

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

Claim No: BVIHC (COM) 2020/0219

BETWEEN:

AO ALFA BANK

Claimant

-and-

KIPFORD VENTURES LTD

Defendant

Appearances:

Mr. Robert-Jan Temmink, QC, with him Mr Christopher Bromilow of Forbes Hare for Alfa-Bank

Mr Alain Choo-Choy QC, with him Ms. Claire Goldstein and Ms. Sarah Thompson of Harneys for Kipford Ventures Limited

2021: November 17 and 18
November 23 (Oral Judgment)
December 14 (Written Judgment)

JUDGMENT

- [1] **JACK J [Ag]:** On 17th December 2020, I granted the claimant, Alfa-Bank, *ex parte* a worldwide freezing injunction against the defendant Kipford. Alfa-Bank said that it was a victim of a substantial fraud committed against it by the Ananyev Brothers who owned the PS Bank at the time and various associated companies. The gist of the fraud was that the Ananyevs had, through a front man, Dimitry Alexandrovich Usanov, induced the Bank to lend the sum of \$140 million for the purchase of a coal mine in the Kemerovo Region of West Siberia. The mine, Alfa-Bank say, was in fact worthless.

[2] Kipford, they say, hold somewhat over \$48 million which forms part of the proceeds of the fraud. I am determining an application by Alfa-Bank to continue the freezing order and the cross application by Kipford to discharge the same order. There was originally also an application by Kipford to stay the action on forum grounds, but that was abandoned in the course of the hearing before me.

[3] Before going into details, I draw the parties' attention to what I said in **HQ Aviation Limited v Sun Vessel Global Limited, The Motor Yacht Bacarella**¹ where at paras [7] and [8] I said:

"This is an *ex tempore* judgment. In a number of recent cases, I have been concerned that in the event of an appeal, an uncorrected version of the oral judgment has been placed before the Court of Appeal. That is not in anybody's best interest. As Danckwerts LJ said in **Bromley v Bromley**:²

'An extemporary judgment is not always easy to deliver perfectly in all respects on the spur of the moment. There must be corrections which need to be made so as to give the real meaning of the judge and he is perfectly entitled, it seems to me, not only to correct mistakes but to alter words which do not express his intended meaning at the time when he uttered them.'

And, of course, there is the need to correct the typescript."

[4] If any appeal is to be brought, I will be sympathetic to an application by the would-be appellant for an extension of time for appealing so that time only runs from the approval of the transcript. That would, of course, be subject to the proviso that reasonable expedition was made in obtaining the transcript.

[5] The test for the granting of a freezing order was, I thought, well established. **Gee on Commercial Injunctions** says:³

¹ [2021] ECSCJ No 554.

² [1965] P 111 at p 116.

³ 7th Ed. (2020) at para 12-033, omitting citations.

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

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

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

- [6] The test of what constituted a good arguable case was decided in the well-known authority **Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)**⁴ where both Mustill J and the English Court of Appeal held that a good arguable case was one which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 percent chance of success. Once an applicant crosses that hurdle, the Court must then consider whether damages would be an adequate remedy and lastly the balance of convenience. If the scale appears very evenly balanced, then it is legitimate to take into account the strength or weakness of the applicant's case: **Polly Peck International plc and Nadir (No. 2)**.⁵

- [7] Mr. Temmink QC submitted, however, that a different test applied to the discharge application. On a discharge application, there was no continuing obligation on the

⁴ [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).

⁵ [1992] 4 All ER 769 at p 754 *per* Scott LJ.

claimant to show a good arguable case in the **Niedersachsen** sense. For that proposition he relied on the case of **Mitsuji Konoshita v JTrust Asia Propriety Ltd.**⁶ In that case, Farara JA said, starting at para [36]:

“The BVI court’s jurisdiction to make freezing orders is statutory. It rests in section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act.**⁷ It is a discretionary remedy which may be granted only where the Court determines that it is just and convenient to do so... Before deciding whether it is just and convenient to make the order sought, the court must first be satisfied that the applicant for a freezing order has made out ‘a good arguable case’. This means 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% chance of success’.

The need to demonstrate on the evidence that the applicant for a freezing order has made out ‘a good arguable case’ is a threshold requirement for engaging the court’s jurisdiction and discretion and a component of the court’s assessment of whether, in all the circumstances, it would be just and convenient to grant the order sought. This much is settled law, and entirely uncontroversial. The burden rests on an applicant for a freezing injunction to satisfy the court on evidence that it has a ‘good arguable case’ against the respondent, and it is just or convenient for the court to grant a freezing order.”

Pausing there, Mr. Temmink QC relies on this passage to show that he has already passed this test on the *ex parte* application. Continuing with the judgment:

“A court has power to vary or to discharge any interim order, including a freezing order. This power is part of the court’s inherent jurisdiction. Thus, once granted, a freezing order may be discharged or varied by the court upon application. On an application to discharge a freezing order, the burden rests on the party seeking to have it discharged the applicant for discharge to satisfy the court, on a balance of probabilities, that it ought to discharge the freezing order. No authority was cited before the learned judge, or before this Court, as to the applicable principles where a judge is considering an application to discharge a freezing order.

In my view, the learned judge was correct in principle when he concluded that there was no continuing requirement for the applicant for a freezing order to demonstrate that it had ‘a good arguable case’, that is, one ‘more than barely capable of serious argument’, in order for the freezing order to

⁶ [2021] ECSCJ No 506.

⁷ Revised Laws of the Territory of the Virgin Islands, cap 80.

be continued. That threshold requirement of a 'good arguable case' having been met to the satisfaction of the court at the time of the application for the order, there was no requirement for the judge to conduct an assessment anew or reassessment of that requirement in order to determine whether the order ought to be properly continued or not. The question for the court on an application to discharge a freezing order, is whether it would be just and convenient to continue the order as made or whether the justice of the case favoured its immediate discharge or that the order ought to be varied in some material respect. This burden rests on the applicant for the discharge or variation of the order, as the learned judge correctly held."

This last sentence is relied on by Mr. Temmink QC to say that Kipford bore the burden of justifying a discharge of the order.

- [8] In my judgment, this overlooks an important factor. When Adderley J in the Court below in **Mitsuji Konoshita** was considering discharging the freezing order, the order had been continued *inter partes*. One can take the facts from the headnote.

"On 21st December 2017, the respondent, JTrust... brought a claim against Mr. Konoshita and APF in the High Court of the Territory of the Virgin Islands... On 13th February 2018, JTrust obtained a worldwide freezing order against both Mr. Konoshita and APF in support of the BVI claim. On 5th July 2018, a receivership order over the assets of APF was made ... On 5th July 2018, the lower court continued the BVI worldwide freezing order. An appeal against the BVI worldwide freezing order and the receivership order was dismissed by the Court of Appeal on 18th December 2018."

- [9] The background to the application to discharge was that there had been proceedings in Singapore which the claimants had lost but there was an appeal pending and Adderley J thought that that justified the continuation of the freezing order. The Court of Appeal agreed.
- [10] I do not accept that in the current application the Claimant has a lower burden. The true position in law, in my judgment, is that once there is a hearing *inter partes* of an application to continue an injunction granted *ex parte*, the court starts completely afresh. The claimant must establish its case from scratch. Were it otherwise, the effect would be to put the defendant on the back foot from the start. That would be a breach of the principle *audi alterem partem*.

[11] I shall thus apply the test as set out in **Gee** and **The Niedersachsen** in deciding whether to continue the freezing order, not the lower test which was set out in the **Mitsuji Konoshita** case. Mr. Temmink QC also submitted that I should refrain from conducting any sort of mini trial or reverse summary judgment application. I agree. However, Mr. Temmink pushes this too far. I agree that it is quite wrong on a Mareva application to reach even preliminary conclusions on disputed facts, but that does not mean the Court should not conduct a close examination of the facts and the evidence. On the contrary, the Court must carry out a focused assessment of the strengths and weaknesses of each party's case.

[12] The starting point for this exercise must necessarily be the pleadings. Now it will often happen that an application for a freezing order is made in haste before any pleadings can be settled. In the current case, however, the Claimant has had 11 months to get its pleadings exactly in order. It is right to take a strict approach to what the Claimant's allegations are against the defendant. Although the English rules of pleadings are more prescriptive than the Eastern Caribbean rules, nevertheless the following passage in **Bullen & Leake & Jacobs' Precedents of Pleading**⁸ reflect, in my judgment, the local requirements in CPR 8.7(1) and 8.7A; see **Sumitomo Mitsui Trust (UK) Ltd v Spectrum Galaxy Fund Ltd**.⁹ At para 57-02 of **Bullen & Leake**, the learned authors say:

"It is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it. The effect of the relevant provision in the **Bar Code of Conduct** was discussed in **Medcalf v Weatherill**.¹⁰ In that case, Lord Bingham stated that at a preparatory stage the requirement is not that counsel should necessarily have evidence in admissible form, but that he should have 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it'.

A pleader may be entitled to take into account that further facts and evidence of dishonesty may turn up before trial, or even during trial. Where

⁸ 19th Ed. (2019).

⁹ [2020] ECSCJ No 149.

¹⁰ [2002] UKHL 27, [2003] 1 AC 120.

he wishes to rely on them in support of his claim, a claimant is required specifically to set out in his particulars of claim any allegation of fraud, details of any misrepresentation, details of all breaches of trust and notice or knowledge of facts... The facts must be so stated as to show distinctly that fraud is charged. Where any inference of fraud or dishonesty is alleged, the party must list the facts on the basis of which the inference is alleged.

A pleading of fraud does not have to plead primary facts which are only consistent with dishonesty. Instead the question is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.”

[13] I turn therefore to the pleadings. The Statement of Claim starts by explaining that Alfa-Bank is a major private commercial bank in Russia; that Kipford is a company incorporated in 2007 in this Territory; that Ludmila Ananyeva was born in Moscow, but is now a Cypriot national; and that she is the sole shareholder of Kipford and one of its joint beneficial owners. Mrs. Ananyeva’s mother, Liudmila Perevozchikova, is the other joint beneficial owner of Kipford.

[14] It then pleads that Mrs. Ananyeva is the spouse of Dmitry Ananyev, who with his brother, Alexey Ananyev, were formerly the owners of PromSvyazBank (“PS Bank”). PromSvyazCapital (“PSC”) is an entity affiliated with PS Bank and at all material times was owned and/or controlled by the Ananyev Brothers. It then explains how PS Bank was the subject of an intervention by the Russian Central Bank in December 2017 and placed into temporary administration. There are various allegations that the Ananyevs dissipated the assets of PS Bank. Alfa-Bank asserts that PS Bank is no longer owned or controlled by the Ananyev Brothers and is pursuing avoidance claims in multiple jurisdictions. It is right to interject here that the Ananyevs’ case is that the intervention was politically inspired. It is also right to say that Interpol has withdrawn a red notice issued by Russia. The withdrawn was because the red notice was apparently issued to pursue criminal matters which were brought on political grounds.

[15] The Statement of Claim then goes on to describe various individuals. At paragraph 6.1 it pleads:

“Dmitry Usanov is a Russian citizen and at all material times represented himself to Alfa-Bank as an independent entrepreneur who was seeking financing for purchasing a coal mining project in Siberia, Russia. It is averred by Alfa-Bank that Mr. Usanov was the front man in the fraud described below for the benefit of the Ananyev Brothers.”

[16] It then describes two other people working at PSC, a Ms. Zinovieva and a Mr. Mitirev.

[17] The Statement of Claim then goes on to deal with various companies which are said to be part of and/or controlled and/or affiliated with PSC and/or PS Bank. Para 7.1 says:

“LLC Krasnobrodsky Yuzhny (‘KBY’)... operated an open-pit mine in the Kemerovo Region, West Siberia, Russia. In light of KBY’s failure to perform its obligations under the Loan (as defined below), Alfa-Bank lodged a bankruptcy petition against KBY on or around 19th April 2019. On 24th May 2019, the Kemerovo Regional Court of Siberia granted the petition and initiated bankruptcy proceedings against KBY. The same day, 24th May 2019, the same Court appointed a Mr. Shkarupin as the bankruptcy receiver of KBY. Later, the same Court appointed Mr. Sergeev to replace Mr. Shkarupin.”

[18] Then para 7.2 pleads that “the limited liability company Redwade was the hundred percent owner of KBY and was itself in turn 99.999 percent owned by Delvenisto as defined below, and 0.001 percent owned by Yulia Yakovleva, a minor Russian shareholder.” And then it pleads:

“The following companies were incorporated in and continue to be registered in Cyprus and were part of and/or controlled and/or affiliated with PSC and/or PS Bank:

8.1. Delvenisto Investments Ltd that owned 99.999 percent of Redwade.

8.2. Wolater Ltd that at all material times was a hundred percent owned by Mr. Usanov and used by him as his corporate vehicle to hold investments.”

It then names a number of other companies which I do not need to set out. A helpful diagram attached to the Statement of Claim shows how monies moved after the fraud was allegedly committed, but I do not need to set that out. Starting at para 10, the Statement of Claim says:

“In or around August 2017 Alfa-Bank was contacted by representatives of UBS Limited on behalf of Mr. Usanov concerning the acquisition of KBY.

11. In or around September 2017 Ms. Lyudmila Khrapchenko (the Head of the Department of Structured Products of Alfa-Bank at the time) and Mr. Anton Shkurovich (a vice-president of Alfa-Bank in charge of the origination and execution of transactions at the time), met with Mr Usanov in the Moscow branch of UBS Limited. Among other individuals, Mr. Usanov represented to Alfa-Bank that high-quality coal was mined in KBY's mine and that KBY was an active business with potential for returns. Alfa-Bank engaged a technical consultant, IMC Montan ('IMC'), to audit the open-pit coal mine and provide a valuation. During the course of the audit, IMC reviewed a number of documents provided by Mr. Usanov that led to the conclusions set out in IMC's report that confirmed Mr. Usanov's representations and estimated the net present value of the coal mining operation at approximately US\$182 million.

12. Alfa-Bank's policy in respect of the financing of projects of that kind was to require the borrower to deploy at least 20 percent of the borrower's own funds in respect of any investment, with the balance being met by Alfa-Bank. Accordingly, at all material times it was understood and acknowledged between Mr. Usanov, Alfa-Bank and UBS Ltd that Mr. Usanov would contribute US\$45 million of his own funds into the transaction, and more specifically, that he (acting through Wolater) would purchase 31 percent of shares in Redwade by purchasing 30.999 percent of the shares from Delvenisto and 0.001 percent from Ms. Yakovleva. Alfa-Bank would then provide financing for the redemption of the remaining 69 percent shares in Redwade. In particular, in the course of the parties' negotiations, Mr. Usanov represented to Alfa-Bank that US\$45 million was available from his own funds (through Wolater) for the purpose of acquiring 31 percent of Redwade. Unbeknownst to Alfa-Bank at the time, Mr. Mitirev and Mrs. Zinovieva of PSC sent various e-mails to Mr. Usanov (that are currently known by Alfa-Bank) on 6th October 2017, 16th October 2017, 24th October 2017 and 16th November 2017, which provided Mr. Usanov with instructions and guidance as to the acquisition of the shares in Redwade from Delvenisto through Wolater.”

[19] Pausing there, the e-mails do not of themselves show that Mr. Usanov was obeying the instructions of Alfa-Bank. An interpretation which can be put on them is that they are simply a perfectly normal discussion of the modalities of how Mr. Usanov would acquire the shares. The pleading continues:

“In reliance on and induced by the representations made by Mr. Usanov set out at paras 11 and 12 above, Alfa-Bank agreed to provide a loan to KBY in the sum of US\$140 million (the ‘Loan’) which would be used to: (i) discharge its existing indebtedness; and (ii) purchase 69 percent of the shares held by Delvenisto in Redwade. Alfa-Bank agreed to provide the Loan to KBY in two installments of US\$40 million and US\$100 million. The Loan was documented by a Loan Agreement No. 01NP44 dated 25th October 2017 (the ‘Loan Agreement’) and two addendum agreements dated 10th November 2017.

The Loan was to be used, in the first instance to pay an outstanding loan to AvtoVazBank (a bank affiliated with PS Bank) (‘AVB’) in the sum of US\$40 million, with the balance being made available to KBY to purchase shares in Redwade from Delvenisto. Subsequently, Mr. Usanov executed and procured the execution by Wolater and Redwade of a number of share pledges in order to provide security for the Loan and further executed a suretyship agreement, No. 01NP4P002 on 20th November 2017 and a guarantee agreement on 16th November 2017.

In the circumstances described below, the representations made by Mr. Usanov were fraudulent. Further, Alfa-Bank would never have entered into the Loan had it been aware of: (i) the true net present value of the open-pit mine; and (ii) that the funds used to purchase of 31 percent shares in Redwade by Wolater did not originate from Mr. Usanov’s own funds, but from PSC and/or PS Bank.”

[20] It then pleads the first tranche being advanced on 22nd November and the utilization of that money to repay the AVB debt; and then later that day, the second tranche of \$100 million being advanced to KBY with that then being transferred to the bank account of Delvenisto in Latvia. From that, KBY obtained 69 percent of the shares in Redwade. Then it says that the mine started to have significant difficulties which Mr. Usanov said were apparently associated with various decisions made by the company’s previous owners.

[21] The Statement of Claim pleads that on 22nd January 2018, Mr. Usanov reported that the financial results for the fourth quarter of 2017 were poor. Following examination of the financial results, Alfa-Bank noted there had been a decline in areas that were subject to financial covenants in the Loan Agreement, such as sales, EBITDA and profit. By or around May 2018, KBY had breached multiple covenants in the Loan Agreement, for example KBY's net debt to EBITDA ratio was higher than the 3.9 maximum provided in the financial covenants of the Loan Agreement. Alfa-Bank and Mr. Usanov attempted to restructure the debt due pursuant to the Loan, but no agreement could be reached. By October, there was no working capital available.

[22] Alfa-Bank refused to provide further advances and proceedings were issued against Mr. Usanov as surety and KBY as borrower under the Loan in November 2018. This resulted in December 2018 in a Russian court judgment against Mr. Usanov as surety in the sum of US\$40 million plus interest, and in April 2019 in a Russian court judgment against KBY as borrower in the sum of US\$140 million plus interest. The Russian court judgment against Mr. Usanov became final and binding on 18th June 2019 following an unsuccessful appeal by Mr. Usanov. The Russian court judgment against KBY became final and binding on 22nd July 2019 following an unsuccessful appeal by KBY. Mr. Usanov and KBY have not complied with the judgments against them. Then the Statement of Claim pleads the falsity of Mr. Usanov's misrepresentations.

[23] It continues with the worth of KBY and the open-pit mine in these terms:

“Around December 2018, Alfa-Bank engaged SRK Consulting (Russia) Ltd ('SRK'), to prepare a report on the coal mining business operated by KBY. SRK's report was extremely negative and revealed serious problems in the existing open-pit mine, which meant the net present value of the mine was negative. Among other matters, SRK stated:

24.1. The difficulties in the mining situation in the open-pit had been underestimated as a result of excessive trust being placed in the documents submitted by the owners of KBY, by which SRK meant Mr. Usanov, despite the concerns about the state of the cut boards mentioned in the IMC report;

24.2. The production capacity of the mine had been unreasonably overestimated;

24.3. The planned removal distances of the rock mass had been underestimated;

24.4. The planned stripping ratio was understated and the condition of the cut sides had been ignored; and

24.5. Crucially, the technical parameters incorporated in the calculations were unreasonable which led to an overestimation of the estimated value of the whole asset.

25. Therefore, contrary to Mr Usanov's representations set out at para 11 above, which he must have known were false or was reckless as to their truthfulness when he made them, the net present value of the mine was in fact negative.

The source of Wolater's funds

26. As set out at paragraph 12 above, Mr. Usanov represented to Alfa-Bank that he would use his own funds (through Wolater) to acquire his interest in KBY. However, this representation was false which Mr. Usanov must have known was false or was reckless as to its truthfulness when he made it, as Mr. Usanov (through Wolater) in fact obtained the funds of US\$45 million from companies affiliated with PSC, in particular Fintailor, Anevlessa, Wolater, Delvenisto, Cydrine and Garrison.

27. It is averred that the circular transfers between the PSC group companies that manufactured Wolater's contribution occurred as follows:

27.1. On 27th October 2017 (within a short space of time):

(i) Fintailor transferred US\$45 million to Anevlessa ...

(ii) Anevlessa then transferred US\$45 million to Wolater that was described as a 'Contra Non-refundable and non-distributable contribution to subsidiary under resolution dated 11th October 2017'.

(iii) Wolater then transferred US\$45 million to Delvenisto that was described as 'payment for purchase of 30.999 percent participatory interests in authorised capital of Redwade LLC'.

(iv) Delvenisto then made two transfers to Cydrine: (a) US\$44,421,780; and (b) US\$587,227.79 that were described as loan payments and interest.

(v) Cydrine then transferred US\$45 million to Garrison that was described as a loan payment.

(vi) Garrison then converted US\$45 million into 2,609,775,000 roubles.

27.2. Subsequently, on 3rd November 2017, Garrison transferred to Fintailor the sum of 2,570,000,000 roubles that was described as 'replenishment of brokerage account', thereby completing the circular movement of the funds.

28. In the premises, PSC manufactured a contribution of US\$45 million supposedly derived from Wolater's (and thus Mr Usanov's) own funds, whereas these funds never left the PSC group and were never Mr. Usanov's own funds."

[24] The Statement of Claim then goes on to describe the dissipation of assets, which I do not need to set out. The claims are defined as being (i) a constructive trust because the loan was obtained by fraud; (ii) knowing receipt; and (iii) dishonest assistance. I will come back to those issues. It can be seen that there are three and only three allegations of fraud:

- (1) The para 11 misrepresentations,
 - (a) that high quality coal was mined in KBY's mine; and
 - (b) that KBY was an active business with potential for returns.
- (2) The para 12 misrepresentation that \$45 million was available from Mr. Usanov's own funds through Wolater for the purpose of acquiring 31 percent of Redwade.
- (3) That Mr. Usanov was a front man for a fraud committed by the Ananyev Brothers.

[25] It is convenient to consider this last allegation first. The starting point is that it is not in itself fraudulent to sell an asset at more than it is worth. Suppose I have an old motorcar. I know its gear box is about to fail. The cost of repair would exceed the value of the car. There is no fraud in my selling the car at the best price I can obtain. Likewise, here, taking Alfa-Bank's case at its highest, suppose the mine definitely had a negative value and the Ananyev Brothers knew that. It would not be fraudulent for the Ananyevs or PS Bank or PSC to want to offload the mine as soon as possible.

- [26] Whether morally that is right is a quite separate question. Adherents to the philosophy of G.E. Moore set out in *Principia Ethica*¹¹ might intuit that selling a dud is immoral. The law, however, has traditionally followed a utilitarian approach, holding that *caveat emptor* promotes the greatest happiness of the greatest number. It has required statutory intervention to give consumers greater protection than the ordinary common law.
- [27] There is no suggestion in the Statement of Claim, still less any pleading, that Russian law is any different. Alfa-Bank is the biggest privately owned bank in Russia. It can be expected to look out for its own interests.
- [28] In order to establish a claim for fraud in respect of the sale of an asset at over value, the claimant must establish some additional feature. Typically, this would be an oral or written misrepresentation, but there can be other ways to establish fraud, such as fraudulent concealment or the classic mining fraud of seeding an unproductive mine with gold ore from a different site. In the current case, the only additional elements Alfa-Bank have been able to identify are the para 11 and 12 misrepresentations.
- [29] In my judgment, the third head of fraud adds nothing to the first two heads of fraud. If the bank cannot succeed on the first or second head, it cannot succeed on the third.
- [30] I thus turn to the para 11 representation. I remind myself that a claim for fraudulent misrepresentation consists of four elements:
- (a) a misrepresentation of fact or law either express or implied must be made;
 - (b) the false representation must have been made knowingly without belief in its truth or recklessly;

¹¹ Cambridge, 1903.

- (c) the representation must be made with the intent to deceive the claimant.
In other words, that it should be acted upon by the claimant;
- (d) the claimant must show it relied on the representation.

[31] As to (a), Mr. Choo-Choy QC submitted that the para 11 representations were too vague and were at most a statement of opinion. He relied on the case of **Brown v Innovatorone plc**.¹² This was a case where the claimants had been persuaded to invest in a number of tax avoidance schemes and it was pleaded that there were a number of representations made by the defendants in the information memorandum which was the basis on which investors invested.

[32] At para [903], the judge set out some of these, including, a representation that “the acquisition cost for the technology rights bore a reasonable relationship to its true market value”, described as “the technology price representation”, and a representation: “That the technology rights, the proposed business, its prospects, its funding and its proposed operators (including legal and technology advisers) business, its prospects, its funding and its proposed operators (including the Administrator, Operators and the Exploiter) and advisers (including legal and technology advisers) had been assessed with appropriate due diligence (‘the due diligence representation’).”

[33] He discussed those at paras [905] to [906] and said:

“Many of the alleged representations relied upon cannot be described as statements of present fact but amount at most to statements of opinion or expectation. The IMs must be read as a whole and each contained a number of explicitly stated assumptions and set out a range of risk factors associated with the investment. Read alongside those assumptions and risk factors, statements as to tax relief or potential commercial success cannot reasonably be regarded as statements of present fact.

¹² [2012] EWHC 1321 (Comm). The representations are numbered 231.2.4 and 231.4.

[34] The Claimants' case was put on the basis of the representations being statements of present fact. There was no pleaded case that statements of expectation, belief or of opinion based on reasonable grounds were made.

"906. In so far as the Claimants were alleging implied representations it was incumbent on them to prove that such representations were understood to have been made since otherwise there could be no reliance. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding from Lead Claimants or IFAs. Equally, in so far as deceit was being alleged, it was incumbent on the Claimants to prove that the alleged representor understood a representation to the alleged effect to have been made. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding."

[35] The next case on which he relied was **Standard Chartered Bank v Ceylon Petroleum Corp.**¹³ This concerned the sale of hedging contracts to the defendant petroleum company which proved a disastrous investment. Again, there was an attempt to set aside the contracts for representation. At para [557], the judge says:

"CPC's case was that, by the Term Sheets it sent to CPC, SCB impliedly represented that:

- (1) The transactions were a true hedge for CPC's physical exposure;
- (2) The transactions were part of a proper hedging strategy;
- (3) The transactions were consistent with the justification for hedging stated in the Study Group Report."

At para [562], the judge held:

"In relation to the alleged implied representations I find as follows:

- (1) For the reasons set out above, the express statements in the Term Sheets are not a sound or proper foundation for the implied representations alleged.
- (2) In any event there is no basis in the Term Sheets or their context for the glosses which make up the alleged implied representations, namely that they were 'true' hedges, or that they were 'part of a proper hedging strategy' or that they 'were consistent with the justification for hedging stated in the Study Group Report;

¹³ [2011] EWHC 1785 (Comm).

(3) The Term Sheets do not refer to any of these matters and they are vague, imprecise and inherently implausible statements for a selling bank to make. The vague and uncertain nature of the statements mean that they are ill-suited to constitute actionable statements. What, for example, is meant by a 'true hedge', a 'proper hedging strategy' and how, precisely, is a bank meant to judge whether the benefits for its counterparty of any transaction outweigh the risks? A reasonable person would not have understood that SCB was making representations in such vague and ill-defined terms."

[36] I will pass over (4). The judge's conclusion at (5) was: "I accordingly find that none of the alleged implied representations were made."

[37] Now these cases are more in the way of examples than stating fresh principles of law, but they are instructive in showing how statements should or should not be interpreted as actionable representations. Here, the Claimant complains that Mr. Usanov said the mine had high quality coal. But what does that mean? I suppose one could infer that it is not poor quality brown coal, but here it is common ground between all the mining consultants who have seen the mine that the coal consists of various varieties of T-grade coal, which is a black coal, some of which is suitable for metallurgic purposes in the steel industry.

[38] Now there are various issues about matters such as the ash content of the coal, but there is no sensible way of defining what high quality coal might be. There is no evidence nor any pleading that it is a term of art in the Russian mining industry. In my judgment, it is too vague to be actionable. Similar issues arise with the alleged representation that the mine was an active business with the prospect of returns. How active is active? This was a working mine and after completion, Mr. Usanov wanted to borrow more money to buy more equipment. What does the prospect of returns mean? The first IMC report was very bullish about the mine but pointed to market volatility.

[39] In the Alfa-Bank credit committee's note of 10th October 2017, it set out the consensus coal price forecast showing the price dropping from \$100 a ton in 2018

to \$89 a ton in 2022. It expressly pointed out that one of the risks in making the loan was “industry risks (market volatility)”. The second IMC report from May 2018 says there were operational reasons, including restrictions imposed by the local council in early 2018, and changes in market conditions which affected returns.

[40] In my judgment, the second part of the para 11 representations is not actionable either. The pleaded matters are too vague and are expressions of opinion. Since the Claimant fails to establish the first element of fraudulent misrepresentation, it is not possible to assess the state of mind or knowledge and intention of Mr. Usanov to determine whether an arguable case on the second and third elements of a fraudulent misrepresentation claim are made out.

[41] Strictly, I do not need to consider the last element of causation, but as it raises different issues to the first three, it is sensible to look at it. Here it must be remembered that Alfa-Bank carried out its own full due diligence, including a very full report from IMC. It is, in my judgment, a reasonable inference from that fact alone that the bank placed reliance on IMC for the mine’s condition and future profitability rather than on any vague representations made by Mr. Usanov. But the fact does not stand on its own.

[42] Firstly, once disaster struck, the bank sued IMC for professional negligence. A key element of that cause of action in Russian as in English and BVI law, is that the professional negligence was causative of the Claimant’s loss.

[43] Now, it is true that — somewhat surprisingly — the Russian Courts at all four instances decided that the bank had not adequately proven causation against IMC. But what is important for our purposes, rather than what appears to have been a technical evidential failing in the way the bank sought to prove its reliance in the Russian Court proceedings, is the fact that the bank was asserting in those proceedings that it was IMC, rather than Mr. Usanov, which caused the bank to enter the transaction.

[44] Secondly, the bank in its loan documents required extensive contractual representations and warranties be given. The references are in footnote 17 of Mr. Choo-Choy QC's skeleton. If the para 11 representations were as key to the bank's decision to lend as the Claimant now asserts, one would expect them to be there.

[45] Taking all these points in the round, in my judgment the Claimant does not meet the **Niedersachsen** hurdle in relation to the para 11 allegation.

[46] I turn then to the para 12 misrepresentation. Here the key issue is what is meant by 'own funds', a term used by UBS in its correspondence with Alfa-Bank. Now it is right that the bank's credit policy limited lending on assets like mines for a maximum of 80 percent and for good reason, but there does not seem to have been any, or any great, interest by the bank in how Mr. Usanov was paying for his 31 percent share of Redwade. No due diligence was carried out into how Mr. Usanov kept his assets or what they were. No contractual representations or warranties were asked of him by the bank.

[47] The bank was given evidence of payment by Wolater for the 31 percent shareholding in Redwade.¹⁴ It did not ask for anything more. Moreover, the monies which Wolater used to pay for the 31 percent were actually Wolater's monies owned by it both legally and beneficially. The monies were paid by Anevlessa to Wolater as a non-refundable and non-distributable contribution to subsidiary under a resolution dated 11th October, 2017. Faced with these difficulties, Alfa-Bank has been revising its case on what was meant by 'own funds'.

[48] Kipford raised a Request for Further Information in respect of the para 12 representation. The Further Information reads as follows:

"Statement of Claim, paragraph 12: Request. In the final sentence of paragraph 12 it is stated that 'in the course of the parties' negotiations, Mr. Usanov represented to Alfa-Bank that US\$45 million was available from his

¹⁴ See bundle F2/2/1135 to 1138.

own funds (through Wolater) for the purposes of acquiring 31 percent of Redwade'.

(1) Please specify when, to whom, where and how Mr. Usanov allegedly made this representation to Alfa-Bank.

(2) Was any such representation made or evidenced in writing? If so, please provide a copy of all relevant documents or communications.

(3) What was Alfa-Bank's understanding (and clarify each relevant individual's understanding that is intended to be relied upon), if any, as to the ultimate source of Mr. Usanov's or Wolater's funds for the purpose of acquiring 31 percent of the shares of Redwade? Explain precisely how and why Alfa-Bank (and each relevant individual on Alfa-Bank's behalf) acquired the alleged understanding.

Response:

(1) The best details the Claimant can currently provide are that, in every interaction Mr. Usanov had with representatives of the Bank concerning this transaction, he told them that he had his own funds (through Wolater) for the purpose of acquiring 31 percent of Redwade. Since Mr. Usanov is aware of the interactions he had with the Bank's personnel this is information he is already aware of.

(2) The representations were made orally, but they are also evidenced by documents Mr. Usanov either provided, or caused others to provide on his behalf. The relevant documents are an email dated 22nd August 2017 (served with this Response) and the bank statements which were exhibited to the affidavit of Mr. Negrey which confirmed that Wolater had the funds Mr. Usanov represented were his own and available for the purpose of acquiring 31 percent of Redwade.

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

[49] That was then amplified by Mr. Negrey in his third statement where at para 23 he said:

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

- [50] I cannot accept what Mr. Negrey suggests there. If money is given to somebody, it becomes that person's money. If parents give their adult son or daughter money for a deposit on a house, the funds become those of the son or daughter. The case of borrowing is perhaps more arguable. But even there, borrowing monies can properly be regarded as the borrower's own funds. If someone buys a car, it matters not whether they had the money in the bank to withdraw or used an overdraft facility. Either way, the car is bought with the buyer's own funds.
- [51] In my judgment, the para 12 allegation does not reach the **Niedersachsen** hurdle. Wolater used its own funds to buy the 31 percent share in Redwade.
- [52] This is sufficient to dispose of the cross applications in respect of the freezing order, but I should briefly deal with the other substantive issues in the case.
- [53] Mr. Choo-Choy QC argues that it is fanciful to suppose that Mr. Usanov, who held senior management positions in major mining ventures, would get involved in a fraudulent scheme with the Ananyevs. That seems to me to be a point for trial. The circular movement of monies through Wolater suggests that there must have been some understanding between Mr. Usanov and the Ananyevs. Mr. Choo-Choy also argues that there are various legal difficulties with the claim to any interest in the money transferred to Kipford. He says the claims for knowing receipt and in restitution are doomed to failure because the bank has affirmed the loan agreement by suing KBY through judgment in Russia and an attempt to rescind the Sale and Purchase Agreement between KBY and Wolater and Delvenisto failed in the Russian Court.
- [54] I accept that the points made by Mr. Temmink QC in his skeleton, paras 11, 12 and in para 16, in respect of dishonest assistance, constructive trust, tracing and restitution, and in paras 35 to 39. These points are properly arguable. If fraud were proved, it is likely that that would unravel everything. But since fraud has not been

proved to the relevant standard, that argument drops to one side. If the claimant did meet the **Niedersachsen** test, then I would find there was a real risk of dissipation. The way monies have been moved shows a real risk that assets will continue to be moved so as to render execution difficult or impossible. But in the event, these points do not save the freezing order.

[55] This leads to the issue of material non-disclosure. This becomes relevant if my conclusions under the para 11 and para 12 misrepresentation claims and the front man fraud allegation, or indeed any of them are wrong. The parties were happy to take my statement of the law on material non-disclosure from my decision in **Great Panorama International Ltd v Qin Hui**.¹⁵ At para [70] I said:

“A party’s duty making an *ex parte* application is well established. The *locus classicus* is the judgment of Ralph Gibson LJ in *Brink’s Mat Ltd v Elcombe*:¹⁶

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

(2) The material facts are those which is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

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

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order. That is a reference to **Columbia Picture Industries Inc v Robinson**.¹⁷ And (c): ‘The degree of legitimate urgency and the time available for the making of inquiries.’

¹⁵ [2020] ECSCJ No. 278.

¹⁶ [1988] 1 WLR 1350 at p 1356. I will omit citations.

¹⁷ [1987] Ch 38.

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

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

Finally, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms. When the whole of the facts, including that of the original non-disclosure, are before [the court], it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.” However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief sought.’

This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari**,¹⁸ and most recently, in **Paraskevaides and another v Citco Trust Corporation and others**,¹⁹ where Carrington JA said:

‘31. ...The onus is on an applicant for *ex parte* relief to comply with the obligation to make full and frank disclosure as *ex parte* applications are, generally speaking, inconsistent with the adversarial nature of court proceedings under our system of law which usually permits a respondent to be heard before an order is made against them. The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the

¹⁸ [2005] ECSCJ No 46.

¹⁹ [2020] ECSCJ No 107.

order being sought. This requires not only objective consideration of the matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may be available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts. The extent of this obligation to make such inquiries is dependent on all the circumstances including the nature of the case being advanced, the order being sought, the effects of such an order, if granted, on both the applicant and potential respondent and the interplay between the degree of urgency of the application and the time available for making such inquiries.

Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the *ex parte* order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted.”

[56] Mr. Choo-Choy QC relied on a large number of alleged non-disclosures. With respect, most of these are criticisms of the emphasis put on points on the *ex parte* and the failure to flag up legal difficulties. I am not going to lengthen this judgment by detailed examination of all of them. Most are at best minor points where a discretion might well stand to be exercised in favour of the bank.

[57] I consider that there are two really serious non-disclosures. These are the two Russian Court cases, the first brought by Alfa-Bank against IMC for professional

negligence; and the second, the KBY/Wolater case which sought to set aside the SPA for fraud.

[58] As regards the IMC case, I have already explained the significance of Alfa-Bank's assertion of causation against IMC. Mr. Temmink QC says that since the bank actually lost on causation, the case actually assists him. I disagree. Firstly, the dismissal of the case in all four instances in Russia was on technical procedural or evidential grounds, rather than on the factual merits. Secondly, it is the fact that the bank was asserting causation of loss against IMC which is significant. Now it is theoretically possible to have two persons jointly causative of harm, but on the facts of a case like this, the reality is the bank will rely on its own professional advisers and its own due diligence, not on the customer.

[59] As regards the KBY/Wolater case, Mr. Temmink QC says that that was litigation between different parties so the Russian judgments are not admissible in evidence under the principle of **Hollington v F. Hewthorn and Co Ltd**.²⁰ What he says is perfectly true when it comes to final determination of matters at trial. But in my judgment, it no longer represents the law on interlocutory applications where it's necessary to consider whether a party has shown a good arguable case.

[60] **VTB Bank v Miccross Group Ltd**²¹ concerned the enforcement of a judgment against a Mr. Skurikhin who was said to be a fraudster. One of the entities against which enforcement was sought was a Nevis discretionary trust called Eastbridge. There had been two judgments in English proceedings given by two deputy High Court judges, Christopher Butcher QC (now Butcher J) and Alice Robertson QC. I held at para [84]:

"This leaves the question whether VTB Bank can rely on the Butcher and Robertson judgments in order at the current interlocutory stage to show a good arguable case that Eastbridge [which was not a party to the action which was the subject of those two judgments] is also a vehicle controlled by Mr. Skurikhin. The classical approach in **Hollington v F. Hewthorn &**

²⁰ [1943] KB 587. In post-judgment submissions, Mr. Temmink QC said that he had in fact conceded this point.

²¹ [2020] ECSCJ No 193.

Co Ltd, as confirmed in **Rogers v Hoyle**,²² and by the Privy Council in **Calyon v Michailaidis**²³ is that, in the absence of an estoppel *per rem judicatam*, the findings of a judge in one case are not admissible in another case. As Christopher Clarke LJ held in **Rogers**:

'39. ...The trial judge must decide the case for himself on the evidence that he receives and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is therefore, as a matter of law, irrelevant and not one to which he ought to have regard.'

[61] However, there appears to be an exception to this rule in the case of interlocutory applications. In **Sabbagh v Khoury**,²⁴ applied by me in two cases, **Advalorem Value Asset Fund Ltd v Redford** ²⁵ and **Re Wardour Trading Ltd Cohen v Nekrich**,²⁶ there had been earlier litigation on related matters (the Masri litigation), but not between the same parties, so *res judicata* did not apply. Carr J (as she then was) held:

'[202] Sana's reliance on the Masri litigation has generated much heated debate. There is first an issue as to admissibility. The defendants contend that, as a matter of principle, judicial findings in previous litigation are not admissible and that is the case even if, unlike in this case, they related to the same subject matter...

[203] Sana, on the other hand, contends that the rule in **Hollington v Hewthorn** does not prevent the use of findings in other litigation at an interlocutory stage. This is because the rationale of the rule in **Hollington v Hewthorn** is to exclude findings that are no more than the opinion of another person, based on unknown facts, so as to preserve the fairness of the trial. There is no risk to fairness of a trial if such material is introduced on the question of whether or not there is a serious issue to be tried. Such material can assist in identifying the evidence which can reasonably be

²² [2014] EWCA Civ 257, [2015] QB 265.

²³ [2009] UKPC 34, 2007-09 Gib LR 321.

²⁴ [2014] EWHC 3233 (Comm).

²⁵ Supreme Court of Gibraltar, decision of 4th September 2015, unreported.

²⁶ 2016 Gib LR 46.

expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage. Reliance is placed on **Joint Stock Co Aeroflot – Russian Airlines and Berezovsky**.²⁷ There, when considering the question of whether or not there was a serious issue to be tried for the purpose of service out of the jurisdiction, Aikens LJ held that the claimant could rely on the findings of the Swiss criminal court...

[204] The defendants counter with reliance on the earlier Privy Council decision in **Calyon and Michailaidis...** and **Ferrexpo v Gilson Investments**.²⁸

[206] I am inclined to agree with Sana that the findings of another court may be relied on at an interlocutory stage for the limited purpose of demonstrating whether there is a serious issue to be tried, for example in considering what material at trial there might be. The Court of Appeal in **Joint Stock Co Aeroflot – Russian Airlines v Berezovsky** clearly thought it appropriate to do so, and would have been well aware of the relevant principle in **Hollington v Hewthorn**. To deploy the findings of another court in this way does not endanger a fair trial for any of the parties. The situation in **Calyon and Michailaidis** is distinguishable: there the findings of the Greek court were being relied on as conclusive, alternatively probative, evidence of a central plank of the Claimants' case, without more.

[207] Thus, to the extent that the Masri litigation is being used simply to inform the question of whether there is a properly arguable claim in prospect, that is, in my judgment a legitimate exercise in principle. To the extent that Sana seeks to use any findings in the Masri litigation as admissible evidence to prove a fact in issue or a fact relevant to the issue in these proceedings, I agree with the Defendants that she cannot do so (see para [28] of the judgment in **Calyon and Michailaidis...**).

[62] I held that "it is proper to take the Robertson judgment into account in considering whether there is a good arguable case that Eastbridge is, like Berenger, a vehicle under the effective control of Mr. Skurikhin."

[63] In the current case, it seems to me to be highly relevant that the Russian Courts, after full trial procedure, dismissed the claim to set aside the SPA. Now civil law systems approach to issues of fraudulent misrepresentation is different to the common laws. Whereas we concentrate on the misrepresentation, civil law systems

²⁷ [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242.

²⁸ [2012] EWHC 721 (Comm); [2012] 1 Lloyd's Rep 588 at para [51].

concentrate on the vitiation of the representee's free will by the mistaken belief caused by the misrepresentation. Russian law appears to adopt this civil law approach. These legal differences are, however, irrelevant in the current case.

[64] The key fact is that the Russian Courts dismissed the fraud claim. It is difficult, in my judgment, to conceive of a more serious non-disclosure than the fact that a court of competent jurisdiction has, after a full trial and after appeals, dismissed a claim based on the selfsame allegations of fraud relied on in the case before the instant court.

[65] I should add that even if the **Sabbagh v Khoury** principle is wrong, although it represents the law of Gibraltar as well as that of England, there is another basis on which it should have been put in evidence. There is an arguable issue as to whether Alfa-Bank was standing behind the KBY/Wolater litigation. If it was, then it was arguably a privy to that litigation: see **Re Lenox Group Ltd**,²⁹ which applied **House of Spring Garden Ltd v Waite**.³⁰ Either way, it should have been disclosed.

[66] Mr. Negrey says he did not know of either judgment when he made his affidavit in support of the *ex parte* injunction. As Mr. Temmink QC rightly accepted, that is irrelevant. The bank knew, and Mr. Negrey needed to make appropriate internal inquiries at the bank. Even if Alfa-Bank is a very large organisation, responsibility for a particular loan, such as that in this case, must be concentrated in a small number of people.

[67] I have a discretion whether to excuse the non-disclosure or whether to discharge the original injunction and grant a fresh injunction. In my judgment, neither course is appropriate. This was serious non-disclosure. Even if I am wrong in concluding that Alfa-Bank has not reached the **Niedersachsen** hurdle and the current exercise is necessarily posited on that counterfactual, the case against Kipford is weak. This

²⁹ [2021] ECSCJ No 445 and [2021] ECSCJ No 605.

³⁰ [1991] 1 QB 241.

is not, in my judgment, a case where it is appropriate to exercise my discretion in favour of Alfa-Bank.

[68] Accordingly, I refuse to continue or reimpose the freezing order on this ground too.

[69] Lastly, I should say there is an application by Alfa-Bank to adduce further factual and expert evidence. In the light of this judgment, there is no prejudice to Kipford in allowing the evidence in and accordingly, I allow the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar