

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0043

BETWEEN:

SERGEY TARUTA

Appellant

and

JSC VTB BANK

Respondent

and

BVIHCMAP2022/0034

ARROWCREST LTD

(a company incorporated under the laws of the Republic of Cyprus)

Appellant

and

[1] JSC VTB BANK

[2] SERGEY TARUTA

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. Adrian Francis, Mr. Carl Moran and Mr. Scott Tolliss for Sergey Taruta
Mr. Stephen Moverley Smith, KC with him Mr. Richard Brown for Arrowcrest Ltd
No appearance by JSC VTB Bank

2022: November 7;
2023: January 25.

Commercial appeal – Appointment of receivers – Duomatic control – Exercise of Duomatic control over third parties – Doctrine of separate legal personality - Whether

the learned judge erred in appointing receivers over the shares in third party company – Discharge of receivership order - Regulation 11(1) of the Russia (Sanctions) (EU Exit) Regulations 2019 - Section 60(2) of the Sanctions and Anti-Money Laundering Act 2018 - Whether the learned judge erred in finding that the receivership order could not be discharged as a result of the sanctions imposed on JSC VTB Bank – Part 7 of the Civil Procedure Rules 2000 - Service outside the jurisdiction - Whether the learned judge erred in adding Arrowcrest as a party to the proceedings and dispensing with service

Mr. Sergey Taruta the appellant in appeal No. BVICHMAP2021/0043, owns 100% of the shares in Arrowcrest Ltd (“Arrowcrest”), a company incorporated in the Republic of Cyprus. Arrowcrest, the appellant in appeal No. BVIHMAP2022/0034 owns 100% of the shares in Enard, a company incorporated in the Territory of the Virgin Islands (“the BVI”). In February 2014, a Russian Court issued a judgment against Mr. Taruta in favour of JSC VTB Bank (VTB Bank) (“the Russian Judgment”). In May 2014, VTB Bank filed a claim in the Commercial Court in the BVI seeking recognition of the Russian Judgment in the BVI as well as a determination of quantum of the judgment debt. During these proceedings a freezing order against Mr. Taruta and the assets within his control, up to the value of US\$30,009,000.00 had been obtained. In June 2021, the learned judge in the court below gave judgment in principle recognising the Russian Judgment in the BVI. While the amount of the judgment stood to be determined by the court on 25th November 2021, the parties were able to agree that the sum due under the judgment was \$29,993,498.25 (“the Judgment Debt”).

VTB Bank, seeking to enforce that judgment, applied to the court for the appointment of receivers over the shares in Enard. The judge handed down a written judgment in November 2021 in which he appointed receivers over all of the issued share capital in Enard by way of equitable execution of the judgment (“the Receivership Judgment”). The learned judge accepted that 100% of the shares in Enard are legally and beneficially owned by Arrowcrest and that 100% of the shares in Arrowcrest are owned by Mr. Taruta. The learned judge found that the appointment of receivers over the shares in Enard was technically an appointment over the power held by Mr. Taruta exercising what he termed Duomatic control, relying on the principles in **Re Duomatic Ltd** to direct how the shares in Arrowcrest and thus the shares in Enard should be voted - in essence to cause the assets of those companies to be made available toward satisfaction of Mr Taruta's debt under the Russian Judgment. The learned judge also found it necessary, as a technical matter, to add Arrowcrest previously not a party to the proceedings as a party so that it would be bound by the Receivership Judgment. He accordingly directed that Arrowcrest be added as a defendant and allotted twenty-one days within which it was to make any applications. He also ordered that service out of the jurisdiction on Arrowcrest be dispensed with.

In January 2022, Arrowcrest applied to set aside the Receivership Judgment primarily on the grounds that: the court did not have jurisdiction over Arrowcrest, it being a Cypriot company and in respect of which none of the gateways set out in CPR 7.3 applied; there were no exceptional circumstances warranting the dispensation with service of the proceedings on Arrowcrest; and that Arrowcrest's assets are legally and beneficially owned by it and are not available for the purposes of equitable execution against Mr. Taruta. In relation to VTB Bank, it was later made subject to sanctions under the **Russia (Sanctions) (EU Exit) Regulations 2019** (“the Sanctions Regulations”).

In a written judgment handed down on 22nd March 2022 the learned judge, among other things, declined to discharge the receivership order on the ground that the sanctions regime prevented such discharge and refused Arrowcrest's application to set aside the receivership order. Among other things he concluded that the Duomatic power over which the receivership order was made is situated within the BVI. Therefore, there was a gateway under CPR 7.3(5) which allowed for service of the order on Arrowcrest outside of the jurisdiction, although it was not the judgment debtor. He further concluded that in any event, Arrowcrest had submitted to the jurisdiction of the court because the relief sought by Arrowcrest was final relief and thus was an unequivocal submission to the jurisdiction.

Mr. Taruta appealed against the Receivership Judgment challenging the judge's findings on several grounds. VTB Bank filed a counter notice of appeal in which it sought to uphold the conclusions of the learned judge on different grounds namely that he erred in law by failing to give sufficient weight to the fact that Mr. Taruta is subject to an existing freezing injunction over his assets and attached insufficient weight to the fact that Arrowcrest (as sole shareholder of Enard) is privy to the proceedings in the lower court by virtue of the fact that Mr. Taruta (a defendant in the proceedings) is the sole shareholder of Arrowcrest. Arrowcrest appealed against the order refusing to discharge the receivership order and its addition as a party to the proceedings. The grounds of appeal put forward by each of the appellants can be crystallised into three main issues to be determined in these appeals: (i) whether the learned judge erred in appointing receivers over the shares in Enard; (ii) whether the learned judge erred in finding that the receivership order could not be discharged as a result of the sanctions imposed on VTB Bank; and (iii) whether the learned judge erred in adding Arrowcrest as a party to the proceedings and dispensing with service. The other issues raised by the respective appellants can be subsumed within these three grounds.

Held: making the orders set out in paragraph 91 of the judgment, that:

1. While Duomatic principles dictate that a sole shareholder of a company may have the 'power' to direct the way the shares in that company are voted, this does not bestow on that shareholder a right to deal with or dispose of the company's assets for any purpose other than the furtherance of the objectives of the company. These principles do not give rise to a power tantamount to ownership over a company's assets. The doctrine of separate legal personality makes it clear that ownership of a company's assets rests with the company itself and that a company is an entity separate and distinct from its shareholders and directors. This position remains the same even where a company is, for all intents and purposes, a one-man company.

Re Duomatic Ltd [1969] 2 Ch 365 applied; **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and others** [2012] 1 WLR 1721 considered; **John Paul Dejoria et al v Gigi Osco-Bingeman et al** AXAHCVP2005/0004 (delivered 24th April 2006, unreported) considered; **Salomon v A. Salomon & Co Ltd** [1897] A.C. 22; **Prest v Petrodel Resources Ltd and others** [2013] UKSC 34 applied; **Tolley's Company Law Service** Division F at F6046 applied; **Satyam Enterprises Ltd v Burton and another** [2021] EWCA Civ 287 applied; **JSC VTB Bank (a company incorporated in**

Russis) v Pavel Valerjevich Skurikhin and others [2019] EWHC 1407 (Comm) applied.

2. In this case, the learned judge in finding that Mr. Taruta was in a position, as the beneficial owner of Arrowcrest which in turn owned Enard, to exercise Duomatic control amounted to a power in respect of which receivers could be appointed over the share capital in Enard, ignored the doctrine of separate legal personality and in effect extended the scope of the Duomatic principles, giving a beneficial owner of a company the power to deal with the company's assets. To allow the creation of such a power at law would cause the concept of ownership of property by a company in the context of its separate legal personality as settled in **Salomon** to fall away. The learned judge fell into error by appointing receivers over the shares in Enard. It was a clear departure from the principles of separate legal personality. Furthermore, the Duomatic principles were not relevant in this case. It was simply not open to the learned judge to rely on them or seek to fashion a new legal concept or to elevate them to create a power that would allow the enforcement of a judgment against assets owned by a third-party company. The learned judge therefore had no jurisdiction to make the receivership order.

Cruz City 1 Mauritius Holdings v Unitech Limited et al [2014] EWHC 3131 (Comm) applied; **Lakatamia Shipping Co Ltd v Su and others** [2015] 1 WLR 291 applied.

3. Regulation 11(1) of the **Sanctions Regulations** prohibits VTB Bank, as a sanctioned entity, from dealing with any of its 'funds' or 'economic resources'. 'Economic resources' is defined by section 60(2) of the **Sanctions and Anti-Money Laundering Act 2018** and the receivership order falls within this definition as it is an asset, but only in so far as it would aid VTB Bank in obtaining funds. Although the receivership order was made before the sanctions were imposed, the receivers had not yet begun to perform their duties. The receivership has been stayed since the imposition of the sanctions and no action will be taken in the immediate future to further the purpose of the receivership. Therefore, a discharge of that order would not constitute the use of it to obtain any as VTB Bank's position will remain exactly the same. Further, it is trite that legislation does not oust the jurisdiction of the court to exercise its normal functions unless that ouster is explicitly stated in that piece of legislation. There is nothing in the sanctions legislation which ousts the Court's jurisdiction to set aside an order unlawfully made or a court for other good reason setting aside its own order.

Section 60(2) of the UK **Sanctions and Anti-Money Laundering Act 2018** applied; Section 11(1) of the **Russia (Sanctions) (EU Exit) Regulations 2019** applied; **Prest v Petrodel Resources Ltd and others** [2013] UKSC 34 applied.

4. The combined effect of CPR 7.2 and 7.3 is to require a party to make an application to the court seeking permission to serve a claim form out of the jurisdiction in the circumstances listed in 7.3. The making of such an application presupposes the existence of a claim or a cause of action against the person whom the applicant wishes to serve. As there was no substantive claim or cause

of action against Arrowcrest, nor was there an application before the learned judge to serve Arrowcrest with the proceedings outside of the jurisdiction, he had no jurisdiction to add it as a party to the proceedings and there was no gateway in the CPR through which it could have been served in Cyprus. Arrowcrest's filing of an acknowledgement of service was simply to allow it to apply to discharge the receivership order purported to be made by the learned judge over its assets. This was the only way for Arrowcrest to seek any type of relief. The order itself recognised Arrowcrest's right to apply to vary or discharge the order, not having been heard on the making thereof. Accordingly, the learned judge had no jurisdiction to add Arrowcrest as a party to the proceedings or make an order in relation to its assets.

Rules 7.2 and 7.3 of the **Civil Procedure Rules 2000** applied.

5. The learned judge's dispensation with service on Arrowcrest was contrary to the position that Arrowcrest is its own legal person, that would need to be served in order for it to be joined to proceedings. Additionally, dispensation with service of a claim form on a potential party to proceedings is a power given to the court under CPR 7.8B. However, this power is only to be exercised in exceptional circumstances and upon application to the court. There having been no application for dispensation with service of the proceedings on Arrowcrest, the learned judge erred in so doing.

Linsen International Limited & others v Humpuss Transport Kima & ors [2011] EWCA Civ 1042 applied; **Alexander Katunin and other v JSC VTB Bank** BVIHCMAP2015/0004 and BVIHCVAP2015/0007 (delivered 20th June 2016, unreported) applied.

JUDGMENT

- [1] **PEREIRA CJ:** These appeals stem from a receivership order made by the learned judge on 29th November 2021 in which he appointed receivers over all of the issued share capital in Enard Investments Limited ("Enard"), with a view to facilitating the enforcement of a judgment by JSC VTB Bank ("VTB Bank"), a licensed Russian Bank, against one Mr. Sergey Taruta ("Mr. Taruta").
- [2] Preliminarily, I note that following the invasion of Ukraine by Russia, VTB Bank was made subject to sanctions under the **Russia (Sanctions) (EU Exit) Regulations 2019** ("the Sanctions Regulations").¹ Accordingly, it was unable to appear by counsel or actively participate in these proceedings. VTB Bank was made aware of the date of the hearing of these appeals and was provided with

¹ UK Statutory Instrument No. 855 of 2019.

the Zoom link to access the proceedings, though no representative attended. In any event, the Court has had sight of and will consider, as appropriate, its counter-notice of appeal and skeleton arguments filed on 14th January 2022 and 15th June 2022.

Background

- [3] Mr. Taruta is a Ukrainian citizen, businessman and politician. He owns 100% of the shares in Arrowcrest Ltd (“Arrowcrest”), a company incorporated in the Republic of Cyprus. Arrowcrest owns 100% of the shares in Enard, a company incorporated in the Territory of the Virgin Islands (“the BVI”).

- [4] On 28th February 2014, the Meshchansky District Court of Moscow issued a judgment against Mr. Taruta in favour of VTB Bank (“the Russian Judgment”). The judgment stemmed from a contractual guarantee made between Mr. Taruta (in his personal capacity) and VTB Bank in 2011. That judgment was later varied by a subsequent decree of the same court dated 24th March 2014.

- [5] On 23rd May 2014, VTB Bank filed a claim in the Commercial Court in the BVI seeking recognition of the Russian Judgment in the BVI as well as a determination of quantum of the judgment debt.

- [6] On 26th May 2014, following an application by VTB Bank, the court below granted a freezing order against Mr. Taruta and the assets within his control, up to the value of US\$30,009,000.00, to ensure that there were assets within the BVI amenable to enforcement, should any judgment be made in VTB Bank’s favour (“the Freezing Order”). The Freezing Order was continued and varied on different occasions, but nonetheless remained in place. It stated, among other things, that Mr. Taruta shall not ‘in any way dispose of, deal with, dispose of (sic) or diminish the value of any of his assets whether they are in or outside the British Virgin Islands including... any interest whether directly or indirectly held by or on behalf of [Mr. Taruta] in Enard Investments Limited...’.²

² Consolidated appeal bundle, pgs 1173-1174.

[7] Furthermore, paragraph 7 of the Freezing Order stated as follows:

“...[Mr. Taruta] must within 14 days after the date of service of this Order ... to the best of his or its ability inform [VTB Bank’s] solicitors of all his or its assets worldwide (other than those located in Russia or Cyprus) exceeding US\$50,000 in value whether in his or its own name or not and whether beneficially, solely or jointly owned, giving the value, location and details of all such assets...”³

[8] Pursuant to a disclosure clause in a consent variation order dated 20th January 2021, Mr. Taruta filed an affidavit on 4th February 2021 to which he exhibited a letter from his then counsel, in which he identified, among other things, his 100% legal and beneficial ownership of the shares in Arrowcrest. Counsel for VTB Bank sought further clarification as to the value of Mr. Taruta’s assets and by letter in reply dated 26th February 2021, Mr. Taruta’s counsel stated as follows:

“Your client ought to be assured as a result of the updated disclosure provided by Mr Taruta that he retains his interest in Enard in the BVI and that Enard controls assets worth over and above the Frozen Value. Mr Taruta has provided details of his corporate structure and he has identified the value and location of specific assets which are sufficient to cover the Frozen Value.

The disclosure adequately complies with the Order and ought to satisfy your client that Mr Taruta has sufficient assets to meet any judgment in the proceedings should the BVI Court make an order in your client’s favour.”⁴

[9] On 15th June 2021, the learned judge in the court below gave judgment in principle recognising the Russian Judgment in the BVI. While the amount of the judgment stood to be determined by the court on 25th November 2021, the parties were able to agree that the sum due under the judgment was \$29,993,498.25 (“the Judgment Debt”).

[10] VTB Bank, seeking to enforce that judgment, applied to the court for the appointment of receivers over the shares in Enard. The amount of the judgment debt already having been agreed by the parties, this was the only application heard by the learned judge on 25th November 2021. The judge handed down a

³ Consolidated appeal bundle, pg 1174.

⁴ Consolidated appeal bundle, pgs 1487-1488.

written judgment on 29th November 2021 in which he appointed receivers over all of the issued share capital in Enard by way of equitable execution of the judgment (“the Receivership Judgment”).

Judgments in the court below

- [11] The learned judge accepted as a fact that 100% of the shares in Enard are owned by Arrowcrest and that 100% of the shares in Arrowcrest are owned by Mr. Taruta. Consequently, the question to be determined was whether VTB Bank could enforce the judgment directly against Enard, or whether it would have to take enforcement measures in Cyprus.
- [12] Mr. Francis, who also represented Mr. Taruta in the court below, submitted that since Arrowcrest (and not Mr. Taruta) is the legal and beneficial owner of the shares in Enard, Mr. Taruta owns no assets in the BVI which could be enforced against. He suggested that the appropriate enforcement route would be for VTB Bank to go to Cyprus to obtain a charging order or receivership over Mr. Taruta’s shares in Arrowcrest.
- [13] The learned judge rejected these arguments and relied heavily on the principles enounced in **Re Duomatic Ltd**⁵ in arriving at his decision to appoint receivers over the shares in Enard. At paragraph 8 of his judgment he said:

“As ultimate beneficial owner of Arrowcrest, Mr. Taruta had Duomatic control of Arrowcrest. Equally, however, he had Duomatic control of Enard as a result of his Duomatic control of Arrowcrest. That power of control is in my judgment a right recognized in law. As I held in **[Industrial Bank Financial et al v Xing Libin BVIHC(COM)2018/0032]**, “[a]n equitable receiver can be appointed over legal rights which the judgment debtor has”, citing the Privy Council decision in **[Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others [2011] UKPC 17]**, which approved the appointment of receivers over a judgment debtor’s power to revoke a Cayman trust. The Privy Council impliedly overruled Bannister J’s view in **[Dalemont Ltd v Alexander Senatorov et al BVIHC(COM)2011/0149]** that receivers could not be appointed over a mere power.”⁶

⁵ [1969] 2 Ch 365.

⁶ BVIHC(COM)2014/006 (delivered 29th November 2021, unreported).

- [14] Mr. Francis also argued that a receiver could not be appointed over the shares in Enard without Arrowcrest being made a party to the action. The learned judge found this to be a purely formal objection given that Mr. Taruta was the beneficial owner of both Arrowcrest and Enard. However, he did find it necessary, as a technical matter, to add Arrowcrest as a party so that it would be bound by the judgment. He accordingly directed that Arrowcrest be added as a defendant and allotted twenty-one days within which it was to make any applications or representations it deemed fit. Service on Arrowcrest was dispensed with.
- [15] The learned judge commented that the appointment of receivers over the shares in Enard was technically an appointment over the power held by Mr. Taruta under Duomatic principles to direct how the shares in Enard should be voted. He rejected Mr. Francis' argument that the appropriate enforcement route would be for VTB Bank to go to Cyprus to obtain a charging order or receivership over Arrowcrest. He found that the purpose of enforcing against Arrowcrest would be to take control of Enard, and that could be done by appointing receivers in the BVI without the pointless expenditure of time and money to pursue proceedings in Cyprus. Accordingly, he found it appropriate to appoint receivers over the shares in Enard.
- [16] By notice of application filed on 6th January 2022, Arrowcrest applied to set aside the Receivership Judgment primarily on the grounds that: the court did not have jurisdiction over Arrowcrest, it being a company incorporated in Cyprus and in respect of which none of the grounds for service out of the jurisdiction under CPR 7.3 applied; there were no exceptional circumstances warranting the dispensation with service of the proceedings on Arrowcrest; Arrowcrest's assets are legally and beneficially owned by it and they are not available for the purposes of equitable execution against Mr. Taruta; there was no evidence before the court that Duomatic principles were applicable to questions of control of Arrowcrest; and that the proper forum for determination of questions of control of Arrowcrest is the Republic of Cyprus.⁷

⁷ Consolidated appeal bundle, pgs 576-579.

- [17] In light of the sanctions imposed on VTB Bank, the learned judge invited comments from the Attorney General and the parties as to the impact of the sanctions on the proceedings. The parties complied and the judge dealt with the matter at a hearing on 17th March 2022. In a written judgment handed down on 22nd March 2022 in which, among other things, he declined to discharge the receivership order on the ground that the sanctions regime prevented such discharge and he refused Arrowcrest’s application (“the Discharge Judgment”).
- [18] The learned judge found that a judgment debt which has the advantage of partial execution in the form of a receivership is altered if the receivership is discharged and the character of that judgment debt would change, as a partially executed judgment is very different to an unexecuted judgment. He also found that a receivership order is itself a “benefit” or “financial benefit” under the sanctions legislation as it has substantial value to the judgment creditor.⁸ Accordingly, he found that it was not lawfully possible to discharge the receivership order nor to allow the receivers to perform the function of the receivership as both of these steps would require a licence from the Governor.
- [19] He also concluded that the Duomatic power over which the receivership order was made is situated within the BVI. Therefore, there was a gateway under CPR 7.3(5) which allowed for service of the order on Arrowcrest outside of the jurisdiction, although it was not the judgment debtor. The judge commented that in any event, if he was wrong on the gateway point, Arrowcrest had submitted to the jurisdiction of the court. This is because the relief sought by Arrowcrest – that is, the discharge of the receivership order – was final relief and seeking final relief is an unequivocal submission to the jurisdiction which cannot be saved by purporting to make the application without prejudice to the jurisdiction of the court.

The appeals

- [20] Two separate appeals were filed in relation to the judgments given in the court below. Mr. Taruta appealed directly against the Receivership Judgment under

⁸ Consolidated appeal bundle, pg 181, paragraph 34.

appeal number BVIHCPMAP2021/0043. He challenged the judge's findings on the following grounds:

- (i) the judge erred in law in finding that Duomatic control was a power constituting property of Mr. Taruta over which receivers could be appointed;
- (ii) the judge erred in law by simply appointing the receivers over the issued share capital in Enard. In both form and substance, he appointed receivers over Arrowcrest's assets to satisfy a judgment debt owed by Mr. Taruta;
- (iii) the judge did not request, and did not receive, any submissions on the concept of Duomatic control, which was his own idea briefly put to VTB Bank's counsel at the hearing and not the basis on which the application was made to him; and
- (iv) the judge erred in dispensing with service of the proceedings on Arrowcrest of his own motion. Such an order can only be made pursuant to an application.⁹

[21] VTB Bank filed a counter notice of appeal on 14th January 2022 in which it cross-appealed on the grounds that the learned judge, although he arrived at the correct conclusion, erred in law by failing to give sufficient weight to the fact that Mr. Taruta is subject to an existing freezing injunction over his assets; and that he attached insufficient weight to the fact that Arrowcrest (as sole shareholder of Enard) is privy to the proceedings in the lower court by virtue of the fact that Mr. Taruta (a defendant in the proceedings) is the sole shareholder of Arrowcrest. As a consequence, Arrowcrest is bound by the findings and orders of the lower court.

[22] By notice of appeal filed in appeal number BVIHCPMAP2022/0034 on 13th April 2022, Arrowcrest appealed against the Discharge Judgment on the grounds that the learned judge erred in the following respects:

⁹ Notice of appeal filed on 16th December 2021.

- (i) deciding that the court had personal jurisdiction over Arrowcrest under CPR 7.3(5), which jurisdiction needed to be established for the receivership order to be made;
- (ii) finding that Arrowcrest had submitted to the jurisdiction of the court, by applying the wrong legal test to that question and/or reaching a factual conclusion not properly available on the evidence;
- (iii) finding that the Duomatic principles give rise to a power over which receivers can properly be appointed by way of equitable execution;
- (iv) finding that Cypriot law was the same as English and BVI law in relation to Duomatic principles. On the evidence and authorities the only proper conclusion was that Duomatic principles would not apply to Mr. Taruta's shareholding in Arrowcrest.
- (v) declining to set aside the receivership order by reason of the imposition of sanctions against VTB Bank, in that:
 - i. the continuation of the receivership order was inconsistent with the terms of the applicable sanctions regulations and/or the imposition and effect of the sanctions was an overwhelming discretionary factor which should have compelled the discharge of the receivership order.
 - ii. the sanctions regime did not prohibit the court from discharging the receivership order.

[23] On 15th June 2022, VTB Bank filed a counter notice of appeal in which it cross-appealed on the identical grounds listed in its counter notice filed on 14th January 2022 in BVIHCMA2021/0043. This counter notice was not timely filed and no extension was sought or obtained. Counsel for Arrowcrest urged, in my view rightly, that it be disregarded.

- [24] There being an almost complete overlap in the issues to be decided in these two appeals, they were heard together and this judgment shall be dispositive of both.

Issues to be determined

- [25] The grounds of appeal put forward by each of the appellants can be crystallised into three main issues to be determined in these appeals: (i) whether the learned judge erred in appointing receivers over the shares in Enard; (ii) whether the learned judge erred in finding that the receivership order could not be discharged as a result of the sanctions imposed on VTB Bank; and (iii) whether the learned judge erred in adding Arrowcrest as a party to the proceedings and dispensing with service. The other issues raised by the respective appellants can be subsumed within these three grounds.

Issue 1: Whether the learned judge erred in appointing receivers over the shares in Enard

Duomatic principles and separate legal personality

- [26] The thrust of the argument put forward by Mr. Francis was that the learned judge's use of Duomatic principles to justify the appointment of receivers over the share capital in Enard was erroneous in law as it was inconsistent with the principle of separate legal personality and that Duomatic principles are not relevant in the context of this case. He relied on a number of cases in his submissions, some of which I shall explore below.
- [27] The principles enounced in **Re Duomatic** have been recognised in English law and BVI law since they were laid down in 1969 and the case remains good law. It states that 'where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be'.¹⁰

¹⁰ Supra note 5, pg 373.

- [28] What this means is that the unanimous assent to a decision by those who ultimately exercise power over the affairs of a company through their right to attend and vote at a general meeting is binding on the company. It does not matter whether the formal procedures stipulated in the articles of association have been complied with. What matters is that they have reached an agreement.
- [29] At paragraph 8 of the Receivership Judgment, the learned judge stated that '[a]s ultimate beneficial owner of Arrowcrest, Mr. Taruta had Duomatic control of Arrowcrest. Equally, however, he had Duomatic control of Enard as a result of his Duomatic control of Arrowcrest. That power of control is in my judgment a right recognized in law.'
- [30] The learned judge relied on two cases from the Privy Council in support of his application of Duomatic principles to the instant case. The first was **Ciban Management Corp v Citco (BVI) Ltd and another**.¹¹ In exploring the extent of the Duomatic principles, the Privy Council found, *inter alia*, that the approval of the beneficial owner of a company could be treated as the approval of the shareholders for the purposes of binding the company. The learned judge applied this principle in imputing Duomatic control over Arrowcrest and Enard by Mr. Taruta, as he was the beneficial owner of both.
- [31] The other case relied on by the learned judge was **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and others**.¹² In that case, the Privy Council found that a settlor's power of revocation in relation to a trust was tantamount to ownership of the trust assets. Accordingly, receivers could be appointed over that power of revocation.
- [32] Mr. Francis also directed this Court to the **Tasarruf** case, in particular the definition of a 'power' contained therein. At paragraph 34 of the judgment, the court cited Farwell on Powers who said:

"A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own

¹¹ [2021] 1 All ER 983.

¹² [2012] 1 WLR 1721.

benefit or for that of others. ... The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership.”¹³

- [33] The definition of a power approved by the Privy Council implies the ability of the holder of a power to deal with the assets of the entity over which it exercises that power. However, Duomatic principles do not appear to give rise to a ‘power’ in accordance with the strict legal definition of the word – they do no more than allow for the ratification of decisions made by the shareholders (or the beneficial owner as was found in **Ciban**) of a company.
- [34] This Court dealt with the applicability of Duomatic principles in a similar situation in **John Paul Dejoria et al v Gigi Osco-Bingeman et al**.¹⁴ Gordon JA at paragraph 17 observed that ‘in Duomatic and in all of the cases which preceded it and were relied on by it as well as in the cases that rely on Duomatic subsequently, the issue was always whether an action performed by a company was properly performed in the absence of certain formalities.’
- [35] However, in that case, the issue was different. The issue was whether a company, wholly owned by a single shareholder could be forced to perform obligations undertaken by the shareholder in his own name. The Court cited the underlying principle of company law that a company is a separate and distinct legal entity from its incorporators as was laid down in **Salomon v A. Salomon & Co Ltd**,¹⁵ and found this to be the law applicable to the issue.
- [36] Ultimately, this Court found at paragraph 19 that if either of the holding companies owned by the appellants incurred some liability arising out of a contract entered into by either of them then, notwithstanding that they were each owned by a single shareholder, such liability would not flow through to that single shareholder. That is the result of separating the corporate personality from the personality of the shareholder(s). This effect is frequently referred to as the corporate veil. The Court was of the view that the corporate veil operates in both

¹³ Sir George Farwell, *A Concise Treatise on Powers* (3rd edn, London: Stevens and Sons, 1916), pg 1.

¹⁴ AXAHCVPAP2005/0004 (delivered 24th April 2006, unreported).

¹⁵ [1897] A.C. 22.

directions. In the circumstances, the holding companies were not caught by the obligations undertaken by their respective shareholders in their personal capacities.

- [37] The doctrine of separate legal personality set out in **Salomon** formed the crux of Mr. Francis' argument and he cited the decision of the UK Supreme Court in **Prest v Petrodel Resources Ltd and others** which expounded on these fundamental principles.¹⁶ The case stated as follows:

"[8] Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon and Co Ltd* [1897] AC 22, 66 LJ Ch 35, 4 Mans 89, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 94 LJPC 154, 31 Com Cas 10, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster, at pp 626-627 said: "no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."

- [38] Lord Sumption went on to say at paragraph 41 that 'for the court to deploy its authority to authorise the appropriation of the company's assets to satisfy a personal liability of its shareholder to his wife, in circumstances where the company has not only not consented to that course but vigorously opposed it, would, as it seems to me, be an even more remarkable break with principle'. Although this case dealt with matrimonial proceedings, it invoked and explored ordinary company law principles. The UK **Matrimonial Causes Act 1973**, which was the applicable legislation in **Prest**, did not in any way expand or widen the scope of the doctrine of separate legal personality such that the conclusions drawn in **Prest** cannot be applied in the present case.

¹⁶ [2013] UKSC 34.

[39] The authorities make it absolutely clear that a company is an entity separate and distinct from its shareholders and directors. From the date of a company's incorporation under the relevant Companies legislation, a metaphorical veil is drawn between the company and its incorporators and it becomes its own legal person. This corporate veil protects the shareholders and directors from incurring liability for the debts of the company, and likewise, the company cannot be called upon to satisfy debts of its shareholders and directors, incurred in their personal capacities. A crucial element of a company's separate legal personality is that the property and assets of the company belong to the company and not the shareholders or directors. This position remains the same even where a company is, for all intents and purposes, a one-man company. This doctrine forms the cornerstone upon which modern company and commercial law are built and it has been jealously guarded by the courts since it was established by the House of Lords in 1897.

[40] **Tolley's Company Law Service**¹⁷ stated:

"Sometimes an attempt is made to treat a group containing a number of companies with a common ultimate parent as though they are one entity, effectively treating the whole group as if it were one legal entity or economic unit. In *Adams v Cape Industries plc* [1990] Ch 433 it was argued that a wholly owned subsidiary of Cape Industries plc with a presence in the United States was a non-autonomous part of the Cape group and that in answering the question whether Cape itself had a presence in the United States, the separate personality of the subsidiary should be ignored. The argument was that the subsidiary was the alter ego of the parent. The court found that the subsidiary did not act as agent for Cape in the conduct of its business but operated for itself as principal. The court acknowledged that in a group of companies, a subsidiary may simply be doing what its parent tells it to do and owe its existence to the fact that the parent does not want to engage in that activity. To the layman this might appear to allow unfair advantage to be taken, but nevertheless something more was required to allow a court to ignore the separate legal personality of the individual companies that together made up a group."

[41] This is where the learned judge fell into error. His treatment of Mr. Taruta, Arrowcrest and Enard in the proceedings in the court below demonstrated a complete disregard for the doctrine of separate legal personality. All the

¹⁷ Division F at F6046.

conclusions drawn by him in the Receivership Judgment – finding that Mr. Taruta was in a position, as the beneficial owner of both Arrowcrest and Enard, to adduce evidence of any insolvency problems caused by the appointment of receivers over Enard (paragraph 9); dispensing with service on Arrowcrest (paragraph 10); and ultimately appointing receivers over the shares in Enard to prevent the inconvenience of instituting enforcement proceedings in Cyprus (paragraph 11) – were based on the premise that the three legal persons were one and the same. While remedies do exist at law to allow for the piercing of the corporate veil in limited circumstances, this was not the approach taken by the learned judge. He instead ignored the corporate veil entirely.

[42] Having established that Mr. Taruta, Arrowcrest and Enard are separate legal persons, I turn back to the question of the applicability of Duomatic principles and whether those principles give rise to a power tantamount to ownership.

[43] In **Satyam Enterprises Ltd v Burton and another**,¹⁸ another case cited by Mr. Francis, the court quoted Pennycuik J in *Ridge Securities Ltd v Inland Revenue Commissioners* [1964]1 W.L.R. 479, 495 where he said:

“A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend, or, with the leave of the court, by way of reduction of capital, or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary distribution, however described, and, if they attempt to do so, the distribution is ultra vires the company.”

[44] The court in **Satyam** went on to say that:

“If, in accordance with this principle, an impugned transaction is an unlawful return of capital, the Duomatic principle cannot be relied on because the transaction would be ultra vires the company, and the corporators cannot do informally what they have no power to do formally”.

[45] It is, in my view, manifestly clear from the authorities, that a shareholder, whether or not he is a sole shareholder, has no right to dispose of the property of a company, either for his own benefit or for that of others. His rights certainly

¹⁸ [2021] EWCA Civ 287.

do not fall within the definition of a 'power' approved in **Tasarruf**. In that case, the settlor of the trust had an unfettered power of revocation over the trust assets and was entitled to call for them to be paid over to him at any time, for any reason or for no reason. He had no fiduciary duties whatsoever and the only discretion he had was whether to exercise the power in his own favour. This, as the Privy Council concluded, was a power tantamount to ownership.

- [46] This line of reasoning cannot and could not have been applied to the present case in my view. While a sole shareholder of a company may have the power to direct the way the shares in that company are voted, this de facto control does not bestow on that shareholder a right to deal with or dispose of the company's assets for any purpose other than the furtherance of the objectives of the company. In **JSC VTB Bank (a company incorporated in Russia) v Pavel Valerjevich Skurikhin and others**,¹⁹ Patricia Robertson QC noted that:

“...proof of de facto control may justify drawing the inference that the person exercising de facto control is the ultimate beneficial owner of the assets (at least, in a broad sense of that term)... Unless that inference can in all the circumstances properly be drawn, de facto control does not, in and of itself, warrant treating a third party's assets as belonging to a judgment debtor in equity and hence available to be enforced against.”

- [47] As was found in **Satyam**, Duomatic principles cannot be relied on to ratify decisions, informally made, that the company could not lawfully make formally. They also could not be used to create a power that would allow a shareholder to do something that would be ultra vires the company.
- [48] Nevertheless, given the limited applicability of Duomatic principles, I find that they are simply not relevant to the case at bar. Despite the learned judge's apparent disregard for the doctrine of separate legal personality, he must have appreciated that he could not simply appoint receivers over the shares in Enard without more. Accordingly, he resorted to Duomatic principles to attempt to circumvent the hurdle created by the corporate veil. If utilising the assets of Enard to satisfy the Judgment Debt would be an unlawful return of capital, and

¹⁹ [2019] EWHC 1407 (Comm) at para 103.

something Mr. Taruta could not himself have done, the learned judge could not have so ordered it, and the principles in **Re Duomatic** took him no further.

[49] Duomatic principles do not give rise to a power over or control of a company or its assets by the persons who ultimately make the decisions for that company. It certainly does not give rise to a power over which receivers could be appointed. It is not a power at all. To allow the creation of such a power at law – that is, the power of a beneficial owner of a company to control the company’s assets, that power being property over which receivers can be appointed – in essence to treat the company’s assets as his own – then the concept of ownership of property by a company in the context of its separate legal personality falls away and the whole foundation of company law as recognised and developed since the time of **Salomon** will have been turned on its head. It would also cut across the foundational concepts on which insolvency law is based in our legal system. In my view, this approach is heretical and is one that this Court simply cannot allow. There were no decisions of the shareholder(s) of either Arrowcrest or Enard that needed ratification. As that was not the case, and that is the extent of the applicability of Duomatic principles, it was simply not open to the learned judge to rely on them or seek to fashion a new legal concept or to elevate them to create a power that would allow the enforcement of a judgment against assets owned by a third-party company.

[50] Arrowcrest, in its written submissions, challenged the use of Duomatic principles to bind Arrowcrest on the ground that the principles did not apply in the Republic of Cyprus. This Court is not seized with the jurisdiction to pronounce on the applicability of Duomatic principles in Cypriot law, and having already concluded that Duomatic principles are not relevant to the facts of this case, I see no need to explore this further.

[51] In my respectful view, the only relevant legal principles which ought to have been considered by the learned judge in the instant case were the principles of separate legal personality, as this Court did in **Dejoria**, to determine the manner in which VTB Bank could enforce its judgment.

[52] Additionally, Mr. Francis raised the issue of a procedural irregularity in the court below in relation to the judge's reliance on **Re Duomatic**. He noted that this concept was raised *sua sponte* by the learned judge and the parties were not given an opportunity to make submissions on the point. I agree with the finding of the Court of Appeal in **Satyam** that this is a course which cannot be allowed. The court held that to decide a case on a basis that had not been explored in evidence, or addressed in submissions, was likely to leave at least one, if not both, parties with a profound and justified sense of unfairness. The court cited the case of **Nada Fadil Al-Medenni v Mars UK Ltd**²⁰ where Dyson LJ at para 21 said:

"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

[53] It appears that the learned judge fell into a similar error in the instant case. This was inappropriate and rather unfair in my view, given that his entire justification for the appointment of receivers was the Duomatic power theory coined by him. In our adversarial system, it is not the function of the judge to devise for a party a pathway for enforcement. If none exists on a party's case, then the party's case must fail. In any event, after the concept had been raised by the learned judge, the parties should at least have been given an opportunity to make written submissions in respect of it. The rules of natural justice and fairness require as much.

Freezing order

[54] VTB Bank, in its written submissions, submitted that due to the enforcement principle, Mr. Taruta could not rely on his mere beneficial ownership of Enard,

²⁰ [2005] EWCA Civ 1041.

created through a corporate structure, to evade payment of the judgment debt.²¹ It relied on the recent Privy Council decision in **Broad Idea International Ltd v Convoy Collateral Ltd**²² where Lord Leggatt stated at paragraph 85 that:

“the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment.”

[55] He went on at paragraph 89 to say that:

“[t]he interest protected by a freezing injunction is the (usually prospective) right to enforce through the court’s process a judgment or order for the payment of a sum of money. A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent’s right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced.”

[56] VTB Bank advanced that pursuant to the Freezing Order, Mr. Taruta, in essence, offered up his interest in Enard for the purposes of enforcing the Judgment Debt and that he now seeks to use the very same corporate structure that he voluntarily disclosed to avoid payment of the sum owed to VTB Bank.

[57] A similar situation arose in the case of **Lakatamia Shipping Co Ltd v Su and others**,²³ where the court dealt with ‘the appropriateness of modifying a freezing order in standard form so as to impose a notice requirement in respect of dealings with assets which cannot at the interlocutory stage be shown to be either legally or beneficially owned by the defendant but where however it is clear that such dealings could have the effect of diminishing the defendant’s assets by diminishing the value of shareholdings of which he is the legal or beneficial owner’.²⁴

²¹ Consolidated appeal bundle, pg 63, para 38.

²² [2021] UKPC 24.

²³ [2015] 1 WLR 291.

²⁴ Ibid, at para 1.

[58] Paragraphs 50 to 53 provide very useful guidance as to how this Court should treat with the present appeals:

“50. The assets that Burton J was considering in paragraph 16 were the assets of the companies. There is no suggestion that such assets belonged beneficially to anyone other than the companies; and it is trite law that a company’s assets so held do not belong beneficially to their shareholders, not even to a shareholder in the position of Mr Su who is, for all practical purposes, the sole owner of the companies. This was explained, by reference to high authority, by the majority of the Court of Appeal in *Prest v. Prest* [2013] 2 WLR 537, to which Burton J was referred, but which, when he came to paragraph 16, he overlooked. He preferred the heretical view that because the sole owner of a company is in a position to control the destiny of its assets, the company’s assets are his assets within the meaning of paragraph 3 of the order.

51. That is wrong. The owner is of course able to control the destiny of the company’s assets. But that does not make them his assets; and paragraph 3 is concerned only with assets which are his assets. Nor is any help the other way to be derived from the third sentence of paragraph 3 of the order. First, that is still only concerned with dispositions of assets belonging beneficially to the defendant, which these assets do not. Secondly, Mr Su has no authority to instruct the companies how to deal with their assets. All he has is the power, as an agent of the company, to procure the company to make dispositions of its assets. Such dispositions, when made, are made in consequence of decisions made by the organs of the company. They are not dispositions made by the company in compliance with instructions from Mr Su. That may seem to be a somewhat formal distinction. But it is a valid one: only the companies have authority to deal with and dispose of their assets. Gloster J (as she then was) explained the position accurately in *JSC VTB Bank v. Shurikhin* [2012] EWHC 3116 (Comm), at paragraph 35, which Tomlinson LJ has cited. So did Hildyard J in *Group Seven Ltd v. Allied Investment Corp’n Ltd and others* [2014] 1 WLR 735, at paragraphs 64 to 70.

52. I would therefore disagree with Burton J’s reasoning in paragraph 16 of his judgment, just as I would disagree with his proposition in paragraph 18 that, if judgment were obtained against Mr Su, a receiver would be able to execute the judgment against the assets of the companies. The receiver would not be able to do that. He might be in a position to deploy his rights over Mr Su’s shareholdings to achieve a winding up of the companies and, in consequence, a distribution to himself of the surplus assets of the companies. But such a possibility still does not mean that the assets of the companies are assets of Mr Su so as to fall within the terms of the freezing order.

53. All that said, I would uphold Burton J’s order on the narrow ground that it was a justifiable fortification of the order restraining Mr Su from diminishing the value of his shareholdings in the companies.”

- [59] I fully endorse the reasoning set out by the court in **Lakatamia**. It is not uncommon for a freezing injunction in commercial cases to capture assets that may not be owned by the judgment debtor directly. Often times, judgment debtors may sit atop corporate structures with a number of subsidiary companies beneath them, with each company owning its own assets. However, due to the nature of commercial transactions, a judgment debtor's dealings with one asset may, whether deliberately or inadvertently, diminish the value of other companies or assets within that corporate structure. For this reason, judgment debtors are often required to disclose all of their assets or subsidiary companies whether or not they are owned directly by them such that they can be frozen to prevent any diminution in value. The Freezing Order made on 26th May 2014 required such disclosure by Mr. Taruta and he complied.
- [60] Furthermore, the nature of freezing orders makes it such that judges need to move swiftly in assessing the assets that need to be frozen. As many freezing orders are made at very preliminary stages of substantive proceedings, courts often freeze assets that, at the time, cannot be proven to legally or beneficially belong to the judgment debtor. If the proceedings get to the enforcement stage, the court will then carry out an investigative exercise to determine which assets are owned by the judgment debtor and which assets can be enforced upon.
- [61] The fact that Mr. Taruta disclosed his indirect shareholding interest in Enard, does not mean that he offered Enard up for enforcement of the Judgment Debt. This was a disclosure made pursuant to an order of the court. The fact that Enard was listed as one of the frozen assets was also not a guarantee that it could be used. The judge froze it, with the information he had before him in 2014, likely to prevent any diminution in value of Enard and other assets that may have existed within its corporate structure. Even if Mr. Taruta had proffered Enard as the asset which VTB Bank ought to enforce against, that would be something he could not lawfully do, for the simple reason that Enard was not his asset, but Arrowcrest's asset and he could not call upon it to satisfy a liability incurred in his personal capacity, for all the reasons outlined above.

Hindrance to enforcement

- [62] Mr. Francis further submitted that a court ought not to exercise its jurisdiction to appoint receivers unless there is some hindrance or difficulty in using the normal processes of execution. He cited the case of **Cruz City 1 Mauritius Holdings v Unitech Limited et al**²⁵ where the Commercial Court of England and Wales stated at paragraph 47 that:

“[t]he jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by dicta which speak of the need for “special circumstances”: see in particular the decision of Tomlinson J in Masri cited above and also the decision of Arnold J in UCB Home Loans Corporation Ltd v Grace [2011] EWHC 851 (Ch), holding that there were sufficient “special circumstances” rendering it just and convenient to appoint a receiver by way of equitable execution when it would be “difficult for the Claimant to enforce its judgment by other means” and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.”

- [63] Mr. Francis contended that the only hindrance relied upon by VTB Bank in its application for the appointment of receivers was the so-called corporate structure created by Mr. Taruta. The court has a very wide discretion in determining whether to appoint receivers and there are no rigid rules governing that discretion as was stated in **Cruz City**. I appreciate the difficulty raised by VTB Bank in its written submissions in these appeals, in that there has been non-compliance with the Russian Judgment by Mr. Taruta for over 7 years. I see no reason why receivers cannot be appointed in a case like this. However, the appointment of receivers has been gone about in the wrong way and against the wrong entity. The separate legal personalities of companies within a corporate structure are not a hindrance to enforcement. It is a fundamental principle of law. VTB Bank could not, in its efforts to enforce a judgment against Mr. Taruta, seek to bypass the separate legal personality of an interposed company – Arrowcrest – to seek the appointment of receivers over the shares in Enard, because it would be more convenient to do so.

²⁵ [2014] EWHC 3131 (Comm).

[64] In light of these authorities, I am constrained to conclude that the learned judge fell into error by appointing receivers over the shares in Enard. This was a clear departure from and disregard for the principles of separate legal personality, and the Duomatic principles could not be used to justify that unlawful act. Mr. Taruta being the only judgment debtor in the proceedings, the learned judge had no jurisdiction to appoint receivers over the shares in Enard (Arrowcrest's asset), and accordingly the receivership order must be set aside.

Issue 2: Whether the learned judge erred in finding that the receivership order could not be discharged as a result of the sanctions imposed on VTB Bank

[65] Having found that the learned judge had no jurisdiction to make the receivership order, I turn now to the question of whether the sanctions imposed on VTB Bank prevent the discharge of that order, as the learned judge concluded in the Discharge Judgment. Two pieces of legislation regulate the sanctions imposed on VTB Bank – the UK **Sanctions and Anti-Money Laundering Act 2018** ("SAML") and the **Sanctions Regulations** – and I shall explore the relevant provisions below.

[66] The first issue in contention was whether the Judgment Debt and the receivership order fall within the definition of 'funds' or 'economic resource' under the **SAML**. Section 60 provides as follows:

"(1) In this Act "funds" means financial assets and benefits of every kind, including (but not limited to)—

1. cash, cheques, claims on money, drafts, money orders and other payment instruments;
2. deposits, balances on accounts, debts and debt obligations;
3. publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative products;
4. interest, dividends and other income on or value accruing from or generated by assets;
5. credit, rights of set-off, guarantees, performance bonds and other financial commitments;
6. letters of credit, bills of lading and bills of sale;

7. documents providing evidence of an interest in funds or financial resources;
8. any other instrument of export financing.

(2) In this Act “economic resources” means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.

(3) In this Act references to “freezing” funds are to preventing funds from being dealt with; and for the purposes of this subsection funds are “dealt with” if—

- (a) they are used, altered, moved, or transferred or access is allowed to them,
- (b) they are dealt with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
- (c) any other change is made that would enable their use, including portfolio management.

(4) In this Act references to “freezing” economic resources are to preventing economic resources from being dealt with; and for the purposes of this subsection economic resources are “dealt with” if—

- (a) they are exchanged for funds, goods or services, or
- (b) they are used in exchange for funds, goods or services (whether by being pledged as security or otherwise).”

[67] There appeared to be some discrepancy among the parties, which could be seen from their oral arguments and written submissions, as to how the Judgment Debt and the receivership order were to be categorised under the legislation. This distinction is relevant to ascertain what a ‘dealing with’ either ‘funds’ or ‘economic resources’ would entail.

[68] I think it is quite clear that the Judgment Debt falls within the definition of “funds” in section 60(1) of the **SAMLA**. A judgment debt is by all means a financial asset to a judgment creditor and the **SAMLA** specifically includes ‘debts and debt obligations’ in the definition of ‘funds’. The receivership order on the other hand, in my view, falls squarely within the definition of ‘economic resources’ in section 60(2) of the **SAMLA**. It is an asset, but only in so far as it would aid VTB Bank in obtaining funds – in this case, the Judgment Debt.

[69] Regulation 11 of the **Sanctions Regulations** provides as follows:

“(1) A person (“P”) must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources.

(2) Paragraph (1) is subject to Part 7 (Exceptions and licences).

(3) A person who contravenes the prohibition in paragraph (1) commits an offence.

(4) For the purposes of paragraph (1) a person “deals with” funds if the person—

- (a) uses, alters, moves, transfers or allows access to the funds,
- (b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
- (c) makes any other change, including portfolio management, that would enable use of the funds.

(5) For the purposes of paragraph (1) a person “deals with” economic resources if the person—

- (a) exchanges the economic resources for funds, goods or services, or
- (b) uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).

(6) The reference in paragraph (1) to funds or economic resources that are “owned, held or controlled” by a person includes, in particular, a reference to—

- (a) funds or economic resources in which the person has any legal or equitable interest, regardless of whether the interest is held jointly with any other person and regardless of whether any other person holds an interest in the funds or economic resources;
- (b) any tangible property (other than real property), or bearer security, that is comprised in funds or economic resources and is in the possession of the person.

(7) For the purposes of paragraph (1) funds or economic resources are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person.

(8) For the avoidance of doubt, the reference in paragraph (1) to a designated person includes P if P is a designated person.”

[70] VTB Bank, as a designated person under the **Sanctions Regulations**, was made subject to sanctions which effectively froze its assets. Regulation 11(1)

prohibits VTB Bank, as a sanctioned entity, from dealing with any of its 'funds' or 'economic resources'. The issue in dispute is whether a discharge of the receivership order would fall within the definition of 'dealing with' any of its 'funds' or 'economic resources'.

- [71] VTB Bank, in its written submissions, agreed with the reasoning of the learned judge and contended that discharging the receivership would involve 'dealing' with the Judgment Debt. It further contended that the receivership order was made prior to the imposition of the sanctions and the effect of the sanctions regime could not be to strip a claimant of any and all relief lawfully obtained through litigation.
- [72] Regulation 11(4) provides that dealing with 'funds' includes using, altering, moving, transferring or allowing access to the funds; dealing with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or making any other change, including portfolio management, that would enable use of the funds. The Judgment Debt, a 'fund' for the purposes of the legislation, is not the subject of the present appeals. The appellants have not sought to challenge, set aside or dispute the amount of the Judgment Debt in these proceedings. Therefore, there can be no dealing with it that would change its amount or character as is contemplated under the legislation.
- [73] What the appellants are seeking is a discharge of the receivership order, which is an 'economic resource' under the legislation. Regulation 11(5) provides that a person 'deals with' economic resources if they exchange them for funds, goods or services, or if they use the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).
- [74] The receivership order was made before the sanctions were imposed, however, the receivers had not yet begun to perform their duties. In fact, the receivership has been stayed since the imposition of the sanctions and no action will be taken in the immediate future to further the purpose of the receivership. As it stands, the receivership order exists in name only. I do not find that a discharge of that

order would constitute the use of it to obtain any funds. In fact, quite the opposite. VTB Bank's position will remain exactly the same. The Judgment Debt is still owed to it by Mr. Taruta, and it would be open to it to explore alternative enforcement routes, subject of course to the lifting of the sanctions.

[75] In any event, for all the reasons outlined in the previous issue, the court below had no jurisdiction and no legal basis for making the receivership order in the first place. As to the power to discharge it, as was stated in **Prest**, 'it is axiomatic that general words in a statute are not to be read in a way which "would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness"'.²⁶

[76] It is trite that legislation does not oust the jurisdiction of the court to exercise its normal functions unless that ouster is explicitly stated in that piece of legislation. In my view, that position does not change in dealing with sanctions legislation. The imposition of sanctions pursuant to the relevant legislation does not prevent this Court from reviewing or setting aside an order of the lower court or indeed the court in appropriate circumstances setting aside its own order.²⁷ I would not go as far as Mr. Francis did, to say that the continuation of the receivership order is inconsistent with the sanctions regime. However, having already found that the learned judge had no jurisdiction to make the receivership order, I find that there is nothing in the sanctions legislation which ousts this Court's jurisdiction to set aside an order unlawfully made.

Issue 3: Whether the learned judge erred in adding Arrowcrest as a party to the proceedings and dispensing with service

[77] Although the previous issues effectively dispose of the two appeals, I will touch on the issue of whether the learned judge had jurisdiction over Arrowcrest to add it as a party to the proceedings, as it was raised and argued by counsel for Arrowcrest, Mr. Moverley Smith, KC at the hearing of these appeals.

²⁶ Supra note 16, para 40.

²⁷ See *Smith v East Elloe Rural District Council and others* [1956] AC 736; *Abacha and others v Fawehinmi* [2002] 3 LRC 296.

- [78] The learned judge, at paragraph 10 of the Receivership Judgment, acknowledged that ‘a receiver cannot be appointed over the shares in Enard without Arrowcrest being made a party to the action’. Further, at paragraph 38 of the Discharge Judgment, he noted that ‘[a]dding Arrowcrest as a party required there to be a gateway for service in Cyprus, even if, as occurred, service was dispensed with’.
- [79] Part 7 of the **Civil Procedure Rules 2000** (“CPR”) deals with the service of court process out of the jurisdiction. Rule 7.2 states:
- “A claim form may be served out of the jurisdiction only if –
(a) rule 7.3 allows; and
(b) the court gives permission.”
- [80] Rule 7.3(5) which deals specifically with service of enforcement proceedings out of the jurisdiction states:
- “A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made by a foreign court or tribunal and is amenable to be enforced at common law.”
- [81] In the court below, counsel for Arrowcrest argued that CPR 7.3(5) only allowed enforcement proceedings to be served on the judgment debtor, however, the learned judge rejected this proposition and noted that there was nothing contained in the rule itself which requires such a construction.
- [82] The learned judge evidently recognised the need to satisfy the gateway requirements of CPR 7.3 in order to add Arrowcrest as a party to the proceedings. The only gateway identified was the one provided for in CPR 7.3(5). However, the combined effect of CPR 7.2 and 7.3 is to require a party to make an application to the court seeking permission to serve a claim form out of the jurisdiction in the circumstances listed in 7.3. The making of such an application presupposes the existence of a claim or a cause of action against the person whom the applicant wishes to serve. While CPR 7.3(5) does not specifically state that the claim form can only be served on a judgment debtor, a true reading of the entire part creates this requirement. The focus is on service of a claim. If there is no claim against the foreign defendant or no claim in respect of which the foreign defendant is said to be a necessary party then it begs the

question as to what basis there is for service out and would run afoul of the well established principles governing service out.²⁸

[83] Furthermore, I accept the authority of **Linsen International Limited & others v Humpuss Transport Kima & ors**²⁹ cited by Mr. Moverley Smith, KC. This case dealt with a claimant seeking to enforce an arbitration award against non-party transferees of the arbitration respondent's assets. Those transferees and their assets were abroad. The case can be distinguished from the case at bar, as was pointed out by VTB Bank in its written submissions, in that the assets of the transferees were outside of the jurisdiction, whereas in this case the shares in Enard exist in the BVI. However, the case emphasised the point that the purpose of the service out provision was to enable the enforcement of a judgment against assets belonging to a defendant. Arrowcrest was not and has never been a proper defendant in these proceedings.

[84] As there was no substantive claim or cause of action against Arrowcrest, nor was there an application before the learned judge to serve Arrowcrest with the proceedings outside of the jurisdiction, he had no jurisdiction to add it as a party to the proceedings and there was no gateway in the CPR through which it could have been served in Cyprus.

[85] Counsel for Arrowcrest also challenged the learned judge's conclusion that Arrowcrest submitted to the jurisdiction of the court. The basis for this conclusion was that Arrowcrest filed an acknowledgement of service and made an application to discharge the receivership order.

[86] I agree with the submission of Mr. Moverley Smith, KC that the test for submission is whether there has been a "wholly unequivocal" submission. He cited the case of **Alexander Katunin and another v JSC VTB Bank**³⁰ where this Court held at paragraph 18 that:

²⁸ Nilon Ltd v Royal Westminster Investments S.A. [2015] UKPC 2.

²⁹ [2011] EWCA Civ 1042.

³⁰ BVIHCP2015/0004 and BVIHCVAP2015/0007 (delivered 20th June 2016, unreported).

“The conduct that is said to amount to submission to jurisdiction must be wholly unequivocal. The conduct must not simply be consistent with submission to jurisdiction, but there must be no other explanation for it. In determining whether conduct is unequivocal the court is required to look at the circumstances of the case.”

[87] I do not find that Arrowcrest unequivocally submitted to the jurisdiction of the court in these circumstances. The filing of an acknowledgement of service was simply to allow it to apply to discharge the receivership order purported to be made by the learned judge over its assets. This was the only way for Arrowcrest to seek any type of relief. The order itself recognised Arrowcrest’s right to apply to vary or discharge the order, not having been heard on the making thereof. Arrowcrest indicated from the inception that it never intended to participate in these proceedings but that the order should be set aside as there was no jurisdiction for it to be made in the first place. Accordingly, the learned judge had no jurisdiction to add Arrowcrest as a party to the proceedings or make an order in relation to its assets.

[88] Furthermore, despite finding that there was no gateway for service on Arrowcrest, I also note that the learned judge erred in dispensing with service. It appears from all the circumstances of the case that that dispensation was based on the fact that Arrowcrest was beneficially owned by Mr. Taruta and as he would have been aware of the receivership order, Arrowcrest would be privy to the proceedings. Again, this treatment is contrary to the position that Arrowcrest is its own legal person, that would need to be served in order for it to be joined to proceedings. The CPR makes provision for service on companies (and not their owners) for this very reason.³¹

[89] Additionally, dispensation with service of a claim form on a potential party to proceedings is a power given to the court under CPR 7.8B. However, this power is only to be exercised in exceptional circumstances and upon application to the court. There having been no application for dispensation with service of the proceedings on Arrowcrest, the learned judge acted outside the scope of his powers under 7.8B and accordingly, the dispensation was unlawful.

³¹ See CPR 5.7 - 5.9.

“Sweep points”

[90] At the hearing of these appeals, Mr. Francis raised a number of what he called ‘sweep points’ in the summing up of his oral submissions. However, the substantive issues having disposed wholly of the two appeals, I do not find it necessary to explore them in this judgment.

Disposition

[91] For the foregoing reasons, I would make the following orders:

- (1) The appeals are allowed.
- (2) VTB Bank’s counter-notices of appeal are dismissed.
- (3) The receivership order made by the learned judge on 29th November 2021 is set aside in its entirety.
- (4) The respective appellants shall have their costs on the appeals and in the court below, such costs to be assessed by a judge of the Commercial Court unless agreed within 21 days.

[92] I thank counsel for all the parties for their very helpful submissions, both written and oral.

I concur.
Vicki-Ann Ellis
Justice of Appeal

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

By the Court

Chief Registrar