

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM No: BVIHC (COM) 2022/0007

BETWEEN:

AO ALFA-BANK

Claimant

and

KIPFORD VENTURES LTD

Defendants

Appearances:

Mr. Andrew Willins and Ms. Tamara Cameron of Appleby (BVI) Ltd for the Claimant

Mr. Alain Choo-Choy KC, with him Ms. Claire Goldstein and Ms. Victoria Lissack of Harney, Westwood & Riegels, LP for the Defendant

2022: September 26
September 27

JUDGMENT

[1] **JACK, J [Ag.]**: On 15th June 2022 on the application of the claimant (“Alfa-Bank”), I adjourned hearings listed on 28th and 29th June and 5th July 2022 to 11th and 12th October 2022. The matter comes before me with a further application by Alfa-Bank to adjourn the two day hearing in October.

[2] Alfa-Bank originally obtained *ex parte* on 17th December 2020 a freezing order against the defendant (“Kipford”) in action BVIHC (COM) 2020/0219. By a

judgment orally delivered orally on 23rd November 2021, but subsequently reduced to writing on 14th December 2021,¹ I discharged the injunction. Alfa-Bank have appealed that order and the discharge has been stayed pending the appeal, which is currently listed for November of this year.

- [3] Alfa-Bank then changed its legal representation to Appleby. The bank issued a fresh action, with action number BVIHC (COM) 2021/0007. This action was based on the same underlying claim as in the first action but with wider allegations of fraud. Alfa-Bank issued an application for a fresh freezing order, but this time to be heard *inter partes*.
- [4] Instead of the application for this second freezing order proceeding on a contested basis, by a consent order of 25th January 2022 Kipford gave an undertaking pending a longer *inter partes* hearing which had the same effect as a freezing order for \$142 million. The order provided that the application for an injunction should “be listed for an early on notice *inter partes* hearing with a time estimate of one day of judicial pre-reading and one and half days for argument.” It was pursuant to that order that the hearings on 28th and 29th June and 5th July 2022 were fixed.
- [5] On 24th March 2022, following the Russian invasion of Ukraine, the British Government sanctioned Alfa-Bank. In **JSC VTB Bank v Taruta**² I held that a legal practitioner’s obligation, in these circumstances, is to apply for a licence. Accordingly, on 1st April 2022 Appleby applied for a licence from His Excellency the Governor so as to be able to receive funds from Alfa-Bank for legal fees. Leading counsel, whom Appleby wished to instruct on Alfa-Bank’s behalf, made a mirror application in London for a licence from the Office of Financial Sanctions Implementation (“OFSI”). His Excellency granted the licence sought on 28th July 2022. OFSI have still not granted a licence to leading counsel.

¹ [2021] ECSCJ No 798.

² [2022] ECSCJ No 85.

- [6] The reason for OFSI's delay is wholly unclear. The Governor and OFSI are both emanations of the British State, so one would expect them to liaise to reach the same conclusion on the self-same set of facts. The question of OFSI's liability for wasted costs under CPR 64.10 may need to be considered at some point.
- [7] The grant of a Governor's licence to Appleby was not the end of Alfa-Bank's difficulties in obtaining representation. Appleby's usual bankers indicated that they would not receive monies from Alfa-Bank, it seems because a policy had been adopted not to receive funds from sanctioned entities, even where permitted by a Governor's licence. In consequence, I had a Notice to Show Cause sent to Appleby's BVI based bank in these terms:

"WHEREAS:

- (a) The claimant is subject to sanction under the Russian Sanctions regime;
- (b) The claimant is obliged to appear in the current action by a legal practitioner authorised to practise this Territory and retains Appleby (BVI) Ltd ('Appleby') for that purpose, who are on the record as so acting;
- (c) Appleby are entitled to payment for their services in so acting;
- (d) His Excellency the Governor has granted a licence in order that the claimant might pay Appleby in respect of their services;
- (e) Appleby have requested [the bank] to open an account with which to receive monies to be sent by the claimant in respect of payment of Appleby's services (some already provided, others to be provided);
- (f) [The bank] have refused to open such an account and have refused to receive any payment which the claimant may make to Appleby;

AND THE COURT NOTING

- (1) That section 16(9) of the **Constitution of the Virgin Islands**³ gives every person the right to a fair hearing within a reasonable time for the determination of that person's civil rights and obligations;
- (2) That at common law, every person 'should have unhindered access to the constitutionally established courts of... civil jurisdiction for the determination of disputes as to their legal rights and liabilities' (see

³ The Virgin Islands Constitution Order 2007, SI 2007 No 1678.

Attorney-General v Times Newspapers Ltd⁴ and the commentary in **Arlidge, Eady and Smith on Contempt⁵**

(3) That [the bank's] refusal to open an account or to receive payment from the claimant as aforesaid arguably interferes with the claimant's said rights;

(4) That a consequence of the said refusal may be that Appleby will be permitted to come off the record as acting for the claimant;

(5) That a further consequence may be that consideration will need to be given as to whether the action as between the claimant and the defendant should be stayed;

(6) That such a stay, if granted, may affect the defendant's rights under section 16(9) and at common law to a fair hearing within a reasonable time of the determination of its civil rights and obligations;

(7) That by the said refusal to open an account and receive payment from the claimant [the bank] may be interfering with the due administration of justice in this Territory and guilty of contempt of court;

[The Court would consider whether to refer the matter to the Attorney-General.]”

[8] In the event, at the hearing to show cause on 1st September 2022 the bank did not object to the matter being referred to the Attorney-General, but she has not yet decided whether to take any action against the bank.

[9] In the meantime, Appleby has been constrained to seek to find another bank willing to accept a payment from Alfa-Bank. An account was opened on 14th September 2022. It has not yet been possible to ascertain that the account is functioning, but there is a reasonable prospect of payment being made by Alfa-Bank to Appleby imminently. By contrast, there is little prospect of leading counsel by 11th October 2022 receiving a licence and being able to find a bank through which to be paid .

[10] Mr. Willins submitted firstly that unless leading counsel could be instructed on Alfa-Bank's behalf there would be an inequality of arms, since Kipford would be instructing Mr. Choo-Choy KC on its behalf. That would be a breach of the

⁴ [1974] AC 273 at 309 *per* Lord Diplock.

⁵ 5th Ed (2019) at paras 11-314ff.

requirement of a fair hearing under section 16(9) of the **Constitution**. I do not accept this. It will be rare that a fair hearing *requires* both sides to be represented by leading counsel. Mr. Willins is an extremely experienced advocate and will have no difficulty in representing Alfa-Bank in a perfectly satisfactory manner.

- [11] Mr. Willins' second ground has much more force. Kipford have presented a detailed factual case in opposition to Alfa-Bank's application for the freezing injunction. This includes an extensive expert report on Russian law. There is no realistic prospect of Alfa-Bank being able to meet the directions for service of evidence in time for the hearing next month.
- [12] Mr. Choo-Choy KC rightly emphasises that the Court has to perform a balancing exercise. He points out that Kipford gave its undertaking expressly on the basis that there would be "an early on notice *inter partes* hearing." It was unfair, he submitted, for the matter to be delayed into next year.
- [13] I note, however, that there is in fact a half-way house. Kipford make three points. The first is as to the merits, on which there is a lot of evidence but which, as I have explained, Alfa-Bank has not yet been able to answer. The second is that it is wrong for the bank to be entitled to bring a second action making allegations which could perfectly well have been brought in the first action. The third is that, where the Court has discharged an injunction based on serious non-disclosure at an *ex parte* hearing, it is, at least on the facts of the current case, inappropriate to grant the same relief in a second action.
- [14] These last two matters are reasonably self-contained. They do not require further evidence in order to be determined fairly and will be largely matters of law and submissions.
- [15] As I indicated to the parties at the hearing yesterday, in the exercise of my discretion the hearing on 11th and 12th October shall proceed with these points two and three. Point one, the merits issue, cannot in my judgment be fairly determined

without Alfa-Bank having an opportunity to answer Kipford's factual case. Alfa-Bank's failure to do so to date is not its fault. Weighing the prejudice to Alfa-Bank from being unable to adduce factual evidence in answer against the prejudice to Kipford by a short adjournment, in my judgment the balance of fairness is in favour of granting an adjournment of point one.

- [16] Kipford also have an application for a stay of the proceedings pending the removal of Alfa-Bank's designation as a sanctioned entity and for security for costs. These and other consequential matters will be considered after the determination of points two and three at the October hearing, including the issue as to whether they should be determined then and there or directions given.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar