

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2022/0007

BETWEEN:

JOINT STOCK COMPANY “ALFA-BANK”

Claimant/Applicant

and

KIPFORD VENTURES LIMITED

Defendant/Respondent

Appearances:

Paul Lowenstein KC, James Gardner, Andrew Willins, and Tamara Cameron for the Claimant/Applicant.

Alan Choo Choy KC, Claire Goldstein, and Victoria Lissack for Defendant /Respondent

IN CHAMBERS

2023: July 4, 5 and 6;
2024: February 29.

JUDGMENT

- [1] **Mangatal J:** The Claimant/ Applicant AO ALFA-BANK (“**the Bank**”), by Notice dated 13 January 2022 (“**the Second Injunction Application**”) applies for an injunction freezing the assets of the Defendant Kipford Ventures Limited (“**Kipford**”), up to the value of U.S. \$165,666,859.94.
- [2] By Notice dated 23 May 2022 Kipford makes a cross-application for a stay, alternatively security for costs (“**the Stay/SFC Application**”). When the Bank first gave short notice of its intention to make the Second Injunction Application, Kipford then gave undertakings (“**the Undertakings**”) in the form of the relief then sought. The Undertakings remain in place.
- [3] Kipford also has before the Court three other applications: (a) an application dated 20 June 2023 for permission to adduce further evidence in connection with the Second Injunction Application (“**the Further Evidence Application**”). I have read the Further Evidence which has been included in the Bundles, *de bene esse*, (b) an application dated 3 October 2022 for an order that Kipford be released from the Undertakings, and (c) Applications dated 8 December 2021 and 14 June 2023 for the payment by the Bank of substantial costs orders in Kipford’s favour, at first instance and on appeal, in connection with the First Injunction (“**the Interim Costs Application**”). However, now that the Second Injunction Application has been heard the Release Application, as I understand Kipford’s submissions to indicate, falls away.

- [4] The hearing of the Second Injunction Application and the Stay/SFC Application and other applications took place over three days during an extremely busy Court Term. The Hearing Bundles and authorities ran into tens of thousands of pages and all applications have been vigorously opposed. The background to these applications is also extremely convoluted.
- [5] On what was effectively the return date of the Second Injunction Application, the Bank sought a worldwide freezing order in support of its claim for US\$163,666,859.94 in damages plus costs, representing the Bank's losses which it claims arise out of a tortious conspiracy between Kipford and various other corporate and natural persons owned by or connected with Mr. Dimitri Ananyev and his brother, Mr. Alexei Ananyev (together, "**the Ananyev brothers**"). The Bank's case is that these include at least LLC Krasnobrodsky Yuzhny ("**KBY**"), Mrs. Lyudmila Ananyeva, Mr. Dimitri Usanov and Mr. Usanov's company Wolater Investments Ltd ("**Wolater**").
- [6] The Bank claims that the conspiracy deceived it into financing Mr. Usanov's acquisition of KBY, the holding company for an open-pit coal mine in Siberia, from the Ananyev brothers ("**the Mine**"). The Bank agreed to do so by a loan agreement dated 25 October 2017 ("**the Loan Agreement**") and advanced sums totalling US\$140 million shortly thereafter in late 2017. About two months later, in January 2018, Mr. Usanov requested further funding due to financial problems at KBY and, by April 2018, KBY's accounts showed that it was in breach of financial covenants in the Loan Agreement. The Bank states that subsequently, it learned that the Mine, which was the principal security for its lending, was effectively worthless.
- [7] It is the Bank's assertion that, pursuant to the conspiracy, the worthlessness of the Mine was deliberately concealed. The Bank was presented with deceitfully manipulated accounts for KBY, which showed (1) significantly better profitability and net assets than the parallel accounts held by KBY for the same period (which reconciled to KBY's ledger but were not provided to the Bank), and (2) just under

Rub 1,8 billion in fake assets. As the conspirators knew, asserts the Bank, had the Bank known the true position it would not have entered into the transactions.

- [8] Other aspects of the conspiracy are said to include (1) the circular movement of the US \$45 million that Mr. Usanov purportedly contributed to the purchase price of KBY, which was (secretly) given to Mr. Usanov by the Ananyev brothers (i.e. the sellers) and returned to them later the same day, in a manner apt to mislead the Bank as to the true price paid for the KBY, and (2) Kipford's subsequent receipt of some US\$48.34 million of the loan monies just 22 days after they were advanced by the Bank, following a rapid series of circuitous transfers between various entities in the Ananyev Brothers' corporate group, pursuant to purported agreements put in place before the loan was disbursed to provide the pretext for this dissipation.

The First Injunction

- [9] The Bank previously applied for a freezing injunction against Kipford by a notice of application dated 15 December 2020, at an earlier stage of its investigation into the fraud ("the **First Injunction**"). In its written Skeleton Arguments, the Bank stresses that the First Injunction was sought in support of a completely different cause of action, namely a proprietary claim to US\$48.34 million held by Kipford based on pre-contractual oral representations made by Mr. Usanov regarding (in summary) the source of the funds he was required to contribute to the acquisition of KBY and the qualities of the Mine and its production. Although initially granted, the First Injunction was discharged on 23 November 2021 following the return date, notwithstanding the Judge, Jack J (Ag)'s finding that there was a real risk of dissipation. The First Injunction was discharged because the judge held that the Bank had no good arguable case and had inadvertently breached its disclosure duties at the *ex parte* hearing. The Bank had appealed this decision but the appeal was dismissed, and Jack J's judgment was upheld by the Court of Appeal in May 2023.

- [10] In the first claim made by the Bank against Kipford in BVIHC (COM) 2020/219 ("the **Original Action**"), in its Statement of Claim, the Bank alleged that it had been

induced to lend US \$140 million to KBY as a result of fraudulent misrepresentations on the part of Mr. Usanov.

[11] Mr. Usanov had been a senior manager within the finance and natural resources sector for many years and presented himself to the Bank as an independent entrepreneur who was interested in acquiring KBY, effectively by means of a leveraged buy-out, with the Bank lending the bulk of the funds required to enable Mr. Usanov's acquisition of KBY. The Bank alleged that Mr. Usanov had represented to it that the Mine owned and operated by KBY had high quality coal and was an active business with potential for returns ("**the Mining Representations**") and that Mr. Usanov had also represented that he had his own funds of US\$45 million to contribute to the transaction ("**the Own Funds Representation**"). The Bank contended that these representations were in fact fraudulent, because the mine was virtually worthless and Mr. Usanov never put in US \$45 million of his own money into the acquisition; instead a sum of US\$45 million was made available to him by a company associated with the previous owners and sellers of KBY (the Aranyev Brothers). The Bank also alleged that Mr. Usanov was a front man for the Aranyev brothers.

[12] At the *ex parte* hearing before Jack J on 17 December 2020 the Bank had obtained a worldwide freezing injunction for a bit over US\$48 million against Kipford on the basis that Kipford was a vehicle associated with the sellers of the Mine ("**Delvenisto**"), which was associated with the Promsvyaz group of companies) and was in knowing receipt of US\$48 million of the loan monies of the US\$140 million (an amount of US\$100 million) was paid to Delvenisto in order to ensure transfer of ownership of the Mine to Mr. Usanov's corporate vehicle Walater. The causes of action advanced by the Bank against Kipford at that stage were BVI causes of action in constructive trust, knowing receipt and dishonest assistance.

[13] Lengthy *inter partes* proceedings ensued. On 23 November 2021, Jack J discharged the First Injunction after a fully contested 2-day *inter partes* hearing, finding that there was no good arguable case of fraudulent misrepresentation in the

respects alleged by the Bank . He also held that the Bank had been guilty of serious misconduct at the *ex parte* hearing, in that it had failed to disclose the fact that:

- (1) it had sued its own financial and mining experts, IMC Montan(“**IMC**”), for negligence in connection with their audit of the operations and financial condition of KBY;
- (2) had failed in its claim in the Russian courts; and
- (3) that a claim to rescind the purchase of the Mine in reliance upon alleged fraudulent misrepresentations similar to the Mining Representations had been brought and been dismissed in the Russian Courts.

[14] The Bank appealed to the Court of Appeal, but by its written judgment dated 12 May 2023, Jack J’s decision was upheld.

[15] After Jack J’s decision in respect of the discharge of the First Injunction Application, the Bank commenced a new action against Kipford under Claim No. BVIHC (COM) 2022/0007. It also issued the Second Freezing Injunction Application in the larger amount of US\$142 million.

[16] On 14 January 2022, the Bank obtained an order from a single Judge of the Court of Appeal staying Jack J’s order discharging the First Injunction, pending the determination of the appeal.

[17] On 25 January 2022, Kipford offered a voluntary undertaking to the Bank not to dispose of its worldwide assets up to an amount of US\$142 million pending the determination of the Second Injunction Application. On the same date the Original Action and the New Action were ordered consolidated and continued to proceed under the new action number BVIHC(COM) 2022/0007.

[18] According to Kipford’s written Skeleton Argument, when it had offered the voluntary undertaking, its expectation was that, the Second Injunction Application, which had been issued by the Bank as an urgent application, would have been determined at

an “an *early on notice inter partes hearing*” as recorded in paragraph 3 of the Order dated 25 January 2022 containing the Undertaking.

- [19] However, continues Kipford's submission, following the Russian invasion of Ukraine on 24 February 2022 and the subsequent imposition of sanctions against entities considered to be closely related to or aligned with the Russian state, including the Bank and its controllers, it proved impossible throughout 2022 and the first half of 2023 to have the Second Injunction Application heard. As Mr. Choo Choy KC points out in Kipford's Skeleton, the licensing and funding difficulties that the UK, as well as the U.S. and the EU sanctions have created for the Bank and its legal team, resulted in a number of adjournments of the Second Injunction Application in June 2022, and October 2022, ultimately to July 2023, almost 18 months after the application was issued and some 2 ½ years after the First Injunction was put in place.
- [20] Kipford maintains that in the meanwhile, the Bank has retained the benefit of the Undertaking and secured a *de facto* freezing injunction of US\$142 million despite the fact that it has repeatedly failed to persuade either the Commercial Court or the Court of Appeal on an *inter partes* basis that it has a good arguable case of fraud against Kipford.
- [21] Kipford further states that Justice Jack (as upheld by the Court of Appeal), found that the Mining Representations were too vague and uncertain to form the basis of a claim in deceit and were in any event substantially true, and that the Own Funds Representation was substantially true in that, since the sum of US\$45 million had been irrevocably given to Mr. Usanov's company Wolater, it has substantially become his or his company's “*own funds*”.
- [22] Mr. Choo Choy KC points out that these findings fundamentally undermined the Original Action, because the BVI law constructive trust claims advanced in that action were “*entirely parasitic*” upon the fraud allegedly arising from the Mining Representations and Own Funds Representation.

[23] In the New Action, as appears from its Consolidated Statement of Claim (CSOC), the Bank continued to advance the Mining Representations and Own Fund Representations as core aspects of its case in fraud., but it also added new allegations of fraudulent misrepresentation or concealment with respect to KBY's financial position as set out in financial statements of KBY that were provided to the Bank prior to its advance of the loan of US\$140 million to KBY. Kipford submits that it is striking that the Bank asserts that its accounting experts had concluded as early as March 2020 that an accounting fraud had taken place at KBY, and that a Criminal Expert Report prepared between July 2020 and March 2021 by technical and financial experts engaged by Russian investigative authorities had confirmed the earlier conclusions, yet the Bank never advanced its new case of accounting fraud either in evidence or argument or the 17-18 November 2021 hearing before Jack J. Accordingly, argues Mr. Choo Choy KC, the Second Injunction Application is therefore the Bank's second bite at the cherry.

Parties and Other Persons Involved

[24] The Bank is a major private commercial bank in Russia.

[25] Kipford is a BVI company incorporated on 30 October 2007. Since that time, Kipford's beneficial owners have been Mrs. Ananyeva and, from 2014 to 8 March 2018 only, her mother Mrs. Luidmila Perevozhikova.

[26] Mrs. Ananyeva is the spouse of Mr. Dimitri Ananyev ("**Mr. Ananyev**"), who, with his brother, owned and controlled Prom Svyazbank ("**PS Bank**") until December 2017. PromsvyazCapital ("**PSC**") was a "*private equity group*" affiliated with PS Bank which "*analysed and entered into investments in a number of sectors.*"

The Bank's allegations as to the acquisition of the KBY Mine

[27] One such investment was KBY. According to Mr. Ananyev, PSC invested in KBY in or around "*late 2010 or 2011*", when "*KBY was in a distressed state*", together with certain joint venture partners. The shares in KBY were then held by Cypriot companies, initially Marendo Investments Limited ("**Marendo**") and then Delvenisto

, whose shareholdings were (according to Mr. Ananyev) divided 50/50 between PSC and its partners.

- [28] From at least 2013 to 2017, KBY paid out substantial dividends. Nonetheless, according to Mr. Ananyev, from as early as 2013, the joint venture partners were open to selling KBY.
- [29] The Bank asserts that from 2016 at the latest, one of the potential purchasers of the Mine was Mr. Usanov. Kipford's evidence is that Mr. Usanov had pre-existing personal relationships with both Mr. Dimitry Suschev, who is said to have brokered the KBY joint venture, and Mr. Zhupanov, then Vice-Chairman of PSC.
- [30] Kipford surmises that Mr. Usanov initially tried to finance his acquisition of KBY through VTB, another Russian Bank prior to Mr. Igor Sorokin of UBS approaching the Bank on his behalf.
- [31] On 22 August 2017, UBS provided to the Bank purported financial statements for KBY for the first half of 2017 ("**the Presented Accounts**") which the Bank states that it has subsequently learnt were materially inaccurate and reported better performance than a parallel set of accounts held by KBY for the same period. It is the Bank's case that the conspirators knew that there had been misstatements and deliberate manipulation of the Presented Accounts.
- [32] In a further email the same day, Mr. Sorokin made further representations on behalf of Mr. Usanov and KBY, including as to the proposed manner of financing the transactions. It was later agreed that Mr. Usanov would deposit his own funds by causing his company Wolater to buy a 31% share in the Russian SPV incorporated as KBY's parent, "**Redwade**" LLC, from Delvenisto for a price of US\$45 million.
- [33] At that time, and over the following days, UBS supplied a financial model for the KBY Project ("**the KBY Model**") and various other information and documents about the Mine.

[34] On or about 13 September 2017, the Bank engaged an external mining consultancy, IMC Montan LLC ("**IMC**"), to conduct a technical audit of the development potential of KBY and to identify risks connected with the Mine operation. In order to complete this work, IMC was provided with information and documents from KBY and Mr. Usanov, including: (1) A development plan for the Mine, which had been approved by the regulator in 2012 ("**the 2012 Development Plan**"), (2) The KBY Financial Model, and (3) The Presented Accounts (which were, as previously described, deliberately false and manipulated).

[35] The Bank indicates that IMC's model, which was based on the documents and information provided to it, said (1) that the planned extraction of coal for 2017 was 1.035 million tons which was expected to increase to 1.95 million per year from 2019 and (2) that KBY was expected to be able to repay the loan within 7 years.

Material Matters that the Bank Claims were not disclosed to either it or IMC

[36] According to the Bank, unbeknown to either IMC or the Bank, because these developments were not disclosed to them either by KBY or by Mr. Usanov (the purported buyer), among other things:

- (1) On 21 August 2017, KBY's new "**2017 Development Plan**") for the Mine had been approved by the relevant regulatory body. The 2017 Development Plan projected coal production which was at least 40% lower than projected by both (a) the KBY Financial Model and (b) the 2012 Development Plan;
- (2) On 2 October 2017, Kipford had entered into a purported ("**Receivables Assignment Agreement No. 1**") by which it agreed to assign certain debts to Croston Consultants Limited ("**Croston**"), a BVI company in the Ananyev corporate group, in consideration of an assignment fee of EUR 24,483,484.97; and
- (3) On 23 October 2017, Rostekhnadzor (a different regulatory body to that which approved the 2017 Development Plan) had completed an audit of the Mine which found that it was being operated in a manner which entailed numerous substantial departures from the 2012 Development Plan- in

consequence of which, among other things , operations at the Mine were partially suspended by Rostekhnadzor.

The Loan Agreement and Loans

[37] It is the Bank's position that, on 25 October 2017, still ignorant of the matters set out in the above paragraph, the Bank executed the Loan Agreement with KBY. The Bank indicates that it will refer to the Terms of the Loan Agreement as necessary, including the representations in clauses 4.1.8 and 4.1.9 as follows:

*"4.1.8 there are no circumstances which can limit, prohibit or produce any other Material Adverse Effect on performance of the obligations of any Obligor or the Beneficiary under any Security Agreement ("**the No Adverse Circumstances Representation**")*

*4.1.9 any and all financial statements provided by the Borrower to the Lender before entering into this Agreement give a true and fair view of the financial position of the Borrower and Obligors as of the balance sheet date for the full reporting period it was prepared for and according to the applicable accounting standards" ("**the Financial Statements Representation**")."*

[38] The Bank indicates that on 27 October 2017, Mr. Usanov caused Wolater to transfer US\$45 million to Delvenisto in purported compliance with the Loan Agreement. However, also unbeknownst to the Bank, but as the evidence is that Mr. Ananyev now accepts he knew all along, the US\$45 million had in fact been given to Wollater by Ananyev group companies earlier on 27 October 2017 before being returned to other such Ananyev group companies by Delvenisto later the same day. The Bank asserts that there was no legitimate commercial purpose for this circular movement of monies. It states that in consequence of this, it was misled as to:

- (1) The true price paid for KBY, which was US\$ 140 million (at most), rather than US\$185 million; and
- (2) The proportion of the price paid by Mr. Usanov out of his own funds, which was none at all, and not US\$45 million.

[39] It is alleged that just three days later, Kipford entered into a further purported "**Receivables Assignment Agreement No. 2**" by which it agreed to assign more debts to Croston in consideration of an assignment fee of EUR 16,724,786.

[40] The Bank recounts that on 22 November 2017, pursuant to addenda to the Loan Agreement executed earlier that month, KBY drew down loan monies from the Bank in two tranches of US\$40 million and US\$100 million with the following ensuing :

- (1) **The first tranche** (US\$40 million) was used to pay off KBY's debt to an affiliate of PS Bank;
- (2) **The second tranche** (US\$100 million) :
 - (a) This, as the Bank subsequently learned, was dispersed through what Mr. Ananyev calls "*inter-company transactions*", a series of circuitous transfers involving five different "*interrelated companies*;
 - (b) These transfers resulted in US\$48,340,991.54 arriving in Kipford's account on 14 December 2017, just 22 days later; and
 - (c) Kipford directly received those monies from Croston, purportedly pursuant to the Receivables Assignment Agreements referred to earlier.

Collapse of PS Bank and alleged breaches of financial loan covenants by KBY and initial investigations by the Bank

[41] The Bank states that shortly thereafter, in December 2017:

- (1) The Bank of Russia issued an instruction to Mr. Ananyev in his capacity as Chairman of PS Bank requiring PS Bank to make additional loan loss provisions in excess of RUB 100 Billion;
- (2) Rather than increase its capital reserves as ordered, PS Bank instead entered into 14 securities sale and purchase agreements with an affiliated company pursuant to which the former sent the latter sums totaling RUB 32,569,830,001.15 and US\$505,669,900.79;
- (3) The following day, the Central Bank of Russia imposed a temporary administration on PS Bank for a period of 6 months; and
- (4) Mr. Usanov reported financial problems at KBY which, Mr. Usanov said, were caused by various commercial and operational decisions made by KBY's previous owners.

- [42] The Bank states that during 2018, KBY fell into breach of its financial covenants under the Loan Agreement and the Bank agreed to restructure its lending on various conditions. At the same time, asserts the Bank, it tried to investigate the reasons for KBY's poor performance with the help of external mining consultants.
- [43] The Bank indicates that ultimately, both IMC and another firm of mining consultants "SRK" Consulting Ltd., reached the conclusion that KBY's previous owners had selectively mined the coal-rich regions of the pit, which required the removal of less waste rock ("overburden") in order to access the valuable mineral deposits. It was submitted that this selective mining allowed a very significant overburden backlog of approximately 20 million m3 to build up which was not reflected in the documents or information provided to IMC and the Bank. According to the Bank, SRK's preliminary opinion was that, given this backlog, KBY would not generate a positive cash flow until 2025 at the earliest and had a negative net present value of about RUB 5 Billion.

Court action taken by the Bank in Russia

- [44] Having come to the view that the Mine was worthless, in late 2018 the Bank informs that it set about trying to realise its security by suing by suing both KBY and Mr. Usanov, obtaining judgments, which were upheld at every level of appeal, before KBY and Mr. Usanov were both bankrupted. The Bank states that it also issued proceedings against IMC and made a report to the Russian investigative authority.

Further Investigations by the Bank

- [45] The Bank states that it continued to investigate whether any other persons might also be responsible for the losses it suffered by virtue of the Loan Agreement, which it describes as catastrophic. In December 2019, these investigations the Bank says, yielded evidence of the circular movement of the US\$45 million, the dissipation of the US\$100 million loan tranche, including the US\$48.34 million which reached Kipford via the series of transfers referred to above, and the collusion between Mr. Usanov and the Ananyev Brothers.

[46] Further, in March 2020, experts instructed by the Bank concluded that there were “*grounds to assert*” that the Presented Accounts misstated KBY’s profits and net assets in the “**Smart Practice Report**”.

Russian Criminal Expert Report

[47] The Bank informs that it reported these findings to the Russian investigative authorities who commissioned a detailed technical report on the KBY loan transactions by five experts with extensive academic and professional experience in the fields of accountancy and mining. The Report was produced in March 2021, and the Bank’s evidence is that it obtained the Report (“**the Criminal Expert Report**”) in 2021. The Criminal Expert Report is described by the Bank as containing a substantial amount of evidence and analysis indicating that:

- (1) many material facts had been concealed from the Bank; and
- (2) that the Presented Accounts had been deliberately manipulated. It is the Bank’s explanation that it was only after it had had time to analyse the Criminal Expert Report together with its expert advisors and legal teams that it was able to plead the present claims.

Tort Claim against Kipford

[48] The Bank has informed this Court that in December 2021 it changed its legal team. It states, without waiving privilege, that it then investigated the possibility of bringing a tort claim against Kipford based on the Bank’s new understanding of the fraud following the analysis of the Criminal Expert Report. This has led to the present claim and the Freezing Injunction Application now before the Court.

The Second Freezing Injunction Application

The Law

[49] Mr. Lowenstein KC, who appeared for the Bank, referred to the well-known case emanating from this jurisdiction, ***Convoy Collateral Ltd v Broad Idea International***

Ltd¹ for the following propositions : In order to engage the Court’s discretion to grant a freezing injunction, the Bank must establish that:

- (1) it has a good arguable case for being granted an order for the payment of a sum of money that will be enforceable through the process of the Court;
- (2) Kipford holds assets against which such a judgment could be enforced; and
- (3) there is a real risk that, unless the injunction is granted, Kipford will deal with such assets other than in the ordinary course of business with the result that the availability or the value of the assets is impaired and the judgment is left unsatisfied.

Good Arguable Case

[50] It is the Bank’s position that it has a very strong case on the available evidence that it has been the victim of a tortious conspiracy under Russian law and-so far as is relevant-BVI law.

[51] Reference was made to the decision in **Sukhoruchin v Van Bekestein**² for the proposition that in deciding whether the good arguable case threshold has been crossed, the Court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or presently obscure.

[52] As to the evidence generally available in a conspiracy case, reference was made to **Lakatamia v Nobu Su**³, where Waksman J noted at paragraph [25] that :

“by definition the claimant is not likely to have much by way of documents itself or direct evidence” and that “ quite often, all it can do is raise inferences from the documents which it has”.

The Bank says that it relies on such inferential evidence of the conspiracy, the inferences to be drawn from strong underlying evidence of primary facts and from

¹ [2023] A.C. 389 at [101].

² [2014] EWCA 399 at [32]

³ [2021] EWHC 2696 (Comm).

investigative reports. In that regard, the Bank says that while it will demonstrate the strong merits of each part of its case, it emphasizes that:

*“[i]t is... the essence of a successful case of circumstantial evidence that the whole is stronger than the parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case” : per Rix J.A. in **JSC BTA v Albyazov**.⁴*

Application to the facts – (1) Joint Tortfeasor-underlying factual allegations

[53] The Bank has identified the following key factual allegations:

- (1) The Accounts Deceits;
- (2) The Non-Disclosure Deceits; and
- (3) The conspirators’ knowledge and intentions as regards those Deceits.

[54] Whilst the Bank has in its Written Skeleton Argument set out factual responses to the many detailed factual points taken by Kipford, its primary position is that:

- (1) it is inappropriate to engage in piecemeal consideration of an inferential case; and
- (2) given the *prima facie* strength of the Bank’s case, there should be no need to get involved in the granular detail of these factual issues, which are properly for trial rather than summary consideration of an injunction application.

Kipford’s knowledge and intention

[55] It is the Bank’s position that Kipford’s knowledge and intention is to be inferred, not least from its having known about and intended the other aspects of the fraud by attribution of the mental states of (at least, but not exhaustively) the Ananyev brothers who represented Kipford relative to and/or decided it should enter the Receivables Assignment Agreements and to whom Kipford was affiliated.

⁴ [2013] 1 WLR 1331 at [52].

[56] Further, Kipford entered the Receivables Assignment Agreements whose purpose (it is to be inferred) was to help to conceal the ultimate destination of the proceeds of the loan monies advanced by the Bank within the Ananyev Brothers corporate group.

[57] Kipford, the Bank says, has been affiliated with the other conspirators. Kipford has also apparently, according to the Bank, been the (intended) ultimate beneficiary of the fraud to the tune of some \$48 million.

Good Arguable Case-Russian Law

[58] The Bank claims against Kipford as a joint tortfeasor in respect of KBY's fraud under **Articles 1064 and 1080 of the Russian Code.**

[59] It is the Bank's posture that Russian law applies to the Bank's claim because, in substance, that is where the tortious conspiracy took place-Russia being where (among other things):

- (1) the Bank is located;
- (2) the Loan Agreement and the Deceits are made; and
- (3) the Bank advanced the loan Monies.

Expert Evidence on Russian law

[60] The Bank points out that the Court has three expert reports on Russian law before it.

- (1) **Simanov-1**, which was served in January 2022 at the same time as Negrey-1;
- (2) **Zykov-1**, which was served in May 2022 at the same time as **Annanyev-1**, in response to Simanov-1; and
- (3) **Kulkov-1**, which was served in March 2023 at the same time as **Negrey-1(2)** in reply to **Zykov 1**.

[61] The Bank points out that on 2 June 2023, Kipford served a further report by Mr. Zygov, which by application dated 20 June 2023, it applied for permission to rely on

this report **Zykov -2**. The Bank has indicated its opposition and therefore only addressed the content in its oral submissions as considered necessary.

Agreed Principles of Russian Law

[62] The Bank asserts that the following principles of Russian law set out in the CSOC are understood to be agreed in the light of the admissions in the Defence :

(1) Article 1064 is the general tort provision of the Russian Civil Code ("**RCC**").

It provides that harm caused to a person or their property is subject to full compensation by the person who has caused the harm. Such liability arises where:

- (a) there was an unlawful act or omission by the defendant;
- (b) for which the defendant is at fault;
- (c) that harm is suffered by the claimant; and
- (d) there is a direct causal link between the unlawful conduct and the harm suffered by the claimant.

(2) The provision of misleading information or non-disclosure of material information to a lender with an aim of receiving monies by way of loan from the lender constitutes an unlawful act or omission for the purposes of RCC Article 1064;

(3) A defendant will be at fault for the purpose of RCC Article 1064 where the unlawful act was intentionally or negligently committed by the defendant (i.e. without the degree of care and diligence which are required by the nature of the obligation and business customs);

(4) Under RCC Article 15, damages will be awarded to compensate the claimant for the harm it has suffered. Such damages will comprise two elements : (1) real loss, and (2) lost profit; and

(5) Under RCC Articles 1080 and 1064, where the harm has been caused by more than one party, then a claim against all parties can be brought against all of them as tortfeasors. The joint and several liability of tortfeasors for the torts they committed under Article 1064, will arise *inter alia*, where they acted in concert, coordination and with a common intent ("**the Common Intent Test**").

Disputed Legal Points and application to the facts.

[63] It is the Bank's contention that if, as it has earlier submitted, the Bank has a good arguable case as regards the Accounts Deceits and/or the Non-Disclosure Deceits (or any of them), the requirements of Article 1064 were plainly satisfied as regards KBY and/or Mr. Usanov, which:

- (1) gave misleading information and/or failed to disclose material information;
- (2) intentionally;
- (3) with the result that the Bank suffered harm by advancing irrecoverable loan monies and losing the profit on that loan; and
- (4) which harm would not have occurred but for the deceits. The Bank infers Kipford's satisfaction of the Common Intent Test from facts previously alluded to.

[64] The Bank summarises that Kipford's Defence and Russian law evidence raise three substantive points in relation to the Bank's case under Russian law, in addition to flagging the issue of limitation. The three main points are as follows:

- (1) that the Bank's claim is an abuse of rights under Article 10 given its alleged involvement in litigation between Wolater and Delvenisto;
- (2) It is the Bank's own fault in entering the KBY transaction which reduced or eliminated Kipford's liability; and
- (3) the allegations against Kipford do not satisfy the joint tortfeasor requirements under Russian law. As regards limitation, Kipford asserts that the Bank's claim is time-barred under Articles 196 and 200 of the RCC.

Freezing Injunction -second limb-a real risk of dissipation

[65] It is the Bank's assertion that, unless an injunction is granted, Kipford will dissipate its assets so that the Bank is ultimately unable to enforce any judgment against it. The Bank notes that it principally relies upon the allegations of dishonesty against Kipford, including Kipford's agreement to act as receiver of U.S.\$48.34 million to help Ananyev Brothers dissipate the proceeds of the fraud against the Bank.

[66] The Bank further relies on the judgment of Jack J in the First Freezing Injunction application, where he found this second limb made out on the basis that “*the way monies have been moved shows a real risk that assets will continue to be moved so as to render execution difficult or impossible*”. The Bank describes the Court of Appeal, which dismissed the Bank’s appeal against the discharge of the injunction as recording Jack J’s finding of a real risk of dissipation without demur at [23].

[67] The bank has also indicated that, given the confidentiality ring around Kipford’s asset disclosure, it has addressed the question whether Kipford has assets which would be amenable to enforcement-and their value-in a separate, confidential annexe to its Skeleton Argument.

Freezing Injunction -third limb-discretion

[68] The Bank commences addressing this consideration by declaring that justice requires that an injunction is granted in circumstances where the Bank has a strong claim of fraud against Kipford and there is otherwise a very serious risk that any judgment will go unsatisfied. The alternative is to risk the Bank discovering, after trial, that there is nothing against which to enforce. It is the Bank’s submission that Kipford suffers no meaningful prejudice from being enjoined and that it has been unable to identify any such prejudice in its evidence.

[69] Whilst in its Skeleton Argument the Bank states that Kipford’s position is unclear, it surmises that Kipford intends to suggest that the Court should exercise its discretion by refusing injunction relief on the grounds of :

- (1) Alleged ***Henderson v Henderson*** (1843) 3 Hare 100 abuse;
- (2) Non-Disclosure in the First Injunction Application;
- (3) the designation of the Bank under various sanction regimes, including in the BVI.

Kipford’s Arguments/Position-The Second Injunction Application-The Nature of the Claim against Kipford

[70] Kipford opines that an important starting point in considering the merits of the Second Injunction Application is to understand the nature of the claims pleaded against Kipford in the CSOC. The argument continues and states that there are two broad categories of claim pleaded against Kipford:

- (1) Russian law claims in tort pursuant to Articles 1080 and 1064 of the RCC;
and
- (2) BVI law claims of unlawful means conspiracy, deceit, constructive trust, and dishonest assistance.

[71] In Kipford's Skeleton Argument, Mr. Choo Choy KC submits that it is plain from the allegations in the CSOC that the wrongful conduct alleged by the Bank is predominantly conduct that took place in Russia. Accordingly, submits learned Counsel, it is necessary to consider the application of the double actionability rule as a matter of BVI conflicts of laws. Reference was made to ***Imanagement Services Ltd. v Cukurova Hilding SA & Anor***⁵, where, at [55], Edwards J,A, stated as follows:

“to found a suit in tort in the BVI for a wrong alleged to have been committed in a foreign country : (1) the alleged wrong must be civilly actionable as a tort if committed in the BVI, and (2) the alleged wrong has to be civilly actionable in the lex loci delicti (i.e. the law of the place where the wrong was committed.)”

[72] The submission continues, that unless therefore, the Bank can establish that that the conduct that it complains about in the CSOC gives rise to civil liability on the part of Kipford under Russian law, it cannot maintain any claim in tort against Kipford.

[73] It is Kipford's position that, so far as the Bank's BVI law claims of constructive trust are concerned, these must be in the alternative to the claims in tort since the Bank could not simultaneously or cumulatively obtain tortious damages and constructive trust proprietary or accounting relief. It was submitted that, more fundamentally, however, these BVI law trust claims are not sustainable for the reasons set out in paragraphs 95.2 and 95.3 of Kipford's Defence, namely :

⁵ HCVAP 2007/025.

- (1) Under BVI conflicts of laws rules, the law applicable to a putative constructive trust or knowing receipt claim (or dishonest assistance claim) is the law of the country with which the obligation in question has the closest and most real connection. Reference was made to ***Sibir Energy plc v Gregory Trading SA & Ors***⁶;
- (2) It was submitted that, in the present case, the law of the country with which the obligation in question has the closest and most real connection is Russian law not BVI law. In particular:
 - (a) the KBY SPA and the Loan Agreement are governed by Russian law and contain Russian jurisdiction clauses;
 - (b) the validity of those agreements is to be judged by reference to Russian law;
 - (c) the restitution sought as part of the constructive trust claim seeks the return of funds transferred pursuant to those Russian law agreements and is intimately connected with the validity of those agreements;
 - (d) the fraud alleged to give rise to the constructive trust is a fraud between Russian individuals and entities, taking place in Russia, regarding a company and a mine in Russia, and involving the payment of funds by a Russian bank to a Russian company; and
 - (e) Under Russian law, the concept of a constructive trust does not exist.

[74] Accordingly, asserts Kipford, the Bank is, and has confined itself to, its Russian law claim for damages in tort, pursuant to Articles 1064 and 1080 of the RCC.

No Good Arguable Case of Joint Liability

[75] The first ground upon which Kipford has invited the Court to dismiss the Second Injunction Application is that there is no good arguable case of Kipford's joint liability in tort pursuant to Articles 1064 and 1080 of the RCC.

⁶ (Civil Appeal No. 26 of 2005).

- [76] Kipford states that it is common ground on the pleadings, that liability for causing harm to a person under Article 1064 requires the commission of an unlawful act by the defendant. Also, that for there to be liability between joint tortfeasors, they must act with a common intent, in concert and coordination of their actions aimed at achieving a common result which is the direct cause of harm to the claimant.
- [77] Kipford says that whilst there are differences of opinion between the Russian law experts as to certain aspects of joint tortfeasorship, the above common ground points appear to be agreed between them and in any event appear to be agreed on the pleadings.
- [78] Against that background, Kipford submits that the following points can be made about the case pleaded against Kipford on the CSOC:
- (1) The unlawful conduct relied upon by the Bank at CSOC paragraphs 88-89 is conduct alleged on the part of either KBY or Mr. Usanov (or his vehicle, Wolater). **None of it is alleged to be conduct on the part of Kipford.** (Counsel's emphasis). Thus:
 - (a) The Accounts Deceit, as defined at CSOC para.58 concerns the contents of the Presented Accounts which are alleged (at CSOC para. 22) to have been presented to Alfa Bank by "*a representative of UBS... acting on behalf of Mr. Usanov and/or KBY*";
 - (b) *The Non-Disclosure Deceit, as described at CSOC para 63, relates to various aspects of the operations of KBY which, the Bank alleges, " were known by KBY and Mr. Usanov and Wolater" but were not disclosed to the Bank;*
 - (c) The No Adverse Circumstances Representation and the Financial Statement Representation, as defined at CSOC para 38, are "*express representations made and/or given by KBY to [the] Bank*";
 - (d) The Own Funds Representation, as described at CSOC para. 31 is alleged to be an oral representation by Mr. Usanov;

- (e) The Mine Representation, the Profits Representation and the Coal Quality Representation, as described at CSOC, para 27(1), are representations alleged to have been made by Mr. Usanov; and
- (f) The Usanov Belief Representations, as described at CSOC para 27(2), are alleged implied representations by Mr. Usanov as to his belief.

[79] It is Kipford's position that, despite the absence of any plea in the CSOC of any unlawful conduct on Kipford's part or of any specific acts of participation by Kipford in the unlawful conduct of others as referred to in paragraphs 88 -89, the Bank makes the bare assertion in CSOC para 90 that "*Kipford acted and conspired in concert with , and/or with companies under the common control of, the Ananyev Brothers for the illegitimate purpose of misleading Alfa Bank to make the Loan to KBY on the security of KBY...*" It was submitted that there is no justification whatsoever for this assertion, either in the CSOC or on the evidence.

[80] According to Kipford, the Bank's case essentially boils down to the proposition that, because Kipford received a substantial sum that may have been derived from the loan monies that the Bank advanced and such receipt occurred because of assignment from Croston, therefore it is appropriate to infer that Kipford is a party to the alleged conspiracy.

The Further Evidence Application

[81] This application by Kipford involves the Court deciding whether to allow Ananyev 2 and the exhibits thereto into evidence. In my judgment, it would be fair to allow the Further Evidence Application. In response to paragraphs 83-85 of Ananyev 1, and disclosure by Kipford of the Receivables Assignment Agreement dated 2 and 30 October 2017, the Bank complained that Mr. Ananyev had "*provided no description of or explanation for any aspect of this "corporate restructuring", such as its motivation and timing*" and "*provided no documents said to evidence this corporate restructuring save for the two purported Assignment Agreements*". I accept Mr. Choo Choy's assertion that the Bank's criticisms effectively called for an answer, in terms of a more detailed explanation of the corporate restructuring of Media 3 and

disclosure of any historical documents relating to the restructuring that could be found. I accept that the Bank's continued objection to the additional information and documentation should be rejected. I therefore granted Kipford permission to rely on the new evidence. The Further Evidence Application also relates to the additional Russian law evidence of Mr. Zykov's 2nd Report and in my view it is appropriate to grant that aspect of the application also.

[82] Relying therefore on the pleaded cases, and the evidence, Kipford submits that the Bank has failed to demonstrate that there is a good arguable case of joint liability on the part of Kipford for the purposes of Articles 1064 and 108 of the RCC.

[83] It was also Kipford's position that if one were to approach the matter from the BVI law perspective of unlawful means conspiracy, as pleaded at CSOC, paragraph 96, the Bank would not fare any better.

[84] Reference was made to the decision in ***Kuwait Oil Tanker v Al-Bader***⁷ where the elements of unlawful conspiracy were set out as follows:

- (1) a combination to use unlawful means;
- (2) with a common intention to injure the claimant;
- (3) causing the claimant to suffer loss and damage; and
- (4) by unlawful means carried out pursuant to the combination.

[85] Learned King's Counsel submitted that the conspirators do not need to enter the conspiracy at the same time, but it must be shown that each defendant knew the facts which form the basis for the conspiracy and shared a common intention to injure. In order to be liable, each defendant must have actively "*joined in the execution of the conspiracy to a significant extent*": ***AA v Southwark LBC***.⁸

⁷ [2000] 2 All E.R. (Comm) 271 at [108].

⁸ [2014] EWHC 500 at para [252].

- [86] Mr. Chow Choy submitted that where a pleading seeks to draw an inference that a defendant had a particular state of mind, the *“facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends”* **Portland Stone Firms Ltd. v Barclays Bank.**⁹
- [87] Reference was also made to **JSC Bank of Moscow v Kekhman**¹⁰ per Flaux J for the proposition that where there are allegations of fraud or dishonesty (including as part of a conspiracy), the claimant must plead facts upon which an inference of dishonesty *“is more likely than one of innocence or negligence”*, otherwise, the Court may strike out the claim.
- [88] Reference was also made to the well-known requirements that *“an allegation of fraud or dishonesty must be sufficiently particularized”* and that, in order to determine whether a plea of fraud can properly be made *“[t]he correct test is whether or not , on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence....there must be some fact ‘which tilts the balance and justifies an inference of dishonesty’”* : **Three Rivers District Council v Bank of England.**¹¹
- [89] It is Kipford’s argument, that applying the above test, and having regard to the available evidence, it is plain that the fund movements between Croston and Kipford are much more likely to be innocent than fraudulent.

No Good Arguable Case that Russian Tort Claim Not time-barred

- [90] Kipford makes the point that, pursuant to Articles 196 and 200 of the RCC, the limitation period in respect of a claim under Articles 1064 and 1080 is 3 years from the date when the claimant learnt or should have learnt of the violation of its rights and the identity of the proper defendant.

⁹ [2018] EWHC 2341 at [29].

¹⁰ [2015] EWHC 3073 (Comm) at [20].

¹¹ [2001] UKHL 16 at [185]-[1]86.

- [91] The argument continues that, in accordance with Russian jurisprudence, the notion of what the claimant “*should have learnt*” is judged by reference to when the claimant had obtained “*a real opportunity*” to discover the relevant facts.
- [92] It was argued that in the present case, the Bank had obtained a real opportunity to discover the relevant facts on which it claims herein are based by no later than 14 August 2018, when it arranged for Binta International Corp (“**Binta**”), one of its associates, to take over control of Wolater (and hence KBY) from Mr. Usanov.
- [93] Kipford maintains that once KBY had defaulted under the Loan Agreement and the situation had deteriorated sufficiently to persuade the Bank to transfer control of Wolater and KBY to Binta in August 2018, there was no excuse for Alfa Bank not to avail itself of all its Information Rights under the Loan Agreement, as well as all means of access to any and all of KBY’s documents and records (whether in paper or electronic form and including all of the documents and records of KBY referred to in the CSOC and Negrey 1 through Binta’s control of Wolater and KBY.
- [94] Kipford therefore submitted at the hearing that there is no good arguable case on the merits on the additional ground that the claims against Kipford are time-barred.

Discretionary arguments

- [95] Kipford argues that if notwithstanding its previous arguments, the Court is minded to find that the Bank has a good arguable case, Kipford nevertheless contends that no injunction should be granted on the following discretionary grounds: (a) The Bank’s serious non-disclosure when obtaining the First Injunction in the Original Action,(b) The fact that under the applicable sanction regime, any judgment that the Bank may obtain would not be recoverable by Alfa Bank against Kipford; and (c) the considerable ongoing uncertainty as to whether, under the sanction regime, the Bank could properly obtain one or more licences to be authorized to pay costs orders in Kipford’s favour.

Stay/Security Application

- [96] Kipford recounts, that following the Russian invasion of Ukraine on 24 February 2022, the Bank became subject to various international sanctions including those applicable in the BVI, the US and the EU. In the BVI the relevant legislation is contained in the Russia (Sanctions) (EU Exit) Regulations 2019, extended to the BVI by the Russia (Sanctions) (Overseas Territories) Order 2020 and the Russia (Sanctions) (Overseas Territories (Amendment) Order 2022, as well as applicable sanctions in the US and EU (together the “**Sanctions Legislation**”). The Bank has, in addition, been designated by OFAC for the purpose of full blocking sanctions which broadly prohibit all transactions between the Bank and US persons, effectively cutting the Bank off from all contact with US financial institutions regardless of whether the transaction would be in US dollars or another currency.
- [97] Kipford has indicated that it issued the Stay and Security Application on 23 May 2022 in response to the Bank being sanctioned because of significant concerns about whether, if Kipford is successful on the claim, the Bank will ever be able to pay any adverse costs made against it to Kipford. Moreover, even if this were possible, it now appears likely that it would be incredibly difficult, if not impossible, for Kipford to enforce any such award in Russia. Since filing its application, Kipford’s concerns have only increased.
- [98] Kipford therefore seeks, as its primary position, an order that the claim be stayed in its entirety until such a time as the Sanctions legislation is revoked or the Bank ceases to be designated. In this situation, it was submitted, that the undertakings given in connection with the Second Injunction Application should be discharged. (regardless of what the Court finds in relation to the discharge of the Second Injunction Application generally) as it would be a major infringement upon Kipford’s rights to prevent it from dealing with its own property for what looks like a considerable and undetermined period.
- [99] It is Kipford’s submission that if the Court is not willing to make the stay order and release the undertakings, its secondary position is that the Bank should be required to provide security for Kipford’s costs which are already considerable (and some of

which are now definitively due and owing because of the success that Kipford has already had in discharging the First injunction.)

The Stay Application

[100] Kipford has described itself as being in the invidious position of fighting a claim with little chance of being able to recover its costs if successful.

Obtaining a license to cover the payment of an adverse costs award

[101] In the third witness statement of Jhneil Stewart it is set out that now that the Bank is a designated entity under the Sanctions legislation it is unable to deal with its own funds and no third party is able to deal with the Bank's funds (which includes receiving them) unless they have first obtained a license.

[102] As Kipford points out, the Sanctions Legislation sets out an Exhaustive List of circumstances in Schedule 5 in which licenses can be granted. Although there is provision for the Bank's own legal practitioner's to obtain licenses in order to be paid their costs of pursuing the claim on behalf of the Bank (and indeed, Kipford claims that it now understands that both Appleby and the Bank's London Counsel have sought and obtained such licenses), there is no provision in the legislation that would appear on its face to cover the payment and receipt of a payment made as a result of an adverse costs order or an order for security for costs.

[103] In this regard, Kipford suggests that only four of the sections in Schedule 5 could conceivably cover the situation but when analysed more closely it is clear, argues Kipford, that none of these provisions appear to actually work. These are discussed below.

[104] Paragraph 6 allows for the "*implementation or satisfaction (in whole or in part) of a judicial, administrative or arbitral decision*" but this paragraph expressly states that it only applies to decisions "*made or established before the date on which the person became a designated person.*" This provision, Mr. Choo Choy K.C. submits will not

therefore apply to the majority of costs awards made in these proceedings and will certainly not cover any future costs.

[105] Paragraph 3 allows for the payment of legal costs but (as considered further below) this paragraph does not appear to cover the payment of an adverse party's legal costs under a costs' award.

[106] Paragraph 5 allows for the payment of "*extraordinary expenses*". The payment of an adverse costs order is, however, Kipford submits, is in no way extraordinary so would not appear to be covered by this provision.

[107] Paragraph 7 allows for payments enabling "*anything to be done to deal with an extraordinary situation*". Again, Kipford submits that the payment of an adverse costs award is not an extraordinary situation; it is an entirely normal one in litigation.

[108] Kipford has referred to the decision of the English Commercial Court, Cockerill J in ***PJSC National Bank 7 anor and Mints & Ors***¹². In that recent case it was found that the sanction regime which is in force in England (and which is in the same terms as the BVI Sanctions Legislation) does cover the payment of an adverse costs order under Schedule 5 paragraph 3 of the English sanctions legislation which provides that licences can be granted: "*To enable the payment of-reasonable professional fees for the provision of legal services,, or reasonable expenses associated with the provision of legal services.*"

[109] Kipford's position is that this decision in ***Mint*** may well be incorrect and Kipford at the time of the hearing indicated that they understand the decision is under appeal. Kipford criticizes the judgment as being not well-reasoned, and an obvious attempt to shoehorn the situation into one of the licensing provisions where it does not clearly fit. In this regard, at paragraph 167 of the judgment, Mrs. Justice Cockerill based her decision that this provision enabled the payment not just of parties' own

¹² [2023] EWHC 118 (Comm).

costs but also of adverse costs on the fact that : *“there is nothing in the language of paragraph 3 to limit the license to the professional fees of the designated person’s own lawyers. What is sought to be paid would on its face fall within the wording: a license to pay an adverse costs order enables (in purely literal terms) the payment of ‘reasonable professional fees for the provision of legal services’”*

Practical ability to pay any adverse costs award

- [110] It was submitted that the **Mints** decision does not in any event deal with a crucially different situation which exists in this case. It was submitted that **Mints** deals only with whether or not a license can be granted to cover payment of an adverse costs order. The affidavit of Jeffrey Kirk in this case explains that in this case, even if the licenses have been obtained and where the payments clearly fall within the ambit of the licence, Appleby has not yet been able to locate any banking institution anywhere in the world willing to process payments from the Bank. It is not clear that any arrangement has been located under which an adverse costs order (or an order for security for costs which will apparently be much more difficult), could practically be paid.
- [111] The Court was advised that on 21 April 2023, Harneys wrote to Appleby stating that as far as the payment of security for costs is concerned, they would be prepared to work with Appleby. Since this letter Harneys say that they have not been able to find a workable solution and none has been proposed by Appleby. As matters stand, conclude Kipford, the situation remains as set out by Mr. Kirk.
- [112] It was submitted that this situation is therefore vastly different from the situation in **Mints** where the security was paid. It was not therefore necessary for Mrs. Justice Cockerill to consider a situation in which, although a payment may be covered by a license, this would not help the defendant at all as in practice no payment could actually be made. Kipford posits that it would clearly be unfair for it to be required to continue to fight the claim against it with little to no hope that any costs award in its favour will ever be paid even if the appropriate licenses can be put in place.

The Law

[113] As Kipford, points out, the Court has a clear power to order a stay of all or the part of any proceedings under EC CPR 26.1(2)(q) and its inherent jurisdiction under CPR 26.1(2)(w).

[114] Reference was made to the decision in **Athena Capital Fund SICAV-FIS S.C. A. v. Secretariat of the State of the Holy**¹³, where the English Court of Appeal stated: *“In my judgment all of the guidance in the cases which I have cited is valuable and instructive., but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted.”*

Interests of justice to grant stay and release undertakings

[115] Kipford reminds that the Bank has argued that if the stay is put in place then it will be denied access to justice because it will be unable to pursue its claim against Kipford. It was submitted that in this case the clear injustice that would be caused to Kipford if it is required to fight a large and costly claim in which, as things stand, it appears on the Bank’s own evidence (set out by Mr. Kirk) to have no hope of ever being able to recover its costs far outweighs the Bank’s right to pursue tis claim. This is particularly the case, the argument continues, in circumstances when :

- (1) If the Bank were to succeed on its claim it is likely to be unable to be paid under any judgment because of the Sanctions Legislation (in this regard paragraph 6 of Schedule 5 makes it clear that licenses can only be obtained to pay judgments handed down before an entity was designated). In these circumstances, argue Kipford, this begs the question as to why the Bank is proceeding with its clam at all. Kipford makes the serious assertion that the fact that it continues (and continues to proceed in a costly manner having now issued two claims and injunction applications covering broadly the same subject matter) adds, Kipford claims adds credence to Kipford’s

¹³ See [2022] EWCA Civ 1051.

assertion that the only reason the Bank is pursuing this claim at all is to force Kipford to incur substantial legal costs as part of a campaign of intimidation by the Russian state aimed at the Ananyev brothers; and

- (2) Kipford points out that it has already managed to set aside the First Injunction that was sought and obtained against it. It has done this both at first instance and at the Court of Appeal on the basis that the Bank had no good arguable case and had made serious non-disclosures when it obtained the First Injunction. Kipford indicates that even solely in relation to its application to discharge the first injunction, Kipford had already incurred total costs of U.S.\$1,375,081.57. These costs, it says, are payable now, subject to argument about quantum) and there is no prospect of these orders being set aside however the Claim is ultimately decided. As a result of this, Kipford says that it has filed two interim payment applications that this Court has also heard during this July sitting. Kipford declares that once these applications are granted (and there is no reason why they should not be), then Kipford would already be owed a clear sum of US \$675,000.00. If this order was not paid immediately, this would entitle Kipford to apply for a debarring order to prevent the claim being prosecuted until paid.

Security for Costs

- [116] Kipford's secondary position is that, if the Court is unwilling to stay the Claim and release Kipford from the undertakings, then Kipford asks the Court to order that the bank pay security for costs as a condition for continuing the Claim. CPR Rule 24.3(g) is the relevant Rule in respect of this application. Rules 24.3(g) and 24.5 provide as follows:

"24.3 Conditions to be satisfied

The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-

.....

(g) the claimant is ordinarily resident out of the jurisdiction

24.5 Enforcing Order for security for costs

On making an order for security for costs the court must also order that-

(a) The claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; (b) If security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out."

- [117] Kipford has estimated that its costs of defending the Claim are likely to be in the region of US\$6 million. I note that the Bank has stated that it was willing in principle to provide security if this can be done *"practically and lawfully..in sums with phasing/tranches to be determined by the Court"*.

Interim Costs Application

- [118] On 8 December 2021, Kipford filed an application for an interim payment on account of costs in the sum of US\$450,000.00 (**"The First Application"**) being approximately 50 % of the overall costs claimed, which total US\$925,669.30, comprising US\$529,052.03 in respect of Harneys' fees, US\$370,571.69 in respect of Counsel's fees, and US\$26,045.58 for disbursements.
- [119] On 14 June 2023, Kipford filed an additional application for an interim payment on account of costs in the sum of US\$225,000.00. Kipford is seeking the additional costs which have been incurred since the November Order in connection with the Bank's application for a stay from the Court of Appeal and the Appeal and which are not covered by the First Application (**"the Second Application"**). The US\$225,000 is approximately 50% of the relevant costs which total us\$449,412.27 comprised of US\$306,018.27 for Harneys' fees, US\$138,400.00 for Lead Counsel's fees, and US \$4,994.00 for disbursements.

The Bank's Response to the Sanction Arguments

- [120] The Bank's position is that its designation is beyond its control. It was submitted by Mr. Lowenstein KC that, notwithstanding its designation, the Bank retains its fundamental common law and constitutional rights of access to the Courts of this Territory.

[121] According to the Bank, *Mints* has held that the following activities are either permitted or licensable: (1) Payment of costs orders; (2) Satisfaction of order for security for costs (3) Payment of damages awarded in respect of a cross-undertaking in damages and (d) entry of judgment.

The Bank's Response to the Stay/Discharge Application

[122] The Bank's position is that on its face, an order for a stay would contradict the law and public policy of this Territory. Whilst the Bank admits there are practical problems in making payments, even if licensed, it submitted that such legal or practical problems in making payments, cannot justify a stay, still less one which would result in the loss of Undertakings or a freezing injunction which would otherwise be in place. It was further submitted that the possibility that Kipford's costs may be irrecoverable by reason of the Bank's designation does not justify excluding the Bank from the Courts of this Territory and thereby stifling its claim.

The Bank's Response to the Security for Costs Application

[123] The Bank has indicated that its primary position is that the Security For Costs Application should be dismissed because there is no evidence that Kipford will be unable to recover costs from the Bank, subject to Kipford identifying a route by which costs may lawfully and practically be paid. It submits that the only doubts as to whether Kipford would be able to recover its costs arise from the question whether the Bank's designation will prevent it from paying Kipford. Further, the evidence is that there have been practical difficulties in paying Appleby. The Bank admits that those practical difficulties may also affect the payment of costs to Kipford. However, the Bank submits that the law and policy in this Territory is that sanctioned persons retain their common law and constitutional rights of access to justice. Therefore, the argument runs, if the Court must choose between the right of a litigant to be paid costs and the right of another litigant to have access to justice, the latter prevails.

The Bank's Response to the Interim Payment Applications

[124] The Bank's primary position is that it would be inappropriate for the Court to make any such Orders until (1) the requisite licenses have been obtained (or at the very

least can be obtained), (2) which requires Kipford to identify a route by which the costs can lawfully and practically be paid.

- [125] The Bank complains that in circumstances where Kipford knows the Bank cannot pay costs and has taken no meaningful steps to facilitate such payment, the Bank infers that Kipford is really seeking the interim payment orders as a springboard for a debarring order application, and submits that the Court should not accede to such an application.

DISCUSSION AND ANALYSIS

The Second Freezing Injunction Application

- [126] In my judgment, this is a fairly complex claim, raising numerous difficult points. I accept Mr. Lowenstein's point that, when hearing a freezing injunction application, the Court should not attempt to resolve critically disputed questions of fact or difficult points of law. However, in this case it does appear to me that, as Mr. Choo Choy K.C. points out, in reformulating its case after the discharge of the first injunction, the Bank is in essence attempting to have a second bite at the cherry. This is because the case of accounting fraud could well have been advanced before Jack J at the first application.
- [127] It does not appear to me that the Bank has a good arguable case of tortious conspiracy. Under Russian Law the concept of a constructive trust does not exist. Further, there is no good arguable case of Kipford having joint liability in tort pursuant to Articles 1064 and 108 of the RCC. None of the unlawful conduct relied upon by the Bank at paragraphs 88-89 of the CSOC is alleged to be conduct on the part of Kipford. In sum, there is no sufficient evidence to tilt the balance from negligent or innocent to an inference of dishonesty. Thus, the necessary inference regarding the fund movement between Croston and Kipford is absent.
- [128] I have tried to follow the arguments about whether the Russian tort claim is time barred, but I am not satisfied on that score.

[129] However, the most powerful factors against granting a freezing injunction are to my mind, the discretionary factors. There was serious non-disclosure in the first injunction application, however, I am not taking that into account in this second application. What points away from the Court granting the injunction are the fact that under the Sanctions Regime, any judgment that the Bank may obtain would not be enforceable by the Bank against Kipford. It is also the case that there is ongoing uncertainty as to whether, under the sanctions regime, the Bank could properly obtain one or more licenses to pay costs orders in Kipford's favour, and that even if the licenses could be obtained, there are practical problems in making payment.

The Stay and Security for Costs Application

[130] In my judgment, the interests of justice favour a case management stay of the proceedings until further order, until such time as the Sanctions Legislation is revoked or the Bank ceases to be designated as a sanctioned entity. I accept Kipford's argument that the problems in this case go beyond the situation considered in *Mints*. This is because *Mints* mainly dealt with whether or not a license can be granted to cover payment of an adverse costs order. But here, a more fundamental problem has arisen and that is that even when licenses have been obtained, and even where the payments clearly fall within the ambit of the license, thus far no Bank has been located by either Appleby or Harneys willing to process payments from the Bank.

[131] Further, whilst the Bank has argued that if the stay is put in place, then it will be denied access to justice because it will be unable to pursue its claim against Kipford. I accept Mr. Choo Choy K.C.'s submission that the Bank's rights have to be balanced against Kipford's rights. In this case, Kipford has already incurred significant costs in successfully having the First Injunction discharged. The clear injustice that will be caused to Kipford if it is required to fight a large and costly claim in which it is highly doubtful that it will be able, (on the Bank's own evidence), to recover its costs, far outweighs the Bank's right to pursue the claim. This is a claim in addition where I am not satisfied that the Bank has a good arguable case and where the Second Injunction Application represents a second bite at the cherry.

[132] In my judgment, a case management stay is the appropriate order to make, and not an order for security for costs. Even without examining whether there would be a case for ordering security for costs, the wording of Rule 24.5 which would make it mandatory for the claim to be struck out if security for costs is not provided, satisfies me that it would not be just to make such an order in this case. As Mr. Lowenstein KC pointed out in his Skeleton, Rule 24.5 places constraints on the Court's discretion, and therefore if, as appears highly likely, the Bank would not be able to comply, then the mandatory order of the Court striking the claim out would take effect. In these circumstances, that would not be a just order to make.

The Interim Costs Applications

[133] On the other hand, in the case of Interim Costs Applications, these relate to costs that have already been incurred and ordered paid to date. As stated by Jacob J in **Mars UK Ltd v Teknowledge Ltd**¹⁴ at 153 (cited by Kipford): "*Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment.*"

[134] In my view, whether one uses the "*irreducible minimum*" discussed by Bannister J and referred to by the Court of Appeal in **Garkusha v Yeqiazaryan**¹⁵, or "*a reasonable estimate of what is likely to be ordered*" as discussed by Vos J in the oft-cited case of **United Airline Inc v United Airways Limited**¹⁶, in my view the sums sought by Kipford are reasonable and proportionate and represent a reasonable estimate of what is likely to be awarded.

Disposition

[135] My decision and orders are as follows:

¹⁴ [2000] FSR 138.

¹⁵ BVIHCMAP 2015/0010 (6 June 2016).

¹⁶ [2011] EWHC 2411 (Ch).

- (1) The Further Evidence Application filed by Kipford is granted, with no order as to costs;
- (2) The Second Injunction Application, filed by the Bank on 14 January 2022 is dismissed, with costs to Kipford to be assessed by another judge if not agreed within 14 days;
- (3) Save for payment and ascertainment of costs and finalizing the Order herein, the Claim is stayed until further order; and
- (4) The Bank is ordered to make interim payments on account of costs to Kipford in the sums of US\$450,000.00 and US\$225,000. Interest is to run at 5 % per annum on the US\$450,000.00 from 23 November 2021, and on the US\$225,000.00 from 12 May 2023, until payment in full. Kipford is awarded the costs of both of its applications on 8 December 2021 and 14 June 2023 to be assessed by another judge if not agreed within 14 days.

[136] It only remains for me to thank Leading Counsel and their teams for the excellent quality of their submissions in this convoluted and complicated matter.

Ingrid Mangatal
High Court Judge

By the Court

Registrar

