

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

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCMAP2021/0047**

**BETWEEN:**

**AO Alfa-Bank**

Appellant

and

**Kipford Ventures Limited**

Respondent

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mr. Paul Webster  
The Hon. Mr. Gerard St. C. Farara

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

**Appearances:**

Mr. Paul Lowenstein KC, with him Mr. Jonathan Ketcheson, Mr. Andrew Willins  
and Ms. Tamara Cameron for the Appellant  
Mr. Alain Choo-Choy KC, with him Ms. Victoria Lissack and Mr. Zachary Van Horn  
for the Respondent

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2022: November 24 and 25;  
2023: May 12.

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*Commercial appeal – Interim freezing injunctions – Appeal against discharge of interim freezing injunction - Whether the learned judge erred in the exercise of his discretion by discharging the injunction when he found that the Bank had no good arguable case of fraud – Appellate interference - Whether the learned judge erred in concluding that the own funds representation was true – Disclosure - Full and frank disclosure on an ex parte application for a freezing injunction - Whether the learned judge erred in concluding that there had been material non-disclosure by the appellant at the ex-parte hearing and that he should not therefore continue or re-grant the injunction – Whether the learned judge erred in holding that the mining representations were too vague to be actionable and were expressions of opinion – Causation - Whether the learned judge erred in law in holding that the Bank’s claim as regards the mining representations failed on the issue of causation*

On 15<sup>th</sup> December 2020, the appellant, AO Alfa-Bank ("the Bank"), filed an ex-parte application seeking an interim freezing injunction against Kipford Ventures Limited ("Kipford"), which it claimed had dishonestly assisted in a complex scheme to defraud the Bank of US\$140 million and/or that it had knowingly received approximately US\$48.34 million of the traceable proceeds of the US\$140 million. The application was granted and the Bank subsequently filed its claim form and statement of claim giving details of the alleged fraud.

The Bank alleged that the beneficial owners of Kipford were connected to Dmitry and Alexey Ananyev (the "Ananyev brothers"), who were the former owners of PromSvyazBank ("PS Bank"). The Bank claimed, that in August 2017, Mr. Dmitry Usanov ("Mr. Usanov"), a Russian citizen, acting as a front man for PS Bank and the Ananyev brothers, contacted the Bank concerning the grant of a loan for the acquisition of a coal mine located in the Kemerovo region in Russia. The mine was owned and operated by a Russian company LLC Krasnobrodsky-Yuzhny ("KBY"). KBY was owned by LLC Redwade ("Redwade"), and Delvenisto Investments Limited ("Delvenisto") owned 99.999% of Redwade. The remaining 0.001% of Redwade was owned by Ms. Yulia Yakovleva ("Ms. Yakovleva"). The Bank alleged that Mr. Usanov presented himself as an independent entrepreneur seeking financing to purchase the KBY mine, representing that 'high quality coal' was mined at KBY's mine and that KBY was 'an active business with potential for returns'.

The Bank engaged a consultant, IMC Montan ("IMC"), to audit the mine and provide a valuation. IMC estimated the net value of the mining operation at the time to be approximately US\$182 million. The Bank asserted that, relying on and induced by Mr. Usanov's representations, they agreed to provide a loan to KBY in the sum of US\$140 million (the "Loan"). The Bank agreed to provide the Loan in two instalments - one in the sum of US\$40 million for the repayment of KBY's outstanding debt to AvtoVazBank ("AVB") and the other in the sum of US\$100 million to purchase the shares in Redwade from Delvenisto.

The Bank stated that its policy was to require borrowers to contribute at least 20% of their own funds towards investments, with the remaining balance to be provided by the Bank. The Bank stated that Mr. Usanov was expected to contribute US\$45 million of his own funds, which he represented was available from Wolater Limited ("Wolater"), a company wholly owned by him. As a condition precedent to the release of the loan funds, Mr. Usanov - acting through Wolater - was to acquire a 31% shareholding in Redwade by purchasing 30.999% of the shares from Delvenisto and the remaining 0.001% from Ms. Yakovleva. The remaining US\$100 million from the Bank would then be used for the redemption of the remaining 69% shares in Redwade. Mr. Usanov complied with these conditions and on 22<sup>nd</sup> November 2017, the Bank loaned the first US\$40 million to KBY, of which US\$37.7 million was used to repay the debt to AVB. The Bank loaned the remaining US\$100 million on the same day, and KBY obtained 69% of the shares in Redwade.

However, by December 2017, Mr. Usanov informed the Bank that KBY was experiencing significant difficulties, and by April 2018, IMC presented a preliminary report to the Bank on

the valuation of the coal mine, showing a bleak picture. By May 2018, KBY had breached multiple covenants in the loan agreement, and by October 2018, Mr. Usanov reported that KBY had no working capital and needed a further investment from the Bank for the coal mining operation to continue. The Bank refused a further loan and instead, on 19<sup>th</sup> November 2018, made a demand from KBY under the loan agreement.

In December 2018, the Bank engaged a consultant to prepare a report on the mine, which revealed serious problems, including an overestimation of production capacity and asset value. The Bank issued proceedings in Russia against Mr. Usanov and KBY, resulting in judgments against Mr. Usanov in the sum of US\$40 million plus interest and against KBY in the sum of US\$140 million plus interest. Mr. Usanov failed to settle the judgment debt, and a bankruptcy petition was lodged by the Bank against KBY, resulting in the appointment of receivers over KBY by a Russian court. It was during the proceedings against Mr. Usanov and KBY that, according to the Bank, they suspected that the entire dealing was a fraudulent scheme for the benefit of the Ananyev brothers, with Mr. Usanov as the front man.

The Bank asserted that although US\$37.7 million had been paid by KBY to AVB, the balance of the Loan, being the US\$100 million, had been dissipated from Delvenisto to a network of offshore companies, including Kipford, which the Bank alleged was ultimately controlled by the Ananyev brothers. The Bank stated that the crucial misrepresentation by Mr. Usanov that he had US\$45 million of his 'own funds' was not true, since the funds were obtained from companies affiliated with the Ananyev brothers. Having traced approximately US\$48.34 million of the funds from the Loan to Kipford, the Bank initiated proceedings in December 2020 in the BVI against Kipford and sought an order to freeze its assets.

The injunction having been granted ex-parte by the learned judge until the return date or further order, the Bank filed an application on 5<sup>th</sup> January 2021 to continue the injunction. Kipford, however, by application filed on 11<sup>th</sup> January 2021 and amended on 23<sup>rd</sup> March 2021, sought to discharge the injunction. The Bank posited that there was a good arguable case that it had been the victim of fraud and that there was a real risk that Kipford would dispose of its assets. The Bank alleged that it had been induced into the Loan by fraudulent misrepresentations made by Mr. Usanov, namely, that the mine had 'high quality coal' and that KBY was 'an active business with potential for returns'.

The Bank alleged too that the representation by Mr. Usanov that he would utilise his own funds was false, since the monies had been obtained from companies controlled by the Ananyev brothers and returned to these companies shortly after. The Bank thus argued that it was just and convenient to continue the injunction. Kipford, on the other hand, argued that the claim did not have good prospects of success since the representations were too vague to be actionable and there was no risk of dissipation. Kipford also argued that there had been material non-disclosure by the Bank and that these factors warranted discharging the injunction.

The judge in the court below refused the application to continue the injunction and instead, granted the application to discharge it. He found that the statements 'high quality coal' and

'an active business with potential for returns' were too vague to be actionable. Both statements amounted to no more than expressions of opinion and did not reach the threshold of representations of fact. The learned judge noted that the Bank had carried out its own due diligence, and it was reasonable to infer that it relied on IMC's report for the mine's condition and future profitability rather than on Mr. Usanov's statements. As to the statement regarding the use of Mr. Usanov's 'own funds', the judge found that Mr. Usanov, through Wolater, did in fact use his own funds to buy the 31% shareholding in Redwade. Having determined this, the judge found that the Bank did not have a good arguable case of fraud. With respect to the issue of material non-disclosure, the learned judge found that there were two serious non-disclosures. These were the Russian court cases, the first of which had been brought by the Bank against IMC for professional negligence, and the second was the KBY/Wolater case which sought to set aside the Share Sale and Purchase Agreement (the "SPA") between Delvenisto and Wolater for fraud. Considering all these factors, the learned judge exercised his discretion to discharge the freezing injunction against Kipford.

Being dissatisfied with his decision, the Bank appealed to this Court on several grounds, however, the main issue which fell to be decided was whether the learned judge erred in the exercise of his discretion by discharging the injunction when he found that the Bank had no good arguable case of fraud. This issue was dealt with under four main heads: (i) whether the learned judge erred in concluding that the own funds representation was true; (ii) whether the learned judge erred in concluding that there had been material non-disclosure by the appellant at the ex-parte hearing; (iii) whether the learned judge erred in holding that the mining representations were too vague to be actionable; and (iv) whether the learned judge erred in holding that the Bank's claim as regards the mining representations failed on the issue of causation.

**Held:** dismissing the appeal and making the orders set out at paragraph 82 below, that:

1. A consideration of whether it would be just and convenient to grant an interim freezing injunction requires an applicant to meet the initial threshold of a good arguable case on the merits. The threshold of a good arguable case is relatively low and the case need only be more than barely capable of serious argument; it need not be a winning argument. The court should be careful not to conduct a mini-trial and seek to resolve questions of law appropriately suited for trial. What is necessary is an assessment of the strengths and weaknesses of the case with the focus being on whether there is a plausible evidential basis for the case.

**Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. & Company K.G. (The Niedersachsen)** [1986] 1 Lloyd's Rep 397 applied; **Hualon Corporation (M) SDN BHD (In Receivership) Acting by its Receiver and Manager Mr. Duar Tuan Kiat v Marty Limited** BVI HC (COM) 2014/0090 (delivered 20th November 2015, unreported) applied; Gee on **Commercial Injunctions** 7th Ed. (2020) at para. 12-033 applied.

2. An appellate court is concerned with a review of the exercise of a trial judge's discretion. If no such discretion has been exercised, then there is nothing for it to

review. The Bank's argument that it was its policy to require a borrower to have 20% of its own funds available at the time of initial discussions and negotiations was not pleaded in the court below and did not form part of the judge's reasons for discharging the injunction. Further, there was no evidence as to whether in September 2017 Mr. Usanov had this money, and no evidence therefore that this representation was false. Therefore, this Court was not in a position to interfere with the exercise of the learned judge's discretion on that basis. Accordingly, the learned judge did not err in holding that a good arguable case of fraud was not made out on this ground.

**Hualon Corporation (M) SDN BHD (In Receivership) Acting by its Receiver and Manager Mr. Duar Tuan Kiat v Marty Limited** BVI HC (COM) 2014/0090 (delivered 20th November 2015, unreported) applied.

3. The question of materiality for the purposes of full and frank disclosure on an ex parte application for a freezing injunction is for the trial judge to determine. Whilst the learned trial judge in this case made no positive finding of deliberate non-disclosure, he made it clear that Mr. Yury Negrey's lack of knowledge of the Russian court proceedings was irrelevant. The Bank would have known and there was no explanation why the Bank failed in its duty of disclosure. A further component of the duty of full and frank disclosure is the duty to make proper inquiries, since the duty extends to any additional facts which an ex parte applicant would have known had such inquiries been made. Accordingly, there was no error on the learned judge's part as to his finding of material non-disclosure. He considered the evidence before him and found that the Russian proceedings were relevant to the mining representations and the issue of causation. He further found the non-disclosure to be a serious breach of duty and that the explanation given by Mr. Negrey in no way negated the Bank's duty to disclose.

**Great Panorama International Ltd v Qin Hui et al** BVIHC (COM) 2019/0180 (delivered 13th August 2020, unreported) applied; **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350 applied.

4. In determining whether a good arguable case exists, a trial judge must have regard to the evidence before him and there must be a plausible evidential basis to ground his findings. The learned judge ruled that the mining representations made by Mr. Usanov were too vague to be considered actionable representations of fact, as there was no evidence of what constituted 'high quality coal' or what was meant by 'potential for returns'. The Bank had not made any specific claims that contradicted these representations, and their own report had painted a positive picture of KBY's profitability. It was plausible, on the evidence before him, for the judge to conclude that there was no good arguable case of fraud on the mining representations. Therefore, the learned judge did not err in this regard.

## JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the decision of a judge of the Commercial Court of the Territory of the Virgin Islands (“the BVI”) to discharge an interim freezing injunction which he had granted on an *ex-parte* application made by an applicant who alleged that: (i) it had been the victim of a fraud involving the grant of a loan of US\$140 million for the purchase of a coal mine, which ultimately turned out to be a worthless asset; (ii) the respondent was a party to the fraud and held traceable proceeds of the loan; and (iii) an injunction was necessary to prevent dissipation by the respondent of the funds to which the applicant was entitled.

### Background

- [2] The appellant, AO Alfa-Bank (“the Bank”), which was the applicant in the Commercial Court, is a bank registered in Russia, and the respondent, Kipford Ventures Limited (“Kipford”), which was the respondent in the Commercial Court, is a company registered in the BVI. By an *ex-parte* application filed on 15<sup>th</sup> December 2020, the Bank sought an interim freezing injunction against Kipford. The Bank asserted that Kipford had dishonestly assisted in a complex scheme to defraud the Bank of US\$140 million and/or that it had knowingly received approximately US\$48.34 million of the traceable proceeds of the US\$140 million.
- [3] By order dated 17<sup>th</sup> December 2020 and entered 21<sup>st</sup> December 2020, the learned judge granted the Bank’s *ex-parte* application for the interim freezing injunction against Kipford. The Bank subsequently filed its claim form and statement of claim in the Commercial Court on 29<sup>th</sup> December 2020. In its statement of claim, the Bank gave details of the alleged fraud perpetrated against it.
- [4] The Bank asserted that Kipford’s beneficial owners were Ludmila Ananyeva (“Mrs. Ananyeva”) and her mother. Mrs. Ananyeva was the wife of Dmitry Ananyev, who with his brother Alexey Ananyev (the “Ananyev brothers”), were the

former owners of PromSvyazBank ("PS Bank"). It was the Bank's contention that in or around August 2017, Mr. Dmitry Usanov ("Mr. Usanov"), a Russian citizen acting as a front man for PS Bank and the Ananyev brothers, contacted the Bank concerning the grant of a loan for the acquisition of an open-pit coal mine located in the Kemerovo region in Russia.

- [5] The mine was owned and operated by the Russian company LLC Krasnobrodsky-Yuzhny ("KBY"). KBY, in turn, was owned by LLC Redwade ("Redwade"), and Delvenisto Investments Limited ("Delvenisto") owned 99.999% of Redwade. The remaining 0.001% of Redwade was owned by Ms. Yulia Yakovleva ("Ms. Yakovleva"), a Russian minority shareholder. The Bank alleged that Mr. Usanov presented himself as an independent entrepreneur seeking financing for the purchase of the KBY mine. In September 2017, officials of the Bank met with Mr. Usanov, who represented to the Bank that 'high quality coal' was mined at KBY's mine and that KBY was 'an active business with potential for returns'.
- [6] The Bank engaged a technical consultant, IMC Montan ("IMC") to audit the mine and provide a valuation. During the audit, IMC reviewed several documents provided by Mr. Usanov, and IMC estimated the net value of the mining operation at the time to be approximately US\$182 million. The Bank asserted that, relying on and induced by Mr. Usanov's representations, they agreed to provide a loan to KBY in the sum of US\$140 million (the "Loan").
- [7] The Loan was documented in Loan Agreement No. 01NP44 dated 25<sup>th</sup> October 2017 (the "Loan Agreement") and two addendum agreements dated 10<sup>th</sup> November 2017. The Bank agreed to provide the Loan in two instalments - one in the sum of US\$40 million for the repayment of KBY's outstanding debt to AvtoVazBank ("AVB") and the other in the sum of US\$100 million to purchase the shares in Redwade from Delvenisto.

- [8] The Bank stated that its policy in respect of financing was to require the borrower to deploy at least 20% of the borrower's 'own funds' in respect of any investment, with the balance being met by the Bank. The Bank pleaded that it was always understood that Mr. Usanov would contribute US\$45 million of his own funds to the transaction and that he represented to them that this money was available from his own funds through Wolater Limited ("Wolater"), a company 100% owned by him. The Bank further pleaded that, as a condition precedent to the release of the Loan funds, Mr. Usanov - acting through Wolater - was to acquire a 31% shareholding in Redwade. This was to be accomplished by purchasing 30.999% of the shares from Delvenisto and the remaining 0.001% from Ms. Yakovleva. The US\$100 million from the Bank would then be used for the redemption of the remaining 69% shares in Redwade.
- [9] Mr. Usanov, through Wolater, subsequently purchased the 31% shareholding in Redwade, and on 22<sup>nd</sup> November 2017, the Bank loaned the first US\$40 million to KBY. On that same date, KBY utilised US\$37.7 million to repay the debt to AVB. Approximately US\$2.2 million of that sum remained in KBY. Later the same day, the Bank loaned the remaining US\$100 million and KBY obtained 69% of the shares in Redwade. Shortly after the Loan was dispersed, however, the situation with the mine changed. By 20<sup>th</sup> December 2017, Mr. Usanov informed the Bank that KBY's business was experiencing significant difficulties. In the same month, PS Bank became the subject of an intervention by the Russian Central Bank. The Central Bank alleged that the Ananyev brothers had been arranging a number of transactions for their own benefit and were dissipating the assets of PS Bank.
- [10] By 22<sup>nd</sup> January 2018, Mr. Usanov reported that KBY's financial results for the fourth quarter of 2017 were poor. In April 2018, IMC presented a preliminary report to the Bank on the valuation of the coal mine, showing a bleak picture. By May 2018, KBY had breached multiple covenants in the Loan Agreement, and by October 2018 Mr. Usanov reported that KBY had no working capital and a further investment from the Bank was needed so that the coal mining operation could

continue. The Bank refused a further loan and instead, on 19<sup>th</sup> November 2018, made a demand from KBY under the Loan Agreement.

- [11] In December 2018, the Bank engaged a consultant to prepare a report on the coal mining operation. The report was extremely bleak and revealed serious problems in the existing mine. The Bank asserted that at that point it formed the view that Mr. Usanov had made a number of misrepresentations when providing documents to IMC for their audit. The report noted that the production capacity of the mine had been overestimated and that there was an overestimation of the value of the whole asset. This report made it clear that the mine was not a worthwhile investment asset.
- [12] The Bank issued proceedings in Russia against Mr. Usanov as surety and KBY as borrower in respect of the Loan. This resulted in Russian court judgments against Mr. Usanov in the sum of US\$40 million plus interest, and against KBY in the sum of US\$140 million plus interest. Mr. Usanov failed to settle the judgment debt and, given KBY's failure to perform its obligations under the Loan Agreement, a bankruptcy petition was lodged by the Bank against KBY. This led to a Russian court appointing receivers over KBY. It was during the proceedings against Mr. Usanov and KBY that, according to the Bank, they suspected that the entire dealing was a fraudulent scheme for the benefit of the Ananyev brothers, with Mr. Usanov as the front man.
- [13] The Bank asserts that although US\$37.7 million had been paid by KBY to AVB, the balance of the Loan, being the US\$100 million, had been dissipated from Delvenisto to a network of offshore companies, including Kipford, which the Bank alleged was ultimately controlled by the Ananyev brothers. The Bank stated that the crucial misrepresentation by Mr. Usanov that he had US\$45 million of his 'own funds' was not true, since the funds were obtained from companies affiliated with the Ananyev brothers. Having traced approximately US\$48.34 million of the funds

from the Loan to Kipford, the Bank initiated proceedings in December 2020 in the BVI against Kipford and sought an order to freeze its assets.

- [14] The injunction having been granted *ex-parte* by the learned judge until the return date or further order, the Bank filed an application on 5<sup>th</sup> January 2021 to continue the injunction. Kipford, however, by application filed on 11<sup>th</sup> January 2021 and amended on 23<sup>rd</sup> March 2021, sought to discharge the injunction. The Bank posited that there was a good arguable case that it had been the victim of fraud and that there was a real risk that Kipford would dispose of its assets. The Bank alleged that it had been induced into the Loan by fraudulent misrepresentations made by Mr. Usanov, namely, that the mine had 'high quality coal' and that KBY was 'an active business with potential for returns'.
- [15] The Bank alleged too that the representation by Mr. Usanov that he would utilise his own funds was false, since the monies had been obtained from companies controlled by the Ananyev brothers and returned to these companies shortly after. The Bank thus argued that it was just and convenient to continue the injunction.
- [16] Kipford, on the other hand, argued that the claim did not have good prospects of success since the representations were too vague to be actionable and there was no risk of dissipation. Kipford also argued that there had been material non-disclosure by the Bank and that these factors warranted discharging the injunction.

### **Judgment of the Commercial Court**

- [17] The judge heard both applications at a hearing that lasted 2 days in November 2021. After hearing counsel for both sides and considering the evidence before him, the learned judge gave an oral ruling on 23<sup>rd</sup> November 2021 which was reduced to writing in a judgment dated 14<sup>th</sup> December 2021. The learned judge refused the application to continue the injunction and, instead, he granted the application to discharge it.

- [18] In his judgment, the learned judge noted that in order to ground its case for fraudulent representation, the Bank had to prove the existence of a misrepresentation which was made knowingly and intentionally. The Bank also had to show that it relied on the misrepresentation to its detriment.
- [19] The judge found that the statement 'high quality coal' was too vague to be actionable and noted that there was no sensible way of defining what 'high quality coal' might be. He further found that there was no evidence (nor was there a pleading) that this was a term of art used in the Russian mining industry. He also ruled that the representation that the mine was 'an active business with potential for returns' was also too vague to be actionable. The judge found that both statements amounted to no more than expressions of opinion and did not reach the threshold of representations of fact. He therefore held that, having failed to establish the first element of a claim for fraudulent misrepresentation in relation to these statements, there was no need for him to move on to consider whether Mr. Usanov made the statements knowingly.
- [20] As to the statement regarding the use of Mr. Usanov's 'own funds', the judge found that Mr. Usanov, through Wolater, did in fact use his own funds to buy the 31% shareholding in Redwade. He found that the monies were actually Wolater's monies, owned by it both legally and beneficially, having been paid to Wolater by Anevlessa Investments Ltd ("Anevlessa"), a Cypriot company with alleged ties to PS Bank. The judge found that the monies had been paid to Wolater as a non-refundable and non-distributable contribution to a subsidiary under a resolution dated 11<sup>th</sup> October 2017. He therefore found that the statement that Mr. Usanov would use his own funds was true and that it was not a misrepresentation.
- [21] Having determined this, the judge found that the Bank did not have a good arguable case of fraud. Despite recognizing that there was no need for him to consider the last element of 'causation' in relation to the fraud allegation, the learned judge noted that it would have been sensible to consider it in light of the

issues raised by the parties. I note here that although the learned judge used the term 'causation', what he was in fact considering was whether or not the Bank had actually relied on the statements made by Mr. Usanov to its detriment. I do not consider that the learned judge's use of the term 'causation' in any way detracted from his consideration of the issue before him.

[22] The learned judge noted that the Bank had carried out its own due diligence, including a very detailed report from IMC. He stated that, in his judgment, there was a reasonable inference to be drawn from this that the Bank placed reliance on IMC for the mine's condition and future profitability rather than on Mr. Usanov's statements. The judge also found that the Bank had sued IMC for professional negligence in Russia and that in those proceedings, the Bank was asserting that it was IMC that caused it to enter into the transaction. Furthermore, in its loan documents, the Bank required extensive contractual representations and warranties to be given, but none of the statements in contention were included among the warranties to be given and the representations to be made. He observed that if such statements were so material, as the Bank was now asserting, one would have expected them to have been among the representations required to be made. He therefore concluded that all of these factors pointed to the Bank's failure to meet the threshold of a good arguable case of fraud.

[23] As to Mr. Usanov being the front man for the Ananyev brothers, the judge held that this was a matter for trial, but that the circular movement of monies through Wolater suggested that there must have been some understanding between the Ananyev brothers and Mr. Usanov. He also found that the points made by learned counsel for the Bank as to dishonest assistance, constructive trust, tracing, and restitution, were properly arguable. Despite ultimately deciding that the fraud allegation had not been proven to the required standard, the judge stated that had the Bank met the threshold, he would have found that there was a real risk of dissipation of funds from Kipford. He said that the way the monies had been

moved showed a real risk that they would continue to move so as to render execution difficult or impossible, but that this did not save the freezing order, because the fraud allegation had not been proven to the required standard.

- [24] With respect to the issue of material non-disclosure, the learned judge found that there were two serious non-disclosures. These were the Russian court cases, the first of which had been brought by the Bank against IMC for professional negligence, and the second was the KBY/Wolater case which sought to set aside the Share Sale and Purchase Agreement (the “SPA”) between Delvenisto and Wolater for fraud. The judge ruled that the failure to disclose the first case was significant, since in those proceedings the Bank asserted causation of loss against IMC. The latter case he also found to be important since the Russian court had, after a full trial procedure, dismissed the claim to set aside the SPA. Considering all these factors, the learned judge found the Bank’s case to be weak and the non-disclosure to be serious. He therefore exercised his discretion to discharge the freezing injunction against Kipford.

### **The Appeal**

- [25] Being dissatisfied with the learned judge’s ruling, the Bank appealed. The Bank also sought a stay of execution of the learned judge’s order, which stay was granted by me (as a single judge) on 14<sup>th</sup> January 2022. The Bank set out several grounds of appeal, but the main grounds can be distilled under the following headings:

- (i) **The Own Funds representation** – that the learned judge erred in law and/or fact in concluding that the own funds representation was true;
- (ii) **Material Non-disclosure** – that the learned judge erred in law, or alternatively in the exercise of his discretion, in concluding that there had been material non-disclosure by the appellant at the *ex-parte* hearing and that he should not therefore either continue the injunction or re-grant it;

(iii) **The Coal Quality and Profits representations (the “Mining representations”)** – that the learned judge erred in law and/or fact in holding that the mining representations were too vague to be actionable and were expressions of opinion;

(iv) **Causation** – that the learned judge erred in law and/or fact in holding that the Bank’s claim as regards the mining representations failed on the issue of causation.

[26] In its notice of appeal, the Bank had said that the learned judge erred in law in applying what the Bank referred to in the notice as ‘BVI/English law principles’, instead of Russian law principles. However, this ground of appeal was abandoned by a Note filed by the Bank on 23<sup>rd</sup> November 2022.

#### **The issues on appeal**

[27] The main issue which falls to be determined on the appeal is whether the learned judge erred in the exercise of his discretion by discharging the injunction when he found that the Bank had no good arguable case of fraud. For the purposes of this judgment, this main issue will be analyzed under the broad headings identified in the notice of appeal – the own funds representation, non-disclosure, the mining representations and causation. I will deal first with the own funds representation, then non-disclosure, and then with the mining representations and causation together. Firstly, however, I will briefly set out the legal framework concerning interim freezing injunctions.

#### **Interim Freezing Injunctions**

[28] The court’s power to grant a freezing injunction is set out in rule 17.1 of the **Civil Procedure Rules 2000** (“CPR”) which states:

“17.1

(1) The court may grant interim remedies including –

“j an order (referred to as a ‘freezing order’) restraining a party from –

- (i) dealing with any asset whether located within the jurisdiction or not;
- (ii) removing from the jurisdiction assets located there;”

[29] Further, section 24 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**<sup>1</sup> (“**Supreme Court Act**”) states that:

“24. (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or a Judge thereof in all cases in which it appears to the High Court or to a Judge thereof to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the High Court or the Judge thinks just.”

The **Supreme Court Act** makes it clear, therefore, that the grant of a freezing injunction involves an exercise of judicial discretion, which is squarely within the power of the lower court judge.

[30] As to the role of the appellate court when a question arises with respect to the exercise of discretion by a judge of a lower court, this Court has on countless occasions stated its position, which is no different from the position in the other territories of the Commonwealth Caribbean and from the position in England. Expressed in different terms, the Court of Appeal’s remit on an appeal against a decision of a lower court made in the exercise of its discretion is to alter the decision only if the lower court went off track by not averting to relevant matters or by diverting to irrelevant matters, and in so doing, strayed too far off the usual course and ended up at a completely wrong destination.

[31] Whilst the **Supreme Court Act** does not state what is meant by the term ‘just or convenient’ in section 24(1), at paragraph 5 of his judgment, the learned judge, in citing the relevant authorities, sets this out:

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<sup>1</sup> Cap. 68 of the Laws of the Virgin Islands.

"[5] The test for the granting of a freezing order was, I thought, well established. **Gee on Commercial Injunctions**<sup>2</sup> says:

"In Mareva cases the all-important question is whether, at the time of the hearing and determination of the application for an injunction, in the circumstances of the case, it is just and convenient to grant it. Because of the intrusion into the defendant's affairs resulting from a Mareva injunction there is a threshold test of the strength required on the merits, which is 'a good arguable case'. (Emphasis added)

A requirement that the court must form the provisional view that the claimant will probably succeed at trial will be inconsistent with an approach which enables the court to achieve 'its great object viz abstaining from expressing any opinion upon the merits of the case until the hearing'. Nevertheless, the court will take into account the apparent strength or weakness of the respective cases in order to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold, and this will include assessing the apparent plausibility of statements in affidavits. The test is not a particularly onerous one, however.

The court should not conduct a mini-trial on this and the Court of Appeal will normally respect the instincts of an experienced judge on whether there is a good arguable case, and not interfere with it unless it is plainly wrong. The central concept at the heart of the test is a plausible evidential basis."

[32] The passage above makes it clear that a consideration of whether it would be just and convenient to grant the interim freezing injunction requires the applicant to meet the initial threshold of a good arguable case on the merits. This threshold is not onerous, and the court should be careful not to conduct a mini-trial. What is necessary is an assessment of the strengths and weaknesses of the case with the focus being on whether there is a plausible evidential basis for the case.

[33] The learned judge went on to cite the case of **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. & Company K.G. (The Niedersachsen)**<sup>3</sup>

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<sup>2</sup> 7<sup>th</sup> Ed. (2020) at para. 12-033, omitting citations.

<sup>3</sup> [1986] 1 Lloyd's Rep 397.

which determined what constituted a ‘good arguable case’. At paragraph 6 of his judgment, he stated:

“[6] ....both Mustill J and the English Court of Appeal held that a good arguable case was one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 percent chance of success. Once an applicant crosses that hurdle, the Court must then consider whether damages would be an adequate remedy and lastly the balance of convenience.” (Emphasis added)

- [34] As **The Niedersachsen** illustrates, the threshold of a good arguable case is relatively low, and the case need only be more than barely capable of serious argument; it need not be a winning argument. There is no dispute between the parties that this was the applicable test and that the learned judge correctly identified it as such. The central dispute surrounds his approach to the application of this test to the facts which ultimately led him to discharging the injunction.

**The “Own Funds” representation**  
**The Bank’s arguments**

- [35] Counsel for the Bank, Mr. Paul Lowenstein KC, sought to address this point first, as being central to the appeal. He asserted that if the Court of Appeal were to overturn the judge’s finding on this issue alone, this would be sufficient to dispose of the entire appeal. Under this heading, the real issue is whether or not the learned judge erred by holding that the Bank did not have a good arguable case of fraud since the own funds representation was true.
- [36] In his oral submissions learned King’s Counsel made some preliminary points concerning notable findings made by the judge. He argued that the judge took a very narrow approach in the exercise of his discretion and that his finding that there was a real risk of dissipation was not challenged by Kipford. He further stated that the judge gave insufficient weight to this risk and failed to consider the overall justice of the case. He pointed out that the judge found that: (i) there must have been some understanding between Mr. Usanov and the Ananyev brothers;

(ii) money was circulated through Wolater; and (iii) if fraud were proven, the Bank's claims against Kipford were properly arguable.

### **The present tense argument**

- [37] As it pertains to the own funds representation, learned King's Counsel argued that despite it not being included in the Loan documents, Kipford was not disputing that the representation was made. He posited two substantive arguments: the first, which was referred to as the 'present tense argument', emphasised that the judge looked at the wrong time. Mr. Lowenstein KC contended that at the time of the Bank's initial discussions with Mr. Usanov in September 2017, he represented that US\$45 million of his own funds was available through Wolater. He (Mr. Lowenstein KC) argued that the judge, in looking only at what was available at the time of the purchase of the 31% shareholding, overlooked what was actually pleaded by the Bank. He further posited that the words 'was available from his own funds' were so clear that they did not need to be construed and that even if they were construed, the representation was simply untrue since at the time of the September 2017 discussions, there was no evidence of any monies being so available.

### **The construction argument**

- [38] Mr. Lowenstein KC's second substantive argument, referred to as the 'construction argument', posited that the learned judge erred by construing the own funds representation in the manner that he did. He contended that, by his construction of the words 'own funds', the judge failed to appreciate that the meaning of a statement is a fact sensitive question and he failed to apply the correct test as set out in **Casso di Risparmio della Repubblica di San Marino ("CRSM") v Barclays Bank Plc.**<sup>4</sup>
- [39] Mr. Lowenstein KC asserted that the judge found the 'own funds representation' to be true in the narrowest personal property sense and, in so doing, solely focused on the time of the acquisition of the shareholding in Redwade and wholly ignored

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<sup>4</sup> [2011] EWHC 484 (Comm).

the context within which the representation had been made. The Bank had pleaded that it was its policy that the borrower would contribute 20% of its own funds to any transaction, so that the borrower would take on a substantial risk himself and 'have skin in the game'. Mr. Lowenstein KC emphasised that the whole commercial purpose of this policy requirement was frustrated in this case, since the US\$45 million simply circulated through Wolater's account and Wolater never actually contributed anything to the transaction.

[40] Mr. Lowenstein KC pointed out that the evidence before the judge was that on 10<sup>th</sup> October 2017, Anevlessa became the holder of a single share in Wolater. On 27<sup>th</sup> October 2017, Fintailor Investments Limited ("Fintailor") (a company affiliated with PS Bank), transferred US\$45 million to Anevlessa. On the same day, Anevlessa transferred the US\$45 million to Wolater. Wolater then paid the monies to Delvenisto for the 31% shareholding. Subsequently, the US\$45 million was transferred from Delvenisto through a network of companies, ultimately arriving at its starting point, Fintailor. Also, after the money had been transferred to Wolater, Anevlessa sold back its one share to Mr. Usanov for the nominal value of €1.

[41] Mr. Lowenstein KC asserted that the entire transaction was artificial, since the monies originated from the seller's side of the transaction and merely circulated between related companies in what Mr. Lowenstein KC described as a 'money go round'. The US\$45 million was never truly Wolater's own and the entire scheme was designed to induce the Bank into granting the Loan. Own funds, he argued, could not mean money originating from the seller's side of the transaction and merely circulating. He submitted that the judge was therefore wrong to conclude that the representation was true, and that there was, at least, a good arguable case of fraud on the basis of the own funds representation.

[42] Learned King's Counsel concluded by stating that, were the Court of Appeal to agree with his submissions on this point, this would be sufficient to dispose of the appeal. Even though the learned judge made findings as to causation and reliance, these, he argued, specifically related to the mining representations and

had no bearing on the own funds representation. Furthermore, as to the judge's finding of material non-disclosure, the two Russian court cases were considered by the judge in the context of the mining representations and this issue did not impact the own funds representation.

### **Kipford's arguments**

- [43] Counsel for Kipford, Mr. Alain Choo-Choy KC, countered that the issue of material non-disclosure was, in fact, relevant to this representation and that it was important for the Court to have regard to the Loan documents themselves. Nowhere in these documents was there a representation to the Bank as to the source of Wolater's funds. The only prerequisite for the dispensation of the Loan was that Wolater would purchase the 31% shareholding in Redwade using its own funds. Whilst not disputing that the own funds representation had been made, learned King's Counsel emphasised that the representations that the Bank considered to be important were the ones actually contained in the Loan documents.

### **The present tense argument**

- [44] Regarding the Bank's 'present tense argument', in accordance with which it had to be that the money was available when Mr. Usanov initially met with the Bank's representatives in September 2017, Mr. Choo-Choy KC asserted that the words could only be construed sensibly as a continuing representation. He stated that the words 'was available' could not be construed in isolation and the context of the statement was important. He emphasised that the money 'was available' for the purpose of acquiring the shareholding in Redwade. He contended that the point of this acquisition was therefore crucial, and it mattered not that prior to this, the representation was untrue. He submitted that the entire thrust of the Bank's pleaded case was reliance on the representation in the context of Wolater's purchase of the shareholding in Redwade. In highlighting the Bank's own policy, learned King's Counsel stated that there was nothing on the evidence to suggest that a borrower needed the 20% at the time of initial talks and negotiations.

- [45] Mr. Choo-Choy KC made the further point that the present tense argument was never advanced in the court below and the judge never made a specific finding in relation to it. He said that it was notably absent from the Bank's notice of appeal and skeleton arguments, and he argued that this was yet a further development in the Bank's case as to the meaning of the pleaded own funds representation.

**The construction argument**

- [46] In relation to the Bank's second substantive argument, Mr. Choo-Choy KC submitted that there was sufficient evidence before the judge for him to conclude that the own funds representation was true. He argued that Wolater did use its own funds given to it by Anevlessa to purchase the shares. As to the Bank's contention that the money came from the seller's side of the transaction, Mr. Choo-Choy KC asserted that this was a matter for trial. Despite conceding that the US\$45 million from Anevlessa could be seen as a gift, learned King's Counsel contended that the manner of Wolater's acquisition of the monies was irrelevant. He concluded that own funds could not be given the narrow meaning of 'monies which must not originate from the seller's side of the transaction' as had been advanced by the Bank. The judge therefore did not err in holding the own funds representation to be true and in ruling that the Bank had no good arguable case of fraud on this basis.
- [47] Neither party disputes that the learned judge was cognisant of the applicable test of good arguable case as set out in **The Niedersachsen**. The central dispute really concerns whether the learned judge erred in his approach to the application of this test to the facts. In the case of **Hualon Corporation (M) SDN BHD (In Receivership) Acting by its Receiver and Manager Mr. Duar Tuan Kiat v Marty Limited**,<sup>5</sup> the court emphasised at paragraph 43 of the judgment that in examining whether there was a good arguable case:

“...[the court is] not to condescend to an in-depth analysis of the evidence or likely evidence, or to try to resolve apparent differences in the competing evidence. These are all matters properly for the trial with the

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<sup>5</sup> BVI HC (COM) 2014/0090 (delivered 20<sup>th</sup> November 2015, unreported).

benefit of cross examination of the witnesses. Nor is it the role of the judge at this stage to try to resolve difficult questions of law...”

[48] As to what would constitute a good arguable case of fraudulent misrepresentation, the learned judge correctly identified, at paragraph 30 of his judgment, the applicable legal principles. He stated:

“I remind myself that a claim for fraudulent misrepresentation consists of four elements:

- (a) a misrepresentation of fact or law either express or implied must be made;
- (b) the false representation must have been made knowingly without belief in its truth or recklessly
- (c) the representation must be made with the intent to deceive the claimant. In other words, that it should be acted upon by the claimant;
- (d) the claimant must show it relied on the representation.”

#### **The present tense argument**

[49] Turning now to the Bank’s ‘present tense argument’, whilst the Bank pleaded that its policy was to require a borrower to have 20% of its own funds, there was no pleading that this sum had to have been available at the time of initial discussions and negotiations. Moreover, in spite of the Bank’s pleading that Mr. Usanov represented that the US\$45 million ‘was available’, there was no evidence as to whether this statement was true or false. There is no evidence that in September 2017 the Bank made inquiries into Mr. Usanov’s or Wolater’s financial affairs.

[50] I take Mr. Choo-Choy’s point that this argument was never posited before the learned judge and note that no specific finding in relation to it was contained in the judgment. The point was absent from the notice of appeal and the Bank’s submissions. The appellate court is concerned with a review of the exercise of the judge’s discretion. If no such discretion has been exercised, what then is there for this Court to review? The present tense argument was not pleaded in the court below and did not form part of the judge’s reasons for discharging the injunction

and, consequently, this Court would not be in a position to interfere with the exercise of his discretion on this basis.

- [51] Even if this Court were to agree with the Bank's second argument in relation to the own funds representation and allow the appeal on that basis and the discretion were to be exercised afresh, I would nevertheless hold that this argument carried little merit. The fact remains that the Bank never pleaded that it was its policy to require the 20% at the time of initial discussions, and there was no evidence as to whether in September 2017 Mr. Usanov had this money, and no evidence therefore that this representation was false. Considering these factors, the evidential basis for the Bank's present tense argument is woefully lacking, and it could hardly be described as giving rise to a good arguable case of fraud.

#### **The construction argument**

- [52] I turn now to the Bank's second substantive argument. The Bank contends that the judge failed to apply the reasonable representee test<sup>6</sup> and construed the own funds representation to be true based on what he understood it to mean. However, as **Hualon Corporation v Marty Limited** reminds us, at this stage the court is not to conduct a mini-trial and seek to resolve questions of law appropriately suited for trial. The real focus has to be on the strengths and weaknesses of the pleaded case based on the evidence before the learned judge.

- [53] The evidence before the judge was that the US\$45 million was transferred to Wolater from Anevlessa as a non-refundable, non-distributable contribution. This money, in Wolater's account, was then used to acquire the 31% shareholding in Redwade. The judge found that the money, being in Wolater's account, belonged to Wolater. The judge also made the specific finding that the money had been circulated. The evidence of the circulation was that Fintailor originally transferred the money to Anevlessa after Anevlessa had purchased one share in Wolater. After Wolater transferred the money to Delvenisto for the purchase of the 31%

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<sup>6</sup> Supra n 4.

shareholding, the money subsequently left Delvenisto, passed through a series of companies, and found its way back to Fintailor. Moreover, after Anevlessa made the contribution to Wolater, it quickly sold its one share back to Mr. Usanov.

[54] Mr. Choo-Choy KC argued that there was no stipulation by the Bank as to the source of Wolater's funds. He submitted that the circulation and source of the funds were irrelevant matters. All that the Bank had been concerned with was the purchase of the shareholding in Redwade and thus, the only representations the Bank saw as important were the ones included in the Loan documents.

[55] In examining the Bank's claim form and statement of claim, nowhere is there to be found a pleading as to the precise meaning and definition of 'own funds' or a pleading as to the source of Mr. Usanov's funds. Furthermore, nowhere in the evidence was there a representation by Mr. Usanov as to the source of his 'own funds'.

[56] At paragraph 12 of the Bank's statement of claim it was stated that:

"Accordingly, at all material times, it was understood and acknowledged between Mr. Usanov, Alfa-Bank and UBS Limited that Mr. Usanov would contribute USD 45 million of his own funds into the transaction, and more specifically, that he (acting through Wolater) would purchase 31% shares in Redwade by purchasing 30.999% of the shares from Delvenisto and 0.001% from Ms. Yakovleva. Alfa-Bank would then provide financing for the redemption of the remaining 69% shares in Redwade." (Emphasis added)

[57] Kipford raised a Request for Further Information (the "Request") in respect of the own funds representation made at paragraph 12. The Request reads:

"Statement of Claim, paragraph 12: Request. In the final sentence of paragraph 12 it is stated that 'in the course of the parties' negotiations, Mr. Usanov represented to Alfa-Bank that US\$45 million was available from his own funds (through Wolater) for the purposes of acquiring 31 percent of Redwade'.

....

....

(3) What was Alfa-Bank's understanding (and clarify each relevant individual's understanding that is intended to be relied upon), if any, as to

the ultimate source of Mr. Usanov's or Wolater's funds for the purpose of acquiring 31 percent of the shares of Redwade? Explain precisely how and why Alfa-Bank (and each relevant individual on Alfa-Bank's behalf) acquired the alleged understanding."

[58] The Bank responded that:

"(3) It is not known what is meant by 'the ultimate source of Mr. Usanov's or Wolater's funds' in this request. The bank's understanding, specifically that of Messrs. Khrapchenko and Shkurovich, was that the position was precisely as represented to them by Mr. Usanov, namely, that US\$45 million was available from his own funds (through Wolater) for the purpose of acquiring 31 percent of Redwade. The understanding was gained from the oral representations made by Mr. Usanov which appeared to be supported by the e-mail sent on his behalf referred to in (2) above, and the bank statements produced by Wolater."

[59] The Bank, based on its response to the Request, initially failed to explain what it meant by own funds. However, Mr. Yury Negrey ("Mr. Negrey") in his third statement later stated at paragraph 23:

"I believe that it is plain that 'own funds' means exactly that: cleared and unencumbered monies that Mr. Usanov or Wolater had available through his personal funds (as I stated at para 11 of my first affidavit), which were not given, gifted or lent by third parties."

[60] On the appeal, Mr. Lowenstein KC went even further to argue that own funds could not mean money originating from the seller's side of the transaction and merely circulating. It would appear, as the judge noted at paragraph 47 of the judgment, that the Bank has been constantly revising the definition of 'own funds' and this simply cannot be. There is no evidence, at the time of the initial discussions in 2017, that these matters were made clear to all parties. Furthermore, these matters were noticeably absent from the Loan documents. The source of the US\$45 million and the circular movement thereof only came to light years after the Loan Agreement had been entered into and it is not open to the Bank now to define what they understood 'own funds' to mean in 2017.

[61] At paragraphs 46 and 47 of the judgment, the judge said:

“[46]...Now it is right that the bank’s credit policy limited lending on assets like mines for a maximum of 80 percent and for good reason, but there does not seem to have been any, or any great, interest by the bank in how Mr. Usanov was paying for his 31 percent share of Redwade. No due diligence was carried out into how Mr. Usanov kept his assets or what they were. No contractual representations or warranties were asked of him by the bank.

[47] The bank was given evidence of payment by Wolater for the 31 percent shareholding in Redwade. It did not ask for anything more. Moreover, the monies which Wolater used to pay for the 31 percent were actually Wolater’s monies owned by it both legally and beneficially. The monies were paid by Anevlessa to Wolater as a non-refundable and non-distributable contribution to [a] subsidiary under a resolution dated 11<sup>th</sup> October, 2017. Faced with these difficulties, Alfa-Bank has been revising its case on what was meant by ‘own funds’.”

As the judge rightly noted, the Bank made no enquiries or stipulations as to the source of the US\$45 million. The Bank’s sole focus was the acquisition of the shareholding in Redwade.

[62] On the evidence, it was the Bank’s policy to require the borrower to deploy at least 20% of the borrower’s ‘own funds’ in respect of any investment. This was done and Mr. Usanov, through Wolater, deployed US\$45 million as had been required by the Bank. Moreover, as had been represented to and understood by all parties, Mr. Usanov, through Wolater, used the US\$45 million to purchase the 31% shareholding in Redwade. On the evidence of the Bank’s own pleaded case, the parties agreed that the only pre-conditions to be met by Mr. Usanov were - (i) the deployment of 20% of his own funds to the investment and (ii) the utilisation of that 20% to purchase a 31% shareholding in Redwade.

[63] If the Bank wanted to specify that the ‘own funds’ could not originate from certain specific sources, it was open to them, back in 2017, to state this and to incorporate such terms into the Loan documents. The Bank never made enquiries as to Mr. Usanov’s or Wolater’s finances and there was no agreement among the parties as to the specific source of the US\$45 million, save that it originated from Wolater, which was owned by Mr. Usanov. As counsel for Kipford rightly argued,

own funds could not have the narrow definition of money not originating from a specific source.

[64] The learned judge had proper regard to all the evidence before him in light of the Bank's pleaded case. It therefore cannot be said that there was a plausible evidential basis that the own funds representation was false. Mr. Usanov, through Wolater, deployed 20% (the US\$45 million) towards the investment and he used the money to acquire the 31% shareholding in Redwade. This was the agreement of all the parties. Further, the money was in Wolater's account and was applied to the purchase of the shares. The source of the money and its subsequent movement from Delvenisto were irrelevant. Such matters formed no part of the Bank's pleaded case, were never part of the initial 2017 discussions and were not pre-conditions for the grant of the Loan. It cannot be said that the judge's decision was blatantly wrong, and he consequently did not err in holding that there was no good arguable case of fraud on the basis of the own funds representation.

[65] I now turn to the issue of material non-disclosure.

**Material non-disclosure**  
**The Bank's arguments**

[66] Mr. Lowenstein KC submitted that despite considering the relevant legal principles concerning non-disclosure, the learned judge erred in his application of those principles. During his oral submissions, though conceding that the Russian cases were in some way material to the mining representations, he posited that the learned judge erred in his assessment of their materiality and adopted a wholly disproportionate course of action by discharging the injunction. He asserted that the judge failed to give due weight to the fact that the non-disclosure was not deliberate and that Mr. Negrey gave an explanation for the omission by the Bank.

[67] Mr. Lowenstein KC further contended that there was no evidence that Kipford would have been materially prejudiced were the injunction to continue in spite of the non-disclosure, and that the Bank had given undertakings as to damages. He

submitted that, all things considered, the judge ought to have had regard to the overall justice of the case and considered a less drastic course of action, such as a costs' order, particularly in the absence of a finding of deliberate non-disclosure.

### **Kipford's arguments**

[68] Mr. Choo-Choy KC countered that the judge rightly found that there had been a serious non-disclosure and that the Bank breached its duty of full and frank disclosure. He submitted that both Russian cases were material and despite the absence of a finding by the learned judge that the non-disclosure was deliberate, Mr. Negrey's explanation was insufficient. He argued that Mr. Negrey's lack of knowledge of the proceedings failed to account for the Bank's failure to disclose, since the Bank would have known. He further contended that despite the Bank's assertion, the judge was aware of the options before him when at paragraph 67 of his judgment, he acknowledged that he had a discretion to excuse the non-disclosure or discharge the original injunction and grant a fresh one.

### **Analysis**

[69] At paragraph 55 of his judgment, the learned judge set out the principles regarding material non-disclosure, which I will repeat here since both parties agree that the judge addressed his mind to the correct test:

“...The parties were happy to take my statement of the law on material non-disclosure from my decision in **Great Panorama International Ltd v Qin Hui [et al]**.<sup>7</sup> At [paragraph] [70] I said:

“A party's duty making an ex parte application is well established. The locus classicus is the judgment of Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe**.<sup>8</sup>

‘(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts’.

(2) The material facts are those which [are] material for the judge to know in dealing with the application as made:

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<sup>7</sup> BVIHC (COM) 2019/0180 (delivered 13<sup>th</sup> August 2020, unreported).

<sup>8</sup> [1988] 1 WLR 1350.

materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order. That is a reference to **Columbia Picture Industries Inc v Robinson**.<sup>9</sup> And (c): 'The degree of legitimate urgency and the time available for the making of inquiries.'

(5) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure is deprived of any advantage he may have derived by that breach of duty.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

Finally, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. When the whole of the facts,

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<sup>9</sup> [1987] Ch. 38.

including that of the original non-disclosure, are before [the court], it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.” However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief sought.”

[70] The judge found both Russian cases to be material to the mining representations. Despite Mr. Lowenstein KC’s concession that the cases were in some way material, he argued that the learned judge erred in the assessment of their materiality. I do not, however, agree with this position. The judge clearly articulated, based on the evidence before him, why he found each of the cases to be material to the mining representations and the issue of causation. Ultimately, as the authorities demonstrate, the question of materiality is for the trial judge to determine.

[71] Mr. Lowenstein KC sought to highlight certain differences between the cases referred to and the present proceedings against Kipford, but it cannot be said that the learned judge’s assessment was irrational or his decision blatantly wrong. Moreover, despite counsel for the Bank’s contention that Mr. Negrey’s explanation for the non-disclosure revealed that the omission was not intentional, as the learned judge rightly found, the Bank itself must have known. Whilst the learned judge made no positive finding of deliberate non-disclosure, at paragraph 66 of his judgement he made it clear that Mr. Negrey’s lack of knowledge of the Russian court proceedings was irrelevant. The Bank would have known and there was no explanation why the Bank failed in its duty of disclosure. A further component of the duty of full and frank disclosure is the duty to make proper inquiries, since the duty extends to any additional facts which an *ex parte* applicant would have known had such inquiries been made. Despite accepting that the Bank was a very large entity, the judge found that Mr. Negrey needed to make appropriate internal inquiries at the Bank.

- [72] There was no error on the learned judge's part as to his finding of material non-disclosure. He considered the evidence before him and found that the Russian proceedings were relevant to the mining representations and the issue of causation. He further found the non-disclosure to be a serious breach of duty and that the explanation given by Mr. Negrey in no way negated the Bank's duty to disclose.
- [73] Counsel for the Bank submitted that, in any event, the course of action adopted by the learned judge was too drastic and that he should have considered a costs order. However, the judge found the non-disclosure to be serious and that there was no proper explanation from the Bank as to this failure of duty. The learned judge therefore did not err in his assessment and analysis of the material non-disclosure issue, and it cannot be said that he was blatantly wrong.

#### **The Mining representations / Causation**

##### **The Bank's arguments**

- [74] Despite being listed as separate grounds of appeal, the issues raised on the coal quality representation and the profits representation (together "the mining representations") are connected and they will be considered together.
- [75] Mr. Lowenstein KC, on behalf of the Bank, argued that the judge erred in holding that the mining representations were too vague to be actionable. He submitted that the judge applied the wrong test and failed to consider the principles set out in **CRSM v Barclays Bank**. He said it was not for the judge at that stage to determine the meanings of the representations and that he erred in so doing since these were matters for trial.
- [76] Mr. Lowenstein KC further contended that the judge erred in holding that in light of the IMC report and the fact that the Bank sued IMC for professional negligence, this meant that the Bank placed reliance on IMC rather than on Mr. Usanov's representations. He emphasised that the Bank's reliance on the mining representations and the IMC report were mutually exclusive and the judge erred in

finding otherwise. The judge therefore should have held that there was, at minimum, a good arguable case of fraud and that the Bank relied on these representations to its detriment.

### **Kipford's arguments**

- [77] Mr. Choo-Choy KC, on behalf of Kipford, argued that the Bank failed to properly explain what it understood by the mining representations. He also stated that the Bank itself failed to plead that the mine did not contain high quality coal or that KBY was not an active business with potential for returns. He submitted that the mining representations were, as the judge found, mere expressions of opinion. He further argued that the judge did not err in holding that the Bank had failed to prove reliance and inducement and, contrary to the Bank's assertions, the judge did not treat reliance on the alleged representations and on the IMC report as mutually exclusive.

### **Analysis**

- [78] The learned judge's ruling on the mining representations was that the representations were so vague that they did not amount to representations of fact. The first representation was that the mine had 'high quality coal' but, as the judge asked, what does 'high quality coal' mean? There was no pleading as to what the Bank understood this to mean. There was also no pleading that the mine did not contain high quality coal. The fact remains that there was no evidence before the learned judge as to what constituted high quality as opposed to poor quality coal.
- [79] As to the second representation that 'KBY was an active business with potential for returns', again the Bank made no specific pleading that KBY was not. Furthermore, what does 'potential for returns' mean? Is this a certainty of returns or a mere possibility? What was the quantity of returns expected by the Bank? Whilst Mr. Lowenstein KC argued that the learned judge failed to apply the reasonable representee test, there is no evidence as to what the Bank understood this phrase to mean. The Bank's own IMC report painted a favourable forecast of

KBY's profitability, and there was no evidence that the Bank sought from Mr. Usanov himself proof of KBY's profitability. It was only after the situation with the mine changed that the IMC report was revealed to be woefully negligent in overstating KBY's profitability, and this resulted in the Bank's suit against them.

- [80] Mr. Lowenstein KC submitted that the IMC report in no way negated the Bank's reliance on Mr. Usanov's representations. However, there was no evidence before the judge on which the Bank relied, apart from the IMC report, in relation to the mining representations. In dealing with a good arguable case, the judge must have regard to the evidence before him and there must be a plausible evidential basis to ground his findings. There was no evidence as to what constituted high quality coal and no evidence, apart from the IMC report, as to KBY's profitability. On the evidence available to him, the judge found that the statements as to coal quality and profitability were too vague to be actionable representations and, in relation to the issue of reliance, the Bank did rely on the IMC report. It was plausible, on the evidence before him, for the judge to conclude that there was no good arguable case of fraud on the mining representations. The judge therefore did not err in this regard.

### **Proprietary Injunction**

- [81] This was a short point. The Bank sought to argue that one of the reliefs prayed for in the notice of appeal was the grant of a proprietary injunction, citing rule 62.20 of the CPR as giving this Court the authority to so grant. As learned counsel for Kipford highlighted, however, this was not a relief sought before the learned judge, the matter was never considered in the lower court, and there was no formal application for it on appeal. Counsel for the Bank also failed to provide this Court with any relevant authorities in support of this extraordinary exercise of the Court of Appeal's powers. Simply put, this was a novel matter, which had not been raised in the proceedings in the lower court and, in the absence of a formal application, this Court would not exercise its powers in such an extraordinary manner.

## Order

[82] Having arrived at the conclusions detailed above, I make the following orders:

- (i) The appeal is dismissed.
- (ii) The order of the learned judge dated 23<sup>rd</sup> November 2021 and entered 2<sup>nd</sup> December 2021 discharging the freezing injunction and refusing to continue or regrant it is affirmed.
- (iii) The respondent shall have its costs on the application for a stay granted on 14<sup>th</sup> January 2022 as well as its costs on the appeal, to be assessed by a judge of the Commercial Court if not agreed within 21 days.

I concur.

**Paul Webster**

Justice of Appeal [Ag.]

I concur.

**Gerard St. C Farara**

Justice of Appeal [Ag.]



**By the Court**

**Deputy Chief Registrar**