

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM No: BVIHC (COM) 2021/0096

BETWEEN:

WWRT LIMITED

Claimant

and

(1) CAROSAN TRADING LTD

(2) BORIS KAUFMAN

Defendants

Appearances:

Mr. Andrew Ayres QC and Ms. Sophia Hurst with them Dr. Alecia Johns of Conyers for the Claimant

Mr. Brian Lacy and Mr. Alexander Muksinov of Ogier for the First Defendant

Mr. Richard Morgan QC and Ms. Amanda Hadkiss with them Mr. Richard Brown of Carey Olsen for the Second Defendant

2021: December 7, 8 and 9
December 10 (Oral Judgment)
December 30 (Written Judgment)

JUDGMENT

[1] **JACK, J [Ag.]**: The claimant is an English company which claims to be the indirect assignee of various claims of the Ukrainian bank, JSC Platinum Bank against, *inter alia*, the first defendant (“Carosan”), a BVI company, and Mr. Boris Kaufman,

a prominent Ukrainian businessman, the second defendant. He is resident in the Ukraine.

- [2] The claimant says that Platinum Bank was the victim of a substantial fraud for which Carosan and Mr. Kaufman are answerable. Platinum entered insolvency on 10th January 2017 and was placed under the supervision of the Deposit Guarantee Fund, the DGF, which protects depositors' interests in the Ukraine.
- [3] On 17th June 2021, I granted the claimant a freezing order against the two defendants in the sum of £56 million sterling. I also granted permission to serve Mr. Kaufman outside the jurisdiction in Odessa in the Ukraine. The gateway relied on by the claimant was CPR 7.3(2)(a), the second defendant being a necessary or proper party to the claim.
- [4] There was a short return date on 12th July 2021 which resulted in the continuation application being listed initially for three days, but later extended to four days from 7th to 10th December this year.
- [5] On 24th September 2021, Mr. Kaufman applied to discharge the freezing order and to set aside the leave granted to serve him outside the jurisdiction. On the 15th of October 2021, Carosan applied to stay proceedings on the ground of *forum non conveniens*. Mr. Lacy who appears on behalf of the first defendant gave an undertaking on Carosan's behalf to submit to the jurisdiction of the Ukrainian courts if a stay on that ground were ordered. It was agreed that I should hear these two applications first and then deal with the claimant's continuation application after giving this judgment.
- [6] The principles upon which the court acts in determining *forum conveniens* or *forum non conveniens* were established in the well-known House of Lords case of **Spiliada Maritime Corporation v Cansulex Ltd.**¹ A useful summary is given in

¹ [1987] 1 AC 460.

IPOC International Growth Fund Limited v LV Finance Group Ltd,² where Gordon JA said:

“This jurisdiction has frequently had to deal with the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of *forum non conveniens*. As always the starting point is **Spiliada**, a decision of the House of Lords, the learning within which has on more than one occasion been accepted by this Court. In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that ‘where there can be pointers to a number of different jurisdictions’ there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: Firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the ‘natural forum’ as was described by Lord Keith of Kinkel in **The Abidin Daver**,³ ‘that with which the action has the most real and substantial connection’. In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but

² [2006] ECSCJ No 131 at [27]

³ [1984] AC 398.

rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv) If the court determines that there is some other available and *prima facie* more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in **The Abidin Daver** made very clear that the burden of proof to establish such a circumstance was on the claimant and that 'cogent and objective evidence is a requirement'."

[7] One matter which the Court may take into account in considering the appropriate forum, is what is described as the Cambridgeshire factor. The **Spiliada** case itself concerned a Liberian owned ship, The Spiliada, which had been chartered to carry a load of sulphur. The sulphur was said to be wet which caused corrosion to the substance of the ship. The shipowner brought a claim in England. The shipper sought a stay in favour of British Columbia in Canada. There was at that time before the judge at first instance, a similar action concerning the same shippers and a ship called The Cambridgeshire. The House of Lords held that this was a relevant factor in making England the *forum conveniens*.

[8] A party seeking a stay on forum grounds must identify what is said to be the appropriate forum: **Wilton Trustees (IOM) Ltd v AFS Trustee Ltd**,⁴ but here the only alternative forum identified is the Ukraine.

[9] The test for granting service out of the jurisdiction is conveniently set out in Mr. Ayres QC's skeleton argument at para 58 onwards, where he says:

"The relevant principles are well known, and summarised by the Privy Council in **Altimo Holdings v Kyrgyz Mobile**⁵ and (on appeal from the

⁴ [2019] ECSCJ No 152.

⁵ **Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd** [2011] UKPC 7; [2012] 1 WLR 1804, on appeal from the Isle of Man, at [71].

BVI Court of Appeal) in **Nilon Ltd v Royal Westminster Investments SA**.⁶ In obtaining permission to serve out, WWRT has to show that:

58.1. There was a serious issue to be tried on the merits.

58.2. There was a good arguable case that the claim against the foreign defendants fell within the classes of case for which permission to serve out may be given, i.e. one of the gateways in the CPR.

58.3. That BVI was clearly or distinctly the appropriate forum for the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

59. Mr. Kaufman challenges all three limbs.

60. Carosan is a BVI company and was served as of right within the jurisdiction. It brings its challenge solely on *forum non conveniens* grounds.

61. The relevant test as to serious issue to be tried on the merits is whether the claim has a real, as opposed to fanciful, prospect of success. See **Altimo Holdings v Kyrgyz Mobile** at [71].

‘First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success.’

62. There is also a close correlation between this test and the test for a good arguable case for the purpose of a worldwide freezing order, and thus given the overlap in the applications before the court, the principles which govern the latter can also conveniently be set out here.

63. In the [worldwide freezing order] context, the test is established as: ‘...a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 percent chance of success’ *per* Mustill J in **The Niedersachsen**,⁷ approved by the Court of Appeal in the same case and again by the English Court of Appeal in **Lakatamia Shipping Co Ltd v Nobu Su Ltd**.⁸

⁶ [2015] UKPC 2, [2015] BCC 521 at [13].

⁷ *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412 (Court of Appeal); and [1984] 1 All ER 398 (Mustill J at p 400 and the Court of Appeal at p 415).

⁸ [2012] EWCA Civ 1193.

See Longmore LJ at [25]. Mustill J's formulation has been approved numerous times in the BVI. See for example **PT Ventures SGPS SA v Vidatel Ltd**,⁹ where the Court emphasized that this involved 'no more than a preliminary appraisal of the claimant's case'.

64. In the specific context of fraud claims, Lord Neuberger MR, said in **Finurba Corporate Finance Ltd v Sipp SA**.¹⁰

'In the light of the increasing sophistication of fraudsters and their extensive use of companies and other entities to mask their activities and assets, the court should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that a fraud has occurred.'

65. In determining whether there is a good arguable case both for the purposes of an application for service out of the jurisdiction and for a freezing order, the judge is not required to conduct a mini trial: see **Konoshita v JTrust Asia Pte Ltd**,¹¹ applying **Finurba**. Rather the judge must assess the claim and evidence before him and determine whether it meets the threshold of a good arguable case. In **Konoshita**, the Court of Appeal held that the judge was entitled to take a robust approach to a *prima facie* case of fraud."

[16] The appropriate starting point, in my judgment, is to consider the pleadings. The Claim Form says the claimant's claims are in respect of breaches of trust, dishonest assistance in breaches of trust, knowing receipt, unlawful means conspiracy and economic harm as particularized in the Statement of Claim.

[17] On the grounds set out in the Statement of Claim, the claimant claims the following relief against the First Defendant:

1. An account, alternatively equitable compensation with dishonest assistance in a breach of trust; and
2. An account, alternatively equitable compensation for knowing receipt against the First and Second Defendants.
3. Damages and/or compensation pursuant to the Ukrainian Civil Code, Article 1166.

⁹ [2016] ECSCJ No 53 at [52] to [53]

¹⁰ [2011] EWCA Civ 465 at [31].

¹¹ [2018] ECSCJ No 364 at [17].

4. All necessary or consequential accounts or inquiries.
5. Interest.
6. Costs.

[17] The Statement of Claim starts by describing the parties. It explains the claimant is incorporated in England and Wales and says that it acquired its interests from the Bank from whom it indirectly acquired the right to claim. In para 3 it says:

“The Claimant's case is the Bank was the victim of a complex fraud carried out between at least 2008 and 2015, pursuant to which it has paid out monies under certain loans to various Ukrainian borrowers, which then transferred the monies on to a number of offshore companies that in turn recycled the monies between the borrowers and the offshore companies.

Although some of the funds have been repaid to the Bank to give the impression that they were legitimate commercial loans, the majority of the monies advanced by the Bank have never been repaid. The Bank's case is that the fraud was carried out on the directions of and/or for the benefit of the second defendant, and that the first defendant played a central role in receiving and paying away the proceeds of the fraud.”

[18] It then pleads that Carosan is a BVI company and that Mr. Kaufman is a wealthy Ukrainian businessman whose business interest include Tedis Ukraine LLC, Ukraine's largest wholesaler of tobacco of which Mr. Kaufman indirectly, via a company called Lidertano Holdings Ltd, owns 49.9 percent. It also pleads that Mr. Kaufman is a minority shareholder in Vertex United LLC and it is the claimant's case that Mr. Kaufman orchestrated and ultimately benefited from the fraud.

[19] It pleads that the Bank was declared insolvent and placed under temporary administration of the DGF. It then pleads that Mr. Kaufman with an associate, Mr. Gurtovoy, were the qualifying shareholders of the Bank. That is an allegation which is no longer pursued; it is accepted that Mr. Kaufman did not have an interest in the Platinum Bank.

[20] It then pleads that until the end of 2015, Mr. Kaufman had a substantial minority shareholding in another Ukrainian Bank, PJSC Finbank, and that Finbank assigned the rights under a number of its loan agreements to the Bank on 4th December 2014, including five loans which are identified. It is right to say that the assignment has not been produced in evidence.

[21] It then pleads that there was an assignment on 5th March 2019 whereby the DGF sold the Bank's rights in respect of the loans set out in the Statement of Claim to Star Investment One LLC, formerly known as APS Ukraine LLC. That assignment — which I am going to call “the Star Assignment” — is then pleaded, and I will come back to the precise terms of it.

[22] It pleads that the effect of the Star Assignment is to assign from the Bank to Star Investment the rights to the causes of action of the Bank against the defendants. That is a key issue in the current application.

[23] It then pleads that Star Investment assigned the rights under the loans to the Claimant by a Loan and Proprietary Rights Sale Agreement dated 29th July 2020. It is common ground that that assignment (“the WWRT Assignment”) was sufficient to assign any claims which had been validly assigned to Star Investment. It pleads the terms.

[24] Then at para 13, it discusses the fraud and says:

“Between 17th January 2008 and 5th February 2014, each of the eleven borrowers whose loans have been assigned to the Claimant (together the ‘Borrowers’) took out one or more loans with the bank as shown in the table.”

[25] There is then a table which shows various lending, both in hryvnia and in US dollars, the last of which, as is pointed out, was 5th February 2014. It then says:

“The Claimant has been provided with the account records of each of the relevant Borrower's account with the Bank (the ‘Banking Records’). From

its analysis of the Banking Records, the Claimant has concluded that the Loans formed part of a fraudulent scheme against the Bank in the circumstances which follow.”

[26] Pausing there, while it is right the claimant has the banking records, in other words, the account records, it does not have any of the other documentation regarding these loans. In particular, it does not have the loan proposals or the Credit Committee minutes showing what representations were made by the Borrowers and what considerations the Bank took into account in deciding to advance monies.

[27] The Statement of Claim then proceeds to say,

“15: The Borrowers are all Ukrainian companies with minimal or no known track record or assets, which do not appear to have carried out any or any substantial commercial activity. The circumstances in which the Loans were made indicate that the Borrowers were connected to one another and to the Bank, and that the Loans were not genuine arms-length transactions between the Borrowers and the Bank.”

[28] It then gives particulars. It is right to say that these assertions are not accepted by the defendants and there is some evidence of the sale of, for example, car jacks. But I do not need to expand on the details of their defences. Since the Borrowers apparently had no genuine commercial activity, it is pleaded that they had no independent means from which to repay the principal of the Loans which (and to the extent) they paid away, nor any interest, other than from monies paid by other Borrowers or companies as part of the fraudulent scheme. There was accordingly no genuine prospect of the Borrowers being able to repay, or to repay in full, all of the Loans, or any interest thereon.

[29] The claimant’s case is that each of the Borrowers was, has been or is connected with Mr. Kaufman and with Carosan. Pending disclosure the claimant relies on the facts and matters set out in Schedule A to the Statement of Claim as

demonstrating (to the best of the claimant's current knowledge and belief) the connections between each of Mr. Kaufman, Carosan and each of the Borrowers and it then sets out the particulars. It is right to say that the Schedule is a long and detailed document. It does, in my judgment, show a *prima facie* case that Mr. Kaufman is involved with all of these companies.

[30] It then pleads the movement of monies and pleads that the movement of monies must be at Mr. Kaufman's direction. And it pleads in para 19 that the Banking Records reveal that:

"19.1: The proceeds of the Loans were received by the Borrowers and then paid on, often in very short order, to various Ukrainian and offshore companies, including in particular Carosan, and other companies believed to be connected with Mr. Kaufman as set out in Schedule A.

19.2. The Loan monies were recycled through the web of companies, involving numerous circular transactions between the Borrowers and other companies. Carosan appears to have played a treasury role in this regard, making and receiving payments to and from the Borrowers and other companies. It received the largest share of the Loan proceeds, receiving the net sum of US\$24,667,961.09."

Then it pleads that:

"In the premises, it is to be inferred that:

20.1. By reason of his connections with the Borrowers, Mr. Kaufman knew and understood the matters set out in paras 17 to 19 above and intended that the Borrowers would not repay the Loans, alternatively repay them in full, such repayments as were made to be only from monies loaned by the Bank to other Borrowers;

20.2. Mr. Kaufman caused, arranged, procured and/or directed the matters set out at paragraphs 17.1 to 17.7 and 19 and intended those matters to:

20.2.1. disguise the fraud being perpetrated on the Bank;

20.2.2. allow the Loan monies to be paid away from the Borrowers, and

20.2.3. make the Loan monies more difficult to trace.

20.3. Mr. Kaufman benefited from the Loan monies advanced to the Borrowers, and/or as a necessary corollary of the matters set out at paras 20.1 to 20.2, intended that the Bank would suffer harm in the form of loss and damage by reason of the fact that the Borrowers would not repay all or any of the Loan monies.

It is further to be inferred, in particular from the large number of transactions between Carosan and companies connected with Mr. Kaufman as set out in paragraph 17.6 above that Mr. Kaufman caused, arranged, procured and/or directed Carosan to receive and make payments between the Borrowers and other companies connected with Mr. Kaufman, and his knowledge and intention is to be attributed to Carosan.”

[31] It then pleads various matters under Article 1166 of the Ukrainian Civil Code. I will come back to this. Article 1166 provides that “property harm caused by unlawful decisions, actions or omissions to personal non-property rights of a natural or legal person, as well as damage caused to the property of a natural or legal person, shall be reimbursed in full by the person who caused it.” There is expert evidence regarding that.

[32] There is then a pleading of double action ability which is relevant to the **Boys v Chaplin** issue.¹² Para 27 reads

“If the relevant facts and matters set out in para 15 to 26 had occurred in the BVI, the Claimant would have been entitled to bring a claim under BVI law for damages for the tort of conspiracy to cause harm by unlawful means, and the Defendants would have been liable to the Claimant to the same extent as under BVI law.”

[33] Pausing there, it is common ground between the experts on Ukrainian law that there is no tort of conspiracy to cause harm by unlawful means in the Ukraine. The Statement of Claim then pleads claims against Carosan under BVI law and pleads dishonest assistance in breach of the trust and says:

¹² [1971] AC 356.

“28. By reason of the matters particularised at paras 15 to 21, the Loans were obtained by false representations to the Bank and without any genuine intention that they would be repaid. In the premises, a resulting, alternatively constructive trust of the Loan monies arose in favour of the Bank. In failing to repay the Loan monies to the Bank, the Borrowers acted in breach of trust.

29. Carosan assisted the Borrowers in their breaches of trust by receiving payments of the Loan monies from the Borrowers, paying away the Loan monies to other companies, and creating a web of payments designed to obscure the onward destination of the Loan monies and make them more difficult to trace.

30. In so acting, Carosan acted dishonestly. For this purpose, Mr. Kaufman’s knowledge is to be attributed to Carosan.

Knowing receipt:

31. Paragraph 28 is repeated.

32. Carosan received net payments of \$24 million-odd in circumstances where it is unconscionable for it to retain those sums because:

32.1. Carosan knew it had no right, entitlement or expectation to those sums, which were given for no consideration and for no, or no genuine commercial purpose;

32.2. Carosan knew or ought to have known that the monies paid to it were received in breach of trust.

33. Accordingly, Carosan holds the sum of the \$24 million-odd on trust for the Claimant as assignee of the Bank and is liable to transfer the same to the Claimant and account to the Claimant for any benefit received by it in respect of or by virtue of its receipt of those sums.”

And then it pleads loss and claims the right to recover not less than £56 million sterling which is said to be the amount unpaid on the loans from the loss of interest, which the Bank would have been able to charge.

[34] It is convenient to consider the assignment point first since, if the defendants’ submissions on the Star Assignment are made out, it is a knock-out point. The Star Assignment itself is at Bundle C8, page 4576. This is an official translation of

the original Ukrainian Assignment. It is different in material terms to the unofficial translation which was provided to me on the *ex parte* application and in my judgment it is the document to which I ought to look in determining its terms. In particular, there is an obvious mistake in the informal translation where a key passage is shown as being a separate sentence.

[35] The Star Assignment is dated 5th March 2019. It is between Platinum — who at that stage would have been in the guardianship of the DGF — and APS Ukraine Ltd which, as we know, became Star. It says in clause 1.1:

“The Parties hereby agree that, by its legal nature, this Agreement is a transaction for the transfer by the Bank through selling the rights of claim specified in this Agreement to the New Creditor (assignment of claims).”

[36] And then in clause 2.1 it says:

“Under this Agreement, in accordance with the terms and conditions specified in this Agreement, the Bank shall assign by selling to the New Creditor, the New Creditor shall acquire, in the amount and under the terms specified in this Agreement the Bank’s claims against borrowers, mortgagors and guarantors specified in Appendix No. 1 to this Agreement hereinafter referred to as ‘the Debtors’, including claims against the successors of the Debtors, heirs of the Debtors, insurers or other persons to whom the duties of the Debtors have been transferred or who are obliged to perform the obligations of the Debtors, under credit agreements, guarantee agreements and pledge agreements, taking into account all changes, additions and appendices to them, according to the list-register in Appendix No. 1 to this Agreement, hereinafter referred to as ‘the Principal Agreements’, hereinafter referred to as ‘the Claims’. The New Creditor shall pay the Bank for the Claims in the amount and in the manner specified in this Agreement. The Parties have agreed that the assignment by the Bank to the New Creditor of the claims under mortgage agreements (pledges), which were concluded to ensure the fulfillment of the Debtors’ obligations under the Principal Agreements and were certified by a notary, shall take place under a separate agreement concluded between the Parties no later than five calendar days from the date of conclusion of this Agreement and is subject to be certified by a notary.”

[37] Clause 2.2 says:

“Under this Agreement, the New Creditor on the day of concluding this Agreement, but in any case not earlier than the time of receipt by the Bank of monetary funds in full, in accordance with paragraph 4.1. of this Agreement, shall acquire all the rights of the creditor under the Principal Agreements, including, but not limited to: the right to demand proper performance by Debtors of obligations under the Principal Agreements, payment by Debtors of monetary funds, interest, penalties, forfeits in the amounts specified in Appendix No. 1 to this Agreement, transfer of collateral to fulfill obligations, indemnity under the insurance contract, etc. The amount of Claims transferred to the New Creditor is specified in Appendix No. 1 to this Agreement. The creditor’s rights under the Principal Agreements shall be transferred to the New Creditor in full and on the terms existing at the time of assignment of the Claims, except for the right to contractual debit of funds from the Debtors’ account (accounts) provided to the Bank in accordance with the Principal Agreements.”

[38] That assignment is subject to Ukrainian law.

[39] The claimant makes two submissions. The first is that on its true construction, the Star Assignment assigns the tortious or delictual claims against Carosan and Mr. Kaufman to Star. The second is that Article 514 of the Ukrainian Civil Code transfers those claims to Star. Article 514 of the Civil Code is entitled “Scope of rights that pass to a new creditor in an obligation”. It provides:

“The rights of the original creditor in an obligation shall be transferred to the new creditor to the extent and on the conditions that existed at the time of the transfer of these rights, unless otherwise established by contract or by law.”

[40] I should also quote Article 516, “Procedure for Creditor’s Replacement in Obligation”.

“1. A creditor in obligation shall be replaced without the consent of the debtor, unless otherwise specified in contract or law. If a debtor was not notified in writing on the replacement of the creditor in obligation, a new creditor shall bear a risk of possible unfavorable consequences. In this case the debtor’s fulfillment of their obligation to an original creditor shall be a duly performance.”

[41] The proper approach for me to take in interpreting the Star Assignment and the statutory provisions of Ukrainian law is set out in **Dicey, Morris and Collins on Conflict of Laws** as follows:¹³

“9-02 The principle that in an English court foreign law as a matter of fact has long been well established, it must be pleaded and it must be proved

...

9-013 It is now well settled that foreign law must in general be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books or authority. Such materials can only be brought before the court as part of the evidence of an expert witness since without his assistance the court cannot evaluate or interpret them ...

...

9-015 An English court will not conduct its own researches in foreign law. In the common law system, the trial is not an inquisition into the extent of relevant foreign law any more than it is an inquisition into other factual issues that parties tender for decision by the court. But if an expert witness refers to foreign statutes, decisions or books the court is entitled to look at them as part of his evidence. But the court is not entitled to go beyond this. Thus, if a witness cites a passage from a foreign law book, he does not put the whole book in evidence since he does not necessarily regard the whole book as accurate. Similarly, if the witness cites a section from a foreign code or a passage from a foreign decision, the court will not look at other sections of the Code or another part of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation.

9-016 If the evidence of the expert witness is to the effect of the sources quoted by him as uncontradicted, it has been repeatedly said that the court should be reluctant to reject it and it has been held that where each party's expert witness agrees on the meaning and effect of the foreign law, the court is not entitled to reject such evidence at least on the basis of its own research into foreign law. But while the court will normally accept such evidence, it will not do so if it is obviously false, obscure, extravagant, lacking in obvious objectivity and impartiality, or patently absurd or if he never applies his mind to the real point of law or if the matter stated by [the expert] did not support his conclusion according to any stated or implied prejudice of reasoning, or if the relevant foreign court

¹³ 15th Ed, 2018.

would not employ the reasoning of the expert even if it agreed with the conclusion.

In such cases, the court may reject the evidence of the expert and examine the foreign sources to form its own conclusion as to their effect; or in other words, a court is not inhibited from using its own intelligence as on any other question of evidence. Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified by reference to any special rule or construction of the foreign law. It should however be noted in this connection that quite simple words may well be terms of art in a foreign statute.

9-017 If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled and indeed bound to look at those sources in order itself to decide between the conflicting testimony. Since the effect of foreign sources is primarily a matter of the expert witness, it is desirable when proving a foreign statute also to obtain evidence as to its interpretation. The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. In the former case, the expert tells the court what the statute means, explaining his opinion if necessary by reference to foreign rules of construction. In the latter case, the expert merely proves the foreign rules of construction and the court itself in the light of these rules determines the meanings of these documents."

[42] These principles are summarised in **Bumper Development Corporation v The Commissioner of Police for the Metropolis**,¹⁴ where Purchase LJ approved the passages cited in **Dicey and Morris** (as it then was), which in turn cited with approval the observations of Lord Langdale MR in **Earl Nelson v Lord Bridport**.¹⁵

"Although knowledge of foreign law is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say, that there may not be cases, in which the judge may, without impropriety, take

¹⁴ [1991] 1 WLR 1362.

¹⁵ (1846) 8 Beavan 527 at p 537.

upon himself to construe the words of a foreign law, and determine their application to the case in question, especially, if there should be variance or want of clearness in the testimony.”

[43] Here, I have three reports from Prof. Natalia Vasylyna for the claimant and two reports from Mr. Andriy Stelmashchuk for Mr. Kaufman. Prof. Vasylyna in her First Report at para 73 deals with assignment and says:

“The claims are assigned under assignment agreements, together with the rights of creditor in the loan agreements. The limits of the scope of rights transferred to the new creditor may be established by law and the contract on the basis of which the transfer of rights is carried out. In each case, to address the possibility of succession, the court analyses the relevant facts.

Article 514 CCU provides (as a general rule) that all rights that were held by the initial creditor in an obligation shall be transferred to the new creditor. In the agreement on replacement of the creditor (on assignment of the right of claim) the parties have the right to independently determine the scope of rights that pass to the new creditor. In accordance with Article 516 CCU, substitution of creditors in an obligation is carried out without the consent of the debtor, unless otherwise stipulated by the contract or the law.

In connection with the replacement of the creditor in the obligation, as on a sale of loans by the Bank/DGF to Star, all of the property rights attached to the loan (including the right to claim against third parties) are assigned to the new creditor. Only the identity of the creditor changes. In this case, WWRT is the creditor and has all the rights of the creditor in the relevant agreements and rights of claim against third parties.”

She expands on that at para 82 where she says:

“As a matter of proper interpretation of the assignment between Platinum Bank and Star, the cause of action under Article 1166 was properly assigned.

83. Article 514 CCU provides that the rights of the original creditor in an obligation shall be transferred to the new creditor to the extent and on the conditions existing at the time of such transfer, unless otherwise stipulated by the contract or the law. With the change of the creditor in legal relations, the single element that is changed is the person of the creditor,

but not the scope of the rights and obligations of the creditor and/or third parties. WWRT has the right to defend its right to repayment and file a claim against parties who made the scheme at the Bank the same way as if it were the bank itself.

For the avoidance of any doubt, it is worth clarifying that in tortious obligations, the creditor is the person who was harmed and who has the right to claim compensation for the damage, and the debtor is the person who caused the damage and who is obliged to compensate the damage. All the rights of the original creditor are transferred to the new creditor in the tortious obligations, together with the assignment under the loan agreements (as the rights of creditor in loan agreements include the rights of claim against third parties)."

[44] In her Second Report at para 307, she says:

"I cannot agree that the rights assigned to WWRT are limited to contractual rights and do not include tortious claims. I have explained in my First Report at paras 82-84 that the rights include 1166 claim, and even if they did not, rights of 1166 claim would have been transferred as a matter of law. I refer as example to **VVIKO v Adams**, mentioned already above, where VVIKO filed a claim against Adams, who was supposed to store the goods of Resurspostach. VVIKO had a contract with Resurspostach, but the goods were not delivered because of the actions of Adams, and the Court satisfied the Article 1166 CCU claim of VVIKO against Adams."

[45] But her reliance on **VVIKO v Adams** is comprehensively answered, in my judgment, by Mr. Stelmashchuk at para 73 of his Supplemental Report. He says:

"In my view, Ms. Vasylyna's reference to **VVIKO v Adams** case is misplaced. I note that between the parties in that case no assignment agreements were made and the court did not reach any conclusions in regard to the assignment. In [that] case, the claimant, VVIKO bought the goods from a third party, which were stored by Adams, the defendant. However, Adams refused to give the goods to VVIKO because, apparently, they were misappropriated. VVIKO brought a claim against Adams and asked the court to oblige Adams to give it the goods. VVIKO also claimed compensation of damages related to late supply (e.g. interest on the loan obtained by VVIKO to buy goods). No contract ever existed between VVIKO and Adams, therefore, the claim in that case cannot have arisen out of the contract and Article 1166 claim was granted. The

decision in this case simply confirms that a contractual claim is entirely separate cause of action from a claim under Article 1166 of the Civil Code.”

- [46] Neither expert suggests that there is any special doctrine of Ukrainian law governing the interpretation of commercial documents such as the Star Assignment in this case. So applying the principles set out in **Dicey, Morris and Collins**, I just need to carry out an ordinary exercise of interpreting the document in its natural meaning.
- [47] The central question here is the part of clause 2.1 in the middle where it says that the assignment includes “claims against the successors of the Debtors, heirs of the Debtors, insurers or other persons to whom the duties of the Debtors have been transferred or who are obliged to perform the obligations of the Debtors.” The reference to ‘other persons’, in my judgment, must be to those persons to whom the duties of the debtors have been transferred or who are obliged to perform the obligation of the debtors.
- [48] There is no basis in this translation of clause 2.1 for saying that claims against third parties of a non-contractual nature, i.e. the tortious or delictual claims under Article 1166, are also transferred. I find as a matter of construction that what is transferred is the contractual claims which the bank had against the debtors as expanded to include other people.
- [49] Accordingly, I hold as a matter of construction that the Star Assignment does not transfer the Article 1166 claims.
- [50] I turn then to Article 514. I agree with what Prof. Vasylyna says in para 74 of her original report where she refers to the replacement of the creditor in the obligation, as meaning that all the property rights attaching to the loan including the right to claim against third parties are assigned to the new creditor. That seems to follow from the plain wording of Article 514. But what I do not accept is her jump from

that conclusion in para 74 to her conclusion in para 83. As to para 74 it is obviously sensible to say that, for example, the benefit of a mortgage transfers with the assignment of the debt which the mortgage secures. Wholly unclear and unexplained is how she goes from para 74 to her conclusion in para 83 that WWRT has the right to enforce its right to repayment by filing a claim against third parties against whom tortious or delictual remedies lay at the suit of the bank, in the same way as if WWRT were the bank itself. That, it seems to me, is an illogical and unjustified jump.

[51] I am of course very mindful of the warning given by Bacon J in **WWRT Ltd v Tyshchenko** where she said:¹⁶

“It follows that the questions of Ukrainian law that arise in this case must be considered in the first place by reference to the expert evidence. Absent expert evidence as to the approach to construction of Ukrainian statutory provisions or case-law, it is not for the court to interpret those materials as if they were English statutes or cases... It is not, therefore, open to me simply to take my own view as to the reliability of the report of Dr. Tsiura or indeed any of the experts, by reference to the parties’ submissions on the relevant statutes or case-law. The fact that Mrs. Tyshchenko is a lawyer qualified in Ukraine does not undermine that conclusion: without corroboration by independent expert evidence, her submissions as to the interpretation and application of Ukrainian law can carry no greater weight than the submissions of counsel for the parties. That does not preclude the court, in an appropriate case, from rejecting expert evidence that is clearly and obviously wrong, or patently absurd, on the basis of the materials before it such as the English translation of statutory provisions on which the expert relies.” [She cites **Dicey, Morris and Collins**.] “But the power to do so must be exercised with great caution, and it should certainly not open the door to the rejection of expert evidence on the basis of submissions as to the interpretation of materials that are ambiguous, incomplete or otherwise unclear.”

[52] However, in my judgment, when the outcome is clear, it seems to me the Court must declare what the case is, rather than let matters go on with an enormous waste of costs if the outcome at the end is going to be the same.

¹⁶ [2021] EWHC 939 (Ch), [2021] Bus LR 972 at [25].

- [53] That is sufficient to dispose of the assignment issue but two matters reinforce my view. First, the DGF clearly do not share Prof. Vasylyna's view of what was assigned. They currently have live proceedings against a large number of managers at Platinum Bank. The complaints include claims relating to the loans assigned to Star. I cannot see how these claims could be brought at all if all tortious and delictual claims had been assigned by the Bank to Star and thence to WWRT.
- [54] Second, Prof. Vasylyna's conclusion in para 84 that third party claims pass to the assignee with the underlying credit obligations, does not reflect any commercial need. It is perfectly sensible for the DGF to want to sell the loans for the best price they can get whilst keeping third party claims, for example, against the managers, for themselves. Prof. Vasylyna accepts that partial assignments of obligations are possible, but I cannot see why Article 514 should be interpreted to import an automatic assignment of all rights in any way associated with an assigned loan.
- [55] In my judgment, Mr. Stelmashchuk's views reach the summary judgment test and I can safely reject Prof. Vasylyna's opinion on the assignment of the Article 1166 claim under Article 514 as fanciful. That is sufficient to determine the issue of setting aside the leave to serve outside the jurisdiction on the second defendant, and I do set aside the leave.
- [56] I turn then to other matters. Obviously, in the light of my finding on the claimant's standing, these other matters only arise in the situation that the issue of standing is successfully appealed. But I turn first of all to the question of whether the Ukraine is a more suitable venue. As to this, the evidence, in my judgment, is all one way.
- [57] The Article 1166 claim is governed by Ukrainian law. As can be seen by the sheer thickness of the five reports prepared by the experts to date, the case bristles with

points of Ukrainian law, which can be much more satisfactorily and cheaply resolved by the Ukrainian courts than by this Court.

[58] On limitation, for example, the experts agree that there are three relevant limitation periods.¹⁷ The primary limitation period for claims under Article 1166 is three years. But there is a secondary limitation period of three years from the date of knowledge; and lastly, there is a discretionary extension of time as a tertiary limitation period under Article 267 of the Ukrainian Civil Code. Such a scheme is not unknown in the common law world. It is very similar to the English law of limitation in relation to personal injury claims, even down to the discretionary extension of time given by section 33 of the **Limitation Act 1980**.¹⁸

[59] However, just as there is a large amount of English case law about when the date of knowledge is and the principles on which the section 33 discretion is exercised, so too there is a divergence of views between the experts as to how the Ukrainian provisions should be applied. Prof. Vasylyna requires much greater knowledge of the facts of the alleged Article 1166 claim to start the secondary limitation period running, than Mr. Stelmashchuk. A Ukrainian court is much better able to resolve these legal issues and will have a much greater understanding of how any discretion to extend the limitation period should be exercised.

[60] Now it is true that the claimant makes claims against Carosan of dishonest assistance and knowing receipt. Mr. Lacy submits in his skeleton at para 38 as follows:

“It is not accepted that claims against Carosan for dishonest assistance and knowing receipt are governed by the law of the BVI, as stated in **Dicey** at 36-008:

‘(a) If the obligation arose in connection with a contract, its proper law was the law applicable to the contract;

¹⁷ All counsel were happy to proceed on the basis that limitation was governed by Ukrainian law rather than the Limitation Act of this Territory, *sed quaere*.

¹⁸ 1980 c 58.

(b) If it arose in connection with a transaction concerning an immovable (land), its proper law was the law of the country where the immovable was situated (*lex situs*);

(c) If it arose in any other circumstances, its proper law was the law of the country where the enrichment occurred.

The above statement from **Dicey** has been approved and followed by the Courts of England and the BVI.¹⁹

It is submitted that, as in **Sibir Energy** (where Russian and not BVI law was held to apply to a knowing receipt claim) all material connections are with Ukraine. The domicile of the banks and the Borrowers is Ukraine and the governing law of the Loans is Ukrainian. There are no relevant factual circumstances and particular issues that could possibly permit the application of any other law but Ukrainian law. Whatever reference point may be chosen, the law that has the closest connection (indeed, any connection) with the claim or the issue is Ukrainian law. BVI law is as purely unconnected with the claim as may be conceived. BVI law is not the proper law of this claim.”

[61] I agree, subject to one point, and that is that Carosan’s bank account was in Latvia. The mere fact that Carosan is incorporated in this territory does not mean that BVI law applies to the dishonest assistance and knowing receipt claims. There is also the difficulty that the loss necessary to found a claim under Article 1166 was sustained when the Bank paid the money out. It is unclear how liability can attach to Carosan for assisting in what is alleged to be subsequent money laundering. As Mr. Morgan QC rightly submits, the claims against the defendants are incoherent.

[62] Pausing there, it is also right to record that some of the loans predate the incorporation of Carosan.

[63] Issues of causation are also much better dealt with in the Ukraine. As is well known in late 2013, there was a popular uprising in the Ukraine which gave rise to

¹⁹ Citing *Sibir Energy Plc v Gregory Trading SA* [2006] ECSCJ No 99.

a movement known as the Maidan revolution. On 20th February 2014, Russia invaded the Crimea and on 22nd February 2014, President Yanukovich fled the Ukraine. This resulted in a collapse in the value of the hryvnia and is said to have contributed to the collapse of the Platinum Bank. Many further issues of causation arise, in that DGF failed to issue proceedings in respect of many non-performing loans made by the Bank. That resulted in claims becoming time-barred. The courts of this territory are unlikely to have anything like the grasp of the overall *actualité* that a Ukrainian Court will have.

[64] There is also the fact there are already related proceedings in the Ukraine — the claim brought by the DGF against the managers, to which I have already referred. The Cambridgeshire factor favours the Ukraine in these circumstances. This is also relevant to the question of documentation. It is often said that one of the advantages in suing in a common law jurisdiction is the availability of disclosure. This is not really of great weight in considering *forum conveniens* but in the current case, it has no weight. It is striking that the claimant does not have any of the documentation relating to the underlying loan agreements which were said to have been obtained by fraud. The claimant does not have the applications for the loans or the minutes of the Credit Committee.

[65] Now it is said that the Ukrainian legal process for obtaining documents from third parties is defective. Well whether that is right or not, it is likely to be the only route to obtaining these documents which are likely to be key to a fair trial of the fraud claim. Moreover, it may well be easier to persuade the DGF voluntarily to assist in producing documents for the Ukrainian proceedings than for BVI proceedings.

[66] A further factor in favour of the Ukraine is that the cost of translations will be avoided. Likewise, witnesses will be able to give evidence in their native tongue. Mr. Kaufman will be able to give instructions to his lawyers without needing an interpreter.

- [67] The claimant says it cannot obtain justice in the Ukraine because Mr. Kaufman will be able to exert political influence on the judicial process. The evidence of this allegation is in my judgment pitiful. An internet news item from 2014 suggested that President Poroshenko, the then President of the Ukraine, interfered with a Court case involving the public procurement processes at Odessa airport. Prof. Vasylyna says that the court decision in that case, which was given in favour of Mr. Kaufman's company, shows oddities. That is the extent of the evidence as to Mr. Kaufman's influence on the Ukrainian court system. Normally, one would expect an expert report, for example, from the Council of Europe or an independent body, to justify such serious allegations. Here there is nothing.
- [68] Moreover, even if there were evidence (which there is not) of any improper relationship with President Poroshenko or President Yanukovich, there is now a new President from a different party, so any political influence which Mr. Kaufman might have had will have disappeared.
- [69] I can reject the suggestion of political interference with any Ukrainian court proceedings. Prof. Vasylyna says that if proceedings were brought in the Ukraine against these two defendants, then it would not be possible to sue Mr. Kaufman in the Commercial Court. Mr. Stelmashchuk agrees that Mr. Kaufman cannot be sued in the Commercial Court. However, he says that both defendants can be sued together in the general court. Prof. Vasylyna does not answer this point. I therefore conclude that both Defendants can be sued in the same general court in the Ukraine, so that point goes too.
- [70] I accept that the claimant has shown an arguable connection between Mr. Kaufman and the companies listed in the annex to the Statement of Claim. Thus, I was taken in some detail to Mr. Kaufman's ownership of an English company, Odessa Airport Development Ltd, which was involved in the public procurement case I have mentioned. Mr. Ayres QC was able to show the involvement of Mr. Malamanchuk in that matter. Mr. Malamanchuk is said to be the ultimate beneficial owner and sole director of Carosan.

- [71] Mr. Ayres rightly invites me to be suspicious about how a man who is ostensibly a lorry driver living in modest circumstances in the Ukraine comes to be the owner of a BVI company handling tens of millions of dollars. However, the BVI connection to Mr. Kaufman should not be exaggerated. The overwhelming number of companies said to be associated with the fraud in Annex A are Ukrainian companies.
- [72] If the Article 1166 claims made by the Claimant were sustainable, I would hold, if it were relevant, that Mr. Kaufman was a necessary or proper party to the action. However, the overwhelming centre of the claims in this case is the Ukraine. The courts of the Ukraine are an available forum where justice can be done. The Ukraine is, for the reasons I have given, clearly the most appropriate forum. There is no risk that the claimant will not receive justice in that forum.
- [73] I will therefore stay the claim against the first defendant on *forum non conveniens* grounds and set aside the service of the proceedings on the second defendant.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar