

"May the defence of breach of natural justice be raised before the English court if the objection could have been taken before the foreign court? In **Jet Holdings Inc v Patel**¹⁰ Staughton LJ said, obiter, that logically the foreign courts view should be neither conclusive nor relevant as to the propriety of its own proceedings. In **Adams v Cape Industries** the evidence was that the judgment debtors had the right to apply in the United States to set aside the default judgment on the ground that the assessment of damages was irregular and it was recognised that such an application would have been allowed if made in due time.

The [English] Court of Appeal thought that where the objection came within two categories mentioned by Atkin LJ, want of notice or lack of opportunity to be heard, the judgment debtor may raise the objection in England even if there is a remedy in the foreign country. But in other categories, (as in the one under consideration in that case), the existence of a remedy in the foreign court is not wholly irrelevant in determining whether the proceedings in the foreign court viewed as a whole offend against English views of substantial justice. It would be anomalous if the English court were obliged to disregard the existence of a remedy under a foreign system of procedure in considering whether the defective operation of that procedure has led to a breach of natural justice.

The judgment debtor cannot justify a failure to avail himself of the remedy by reference to his own unwillingness to submit to the jurisdiction of a foreign

¹⁰ [1991] QB 335 at 345.

court. But in that case, the defendants had no way of knowing from the judgment served on them that the judgment had been entered without a judicial assessment of the damages. Since the recitals in the judgment indicated there had been a hearing, in **Masters v Leaver**, the Court of Appeal held that on the evidence before it, it was not incumbent on the judgment debtor to have pursued his complaint before the foreign court. It appears there is no general answer and that in each case the plea that the judgment debtor should have complained to the foreign court will be assessed in the context of the broader merits. But where the issue or procedural error has been raised before the foreign court and rejected, it is less likely that the English court will entertain arguments concerning natural or substantial justice which are based on it."

This judge relied on this extract, to affirm his conclusion of the principle of curing where there are avenues of redress in the foreign jurisdiction.

- [38] In **Calvin v Carr**¹¹ the Board of the Privy Council sought to resolve various conflicting common law authorities on the effect of appeals from administrative and quasi-judicial tribunals, where claims of breach of natural justice were asserted. Their Lordships recognised the theory of the curing effect of fair appeal proceedings. In **Carr** the appellant before the Board was a jockey who was found guilty of an offence against the rules of racing of the Australian Jockey Club. He appealed to the Committee of the Australian Jockey Club and an appeal was held at which he was represented by counsel and given the full right of cross examination. His appeal was dismissed. The decision was challenged before the Supreme Court and the judge found that the stewards of the Australian Jockey Club had not accorded him natural justice, but the appeal to the Committee of the Jockey Club, was a hearing de novo and the defects in the stewards enquiry was thereby cured. The jockey appealed this ruling. The Board had two questions to consider, one of which was whether the subsequent hearing by the Committee of the Australian Jockey Club had the effect of curing the breach of natural justice. In assessing conflicting judgments of the English and Canadian courts, the Board concluded that there was no automatic rule, and adopted the approach of Cooke J. with some difference in emphasis that when reviewing domestic or statutory decisions, it should take into account all the

¹¹ [1980] AC 574.

proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. Lord Wilberforce on behalf of the Board said this:

“.. .their Lordships recognise and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be ‘cured’ through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so”.

The Board agreed with the Court of Appeal and the dicta of Cooke J in the same case, when he stated that he would hesitate to conclude that cases of "insulation" or "curing", after a full hearing by an appellate body, may not exist.

[39] In **Adams v Cape Industries** the English Court of Appeal concluded that it was sufficient to derive the requirements of natural justice for the purposes of enforcement of a foreign judgment and the special defence of breach of natural justice from the principles stated in **Pemberton and Hughes** without resort to the requirements of natural justice in administrative law cases. That principle being whether the proceedings in the foreign court offended against the English court's view of substantial justice. The Court of Appeal concluded that since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would “be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy”.

[40] The approach in **Adams v Cape Industries** highlights a pragmatic view on the enforcement of foreign judgments, where the emphasis is on substantial fairness and the capacity of the foreign court to address and rectify breaches of natural justice. In making this assessment the English court will consider whether procedural rules were fair and whether there was fair opportunity to be heard.

[41] Having regard to the foregoing, I accept that there was no obligation on the appellant to pursue an available remedy to the alleged breaches in Russia, however where as

in this case the appellant did pursue a remedy with the appellate court, it seems to me to be obligatory for a judge, to consider all of the proceedings conducted in Russia to determine whether in the proceedings that ultimately resulted in the judgments, the appellant, received substantial fairness. On my judgment, there was no error of law in the judge's obligation to consider the effect of the appellate process on the fairness of the proceedings. This however is not the end of this issue.

- [42] The appellant submits that the judge having concluded that the identified breach was capable of curing, went further and concluded that in the circumstances of this case the breach was in fact cured. The appellant challenges this finding on several grounds. He submits that the burden of proving the curative effect of the Russian appeal lay with the respondent which they neither addressed nor discharged. The appellant also submits that in reaching the conclusion that the appeal cured the defects of the original proceedings, the judge erroneously made findings on Russian law which it was not open to him to do, in the absence of Russian law evidence. In so doing he submits that the judge made findings fatal to the appellants defence to the application for enforcement of judgment, by concluding that the appellant failed to avail himself of Article 327.1 of the Russian Code that allowed him to produce fresh evidence and that the appellant did not avail himself of Article 330 of the Russian Code that would allow him to seek a retrial of the proceedings both of which avenues the judge concluded were available avenues for the appellant to pursue and which would have allowed him to put his case fully before the Russian court. I will take each of these submissions in turn.

The Burden of Proof on the effect of the Russian appeals

- [43] The respondent by its claim in TVI filed on the 23rd of May 2014 for damages of breach of contract, sought the enforcement of the Russian judgments. This enforcement was challenged by the Appellant who by his defence filed on the 2nd of November 2014 averred at paragraphs (9) and (10) that the judgments are impeachable. The grounds of his challenge were that the judgments were obtained in breach of natural justice and against public policy being contrary to the

requirements of section 9(a) and 16 (9) of the Virgin Islands Constitution Order 2007. The respondent countered with a Reply to the Defence filed on the 24th November 2014. Of significance, are paragraphs (2), (3), (5) and (6) of the Reply, which are the paragraphs that touch on the effect, if any, of the appeal proceedings in Russia. The paragraphs are repeated below:—

- (2) It is denied that the Claimant breached clause 4.2 of the guarantee. The Claimant will rely on the decision of the Moscow City Court, which dismissed Mr. Taruta's appeal on this issue on the 24th of October, 2014.
- (3) As to paragraph six of the Defence, the Claimants claim is that it is furthermore entitled to rely on the factual and legal findings pleaded at paragraph 12 of the Statement of Claim as a result of the decision of the Moscow City Court made on the 24th of October 2014, dismissing Mr. Taruta's appeal in its entirety and upholding the judgment of the Meshchansky District Court of Moscow.
- (5) Paragraph 9 and 10 are denied. And paragraph three of this reply is repeated further and alternatively, Mr. Taruta is put to strict proof in relation to matters pleaded at paragraphs 9 and 10.
- (6) Except as stated above, the Claimant requires Mr. Taruta to prove the matter set out in the Defence.

[44] As to who bore the burden of establishing the effect of the Russian appeals, I have relied for guidance on the authority of **Halsbury's Laws of England**¹² at paragraph 699 which explains:

“ The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any stage. If the party bearing the legal burden fails to adduce evidence, he has failed to

¹² Vol 11(2020) para 699.

discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts.”

Based on this guidance, I am satisfied that the burden lies upon the party for whom the substantiation of a particular issue is essential, and I accept the appellant’s contention that the burden was with respondent to establish that the appeal process in Russia cured the breaches of natural justice occurring with the originating proceedings in the Russian Court.

- [45] When the respondent filed its claim in the TVI, the Russian appeal had not been filed, and this justified why there was no reference to the appeal proceedings. When the Defence was filed, the process of appealing was ongoing. In paragraph 2 of the Reply to the Defence filed on 24th November 2014, it is pleaded that the Moscow City Court had dismissed the appeal from the judgment of the Meschansky District Court. A further appeal to the Court of Cassation was concluded by its judgment dated the 25th February 2015, wherein the appeal court’s decision was upheld. As such the Russian appeals were concluded in February 2015 well before the TVI claims were tried in June 2021. I note that there were no further pleadings or amendments to pleadings filed after the Russian appeals concluded.
- [46] According to the Board in **Adams v Cape Industries**, the main focus of the court when faced with a defence to enforcement, should be on whether substantial justice was done in the foreign jurisdiction. The burden on a respondent in such circumstances where curing is alleged, would be to show how the subsequent proceedings effectively cured the breach, such that an English court could conclude that substantial justice was done.
- [47] The respondent’s submissions filed on 31st May 2021, before the lower court frontally dealt with the issue of the effect of the Russian appeals on the claim of the appellant that there was a breach of natural justice alleging that:

- (1) The appellate courts in Russia dismissed the appellant's arguments that the original notice of proceedings was flawed.
- (2) The appellant participated fully in the Russian court process, including contesting the legitimacy of service, which indicates that he had the opportunity to present his case.
- (3) The appeal encompassed both procedural and substantive issues, with the appellant arguing not just about service but also seeking a re-examination of the core claim.
- (4) The appellant raised six comprehensive grounds in his appeal, which included procedural issues regarding notification of the hearing and substantive claims regarding the indebtedness under the guarantee. The Russian Appeal Court ultimately dismissed these claims, and found that the appellant had not established any means to allow the reversal or a change of a judgment.

[48] I agree that the respondent's pleadings, especially the Reply to the Defence, lacked the necessary depth in addressing the specific allegations of a breach of natural justice. The respondent's primary stance was that no such breaches occurred, and since the Russian appeal court rejected the appellant's claims, the respondent was not obligated to provide further evidence or rebuttals in their pleadings.

Proof of Foreign Law

[49] The judge made two significant conclusions on the appellant's Defence at paragraph [19] of the judgment. He concluded that Article 330.5 of the Russian Code of Civil Procedure allowed for the retrial of issues and that the appellant did not avail himself of that procedure. He also concluded that pursuant to Article 327.1 of the Russian Civil Code, the appellant was entitled to adduce fresh evidence, but he failed to do so. The judge concluded that these omissions were significant, and this finding is directly linked to his conclusion at paragraph [40] of the judgment, that the appellant

“failed to show any matter on which he would have been able to rely or wish to rely which he could not rely on in his appeal in Russia.

[50] The respondent’s submissions before the lower court were that the hearing before the appeal court was an “effective rehearing”, that the appellant “was afforded ample opportunity to argue his position in the appeal courts” and that before the Court of Cassation the appellant “substantively engaged with the underlying facts in the claim”.

[51] The appellant submits that he was not afforded a rehearing of the claim. His evidence was and continues to be that a rehearing of the trial was the prescribed consequence under Russian law were the appeals to have been accepted. His submission is that it was not up to him as a relief to pray for a rehearing.

[52] The appellant argues that proof of the effect of the subsequent hearing was neither pleaded or proved. The appellant submits that the respondent produced no expert evidence on Russian law to prove that he failed to seek a rehearing in his appeal or that he was able to but did not adduce new evidence in his appeal, and that this conclusion was drawn by the judge on his own and without the benefit of expert guidance on the law. He submits that in so far as the evidence relied on, on these points came from Vladislav Osykin, this witness is employed with the respondent as a project manager and consequently his evidence is inadmissible and lacks independence.

[53] I have perused the affidavit evidence of Vladislav Osykin. He is a lawyer with a firm that specialises in litigation and arbitration, although he admitted to be mainly engaged in commercial litigation. He admitted that he swore the affidavit from his own knowledge and from instructions provided to him by the respondent. At best his affidavit summarises the history of the proceedings from the perspective of the respondent and it is not nor does it purport to offer an interpretation of the Russian Code of Civil Procedure. He admitted in his affidavit evidence, that his familiarity is

with commercial litigation which he says subscribes to a different procedural code to the Code of Civil Procedure. He was called as a witness for the respondent, and I accept the submission of the appellant that he is not an expert and that he lacks independence.

[54] From the judgment, it appears that the judge formed his analysis and conclusions of the foreign law by merely reviewing the translated extracts from the Russian Code of Civil Procedure without the benefit of independent guidance on the issues in contention. Appropriately and where it is necessary for an English court to know or apply the law of any country or territory outside the United Kingdom, that law may be proved in civil proceedings by a person suitably qualified to give expert evidence of such law on account of his or her knowledge or experience. This position is the same with regard to proof of foreign law in the TVI. A court is not generally competent to construe a foreign code itself without expert assistance¹³.

[55] In **Macmillan Inc v Bishopsgate Investment Trust Plc (no. 4)**,¹⁴ the Court of Appeal of England emphasised that English courts will not conduct their own research into foreign law. The Court said:

“.....the evidence of expert witnesses is necessary for the court to find that foreign law is different from English law. In the absence of such evidence or if the judge is unpersuaded by it , then he must resolve the issue by reference to English law even if according to the rules of private international law, the issue is governed by the foreign law.”

[56] Exceptions have emerged to this rule. Notably Leggatt LJ in two recent authorities out of the Court of Appeal and Supreme Court confirmed that reliance on expert evidence should be context dependant. A judge does not generally need expert assistance in order to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law.¹⁵ More recently in **FS (Nile Plaza) LLC v Brownlie** ¹⁶ Leggatt LJ in discussing the

¹³ Halsbury's laws of England Vol. 11 (2020) at paragraph 742

¹⁴ [1999] C.L.C 417 at [10].

¹⁵ R (KV) v Secretary of State for the Home Department [2018] EWCA Civ 2483.

¹⁶ [2021] UKSC 45 at paragraph 148.

doctrine that in the absence of satisfactory evidence of foreign law, the court will apply English law (“the presumption of similarity”) offered this exception:

“The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says.”

[57] In **Perry v Lopag Trust**,¹⁷ the Privy Council drew on the principles established in **Brownlie** to address issues related to the proof of foreign law, even though the case did not specifically involve the presumption of similarity.

[58] The effect of the hearing by the Russian appellate court was crucial in assessing the claim for enforcement of the foreign judgment. This issue was contentious, particularly regarding whether a subsequent hearing, held in violation of natural justice principles, could effectively remedy that breach. Each party had differing views: the appellant contended that a rehearing was a necessary outcome had the appeal been successful, while the respondent argued that the appeal court’s hearing functioned as a rehearing of the claim.

[59] Given the active disputes over the implications of the appeal, it was inappropriate for the judge to independently interpret the provisions of the Russian Code of Civil Procedure and make conclusions about the appellant’s appeal limitations. Independent expert guidance on the application of the Russian Code was essential in this case. The failure to seek such guidance has rendered the judge’s conclusions regarding the appeal’s curing effect unsafe. Therefore, the appeal on this ground should be allowed.

¹⁷ [2023] UKPC 16.

[60] This finding reverses the previous recognition of the foreign judgment and any associated decisions regarding quantum. Essentially, this overturns the earlier acknowledgment of the foreign judgment's validity and its financial consequences in the TVI. This renders the assessment of grounds 1, 6, and 9 unnecessary. However, as the issue of the materiality of the breach of rights is emphasized in these grounds and featured significantly in the lower court's judgment, for this reason I will comment on the Judge's finding.

Whether the judge misapplied the *Grand Pacific Holdings* case in finding that a breach of natural justice is capable of being material or immaterial – grounds 1, 6 and 9.

[61] Mr. Francis contended that the judge's reliance on **Grand Pacific** was fundamentally flawed. He stated that where a breach of natural justice occurs, and a foreign court enters judgment against a defendant without due notice, it is not appropriate for a TVI Court to question whether the defendant's defence would have succeeded had he received due notice and had an adequate opportunity to defend himself. In that regard, Mr. Francis contended that the judge erred in reviewing the appellant's grounds of appeal as if it were his defence to the underlying claim. That in Mr. Francis's view was a manifest error, contrary to principle.

Discussion

[62] In reaching the conclusion that the breach of natural justice by the Russian Court was not material, the judge made several key findings: (i) the judge found that there was indeed a breach of the appellant's rights during the proceedings before the Merchansky District Court; (ii) the judge noted that the appellant had an opportunity to address or remedy this breach through the Russian appeals process; (iii) he found that it was incumbent upon the appellant to show the enforcing court what arguments or evidence he wished to present but were unable to due to the breach; (iv) he stated that the enforcing court must evaluate whether the arguments or evidence that the appellant could have presented might have changed the outcome of the case. If there was a possibility that the breach could have affected the final decision, then the

breach would be considered material. Conversely, if it is determined that the breach would not have influenced the outcome, it would be deemed immaterial.

[63] In making these findings the judge relied for guidance on the case of **Minmetals v (Germany) GmbH v Ferco Steel Limited**¹⁸ and on the reasoning of Bannister J in **Grand Pacific**. In **Minmetals** the issues for consideration were inter alia: (i) whether the defendant had been prevented from presenting its case at arbitration conducted by the China International Economic and Trade Arbitration Commission of Beijing (CIETAC); (ii) whether the awards had been arrived at by an arbitral procedure not in accordance with the agreement of the parties, in breach of arts 14, 20 and 53 of the CIETAC Rules; and (iii) whether the defendant had established that the awards had been arrived at by means which were contrary to the requirements of substantial justice contained in English law as explained in **Adams v Cape Industries**, and that enforcement would thus be contrary to public policy. The Court found that there was no doubt that, as regards the first award, the Arbitrators had not acted in accordance with 'international practices and the principle of fairness and reasonableness', in that they had not given the defendant a prior opportunity to deal with a sub-sale award. Notwithstanding that, following the Beijing court's order for a resumed hearing, the evidence relied on by the arbitrators at the first hearing was open to challenge, but no such challenge had been advanced. The defendant had thus, by article 45 of the rules, waived its right to object to the continuing omission of the arbitrators to disclose the sub-sale award, and it was no longer open to it to rely on non-compliance with the rules for the purposes of resisting enforcement of the award. The judge relied on the dicta of Colman J in that case where he said:

"In summary, therefore, in a case where an enforcer alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations: (i) the nature of the procedural injustice; (ii) whether the enforcer has invoked the supervisory jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that jurisdiction have conclusively determined the enforcer's complaint in favour of upholding the award; and (v) if the

¹⁸ [1999] CLC 647.

enforcee has failed to invoke that remedial jurisdiction, for what reason, and in particular whether he was acting unreasonably in failing to do so.”

- [64] The judge further relied on the reasoning of Bannister J in a judgment on an application in **Grand Pacific** where the appointment of liquidators was sought because the respondent had failed to pay its debt under an award, suggesting insolvency of the respondent. Bannister J's reasoning centred on the principle that insolvency courts should not appoint liquidators based on debts that are subject to genuine challenge, especially when substantial grounds exist for contesting the enforcement of the award. Specifically, in the **Grand Pacific** case, the respondent argued liquidators should not be appointed, because it was given insufficient time by the tribunal during the case to present expert evidence concerning the legality of the loan agreement under Taiwanese law, claiming that this constituted procedural unfairness. Bannister J observed that the unfairness may have been self induced as the application on illegality of the place of performance was raised by the respondent very late in the proceedings. The tribunal gave the applicant the maximum time available to reply to the respondent's expert so as to overcome any prejudice to the applicant, arising out of the fact that the respondent had changed its case late in the day. Bannister J found that the procedural unfairness if any to the respondent was immaterial to the tribunal's overall findings. He concluded that:

“A ruling of a tribunal which results in a party being unable to present an immaterial part of his case (even if that was not the ground for the tribunal decision) is not in truth a ruling preventing him from presenting his case or his best case. It is a ruling which turns out merely to have prevented him from wasting time and costs on irrelevant submissions. There can be nothing unfair about that. “

- [65] Despite his acceptance of a breach of natural justice, and acknowledging that the underlying merits of the claim is often inconsequential to a finding of a breach of natural justice, the judge went on to assess the merits of the appellant's intended defence and to assess the merits of the appellants case based on his grounds of appeal before the Russian Court. He found that neither in his witness statement before the TVI court nor in his grounds of appeal, did the appellant demonstrate any substantive defence or specific arguments that he would have pursued had the

breach not occurred. Consequently, while acknowledging that a breach of natural justice occurred, the Judge concluded it was not material to the outcome of the case because the appellant failed to show that the breach affected his ability to present a significant defence or evidence.

[66] The **Grand Pacific** case, should not be directly compared with the current case due to differences in their factual circumstances. Each case has its own set of facts and procedural history that significantly influenced the outcome. A procedural irregularity (such as was suggested existed in **Grand Pacific**) refers to deviations from prescribed procedures that might affect the outcome but are not necessarily fundamental breaches of fairness. On the other hand, principles of natural justice are core procedural rights that ensure fairness in legal proceedings, such as the right to know the case against you and the opportunity to respond, such breaches are always significant because they directly affect the fairness of the legal process. Procedural irregularities might sometimes be deemed less critical if they don't substantially impact the outcome, but breaches of natural justice are fundamental and cannot be disregarded. The appellant's submission on this ground is upheld for the following reasons:

- (i) Without expert evidence and guidance on the remedies available to the appellant before the Russian Appeal Court, it's challenging to determine what remedies were indeed accessible and whether the appellant might have failed to utilize them. This uncertainty means that forming any conclusions about the appellant's actions or inactions in this context would be unsafe and potentially unjust.
- (ii) The trial judge was not within his rights to assess the merits of the appellant's underlying claim. The judge's role is typically limited to reviewing the procedural aspects of the case rather than delving into the substantive issues of the claim itself. This means that any conclusions regarding the merits of the appellant's claim were beyond the judge's proper authority.

- (iii) The principles established in the **Grand Pacific** case are not relevant or applicable to the present proceedings, due to significant differences in the factual or procedural contexts between the two cases, making the precedents set in Grand Pacific unsuitable for guiding the current case.

Disposition

[67] In the circumstances, the appeal is allowed in so far as the trial judge concluded that the Russian appeals had a curative effect on the breach of natural justice and in so far as he concluded that in the circumstances of this case a breach of natural justice was capable of being material or immaterial. The counter appeal is dismissed. The order of the court dated 15th June 2021 for enforcement of the foreign judgment is set aside, and the injunction over the appellant granted on 26th May 2014, and continued and amended by orders dated 28th July 2014 and 12th August 2014 and continued until further order of the court, is discharged. The appellant is awarded his costs in the court below and in the Court of Appeal, including the quantum appeal. The respondent is directed to return any monies paid by the appellant pursuant to the order for a payment on account of costs made by the court on 29th June 2021.

I concur.
Eddy D. Ventose
Justice of Appeal

I concur.
Gerard St.C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar