

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

CLAIM No: BVIHC (COM) 2014/0062

BETWEEN:

JSC VTB BANK

Claimant

and

~~(1) ALEXANDER KATUNIN~~

(2) SERGEY TARUTA

Defendants

Appearances:

Mr. Grant Carroll, Mr. Daniel Mitchell and Mr. James McDermott of Ogier for the
Claimant

Mr. Adrian Francis, Mr. Scott Tollis and Mr. Carl Moran of Maples for the
Defendant

2021 November 25
 November 29

JUDGMENT

[1] **JACK, J [Ag]:** On 15th June 2021 I gave judgment in principle recognising a judgment of the Meshchansky District Court of Moscow given against the defendant ("Mr. Taruta") in favour of the claimant ("VTB") on 28th February 2014 as varied by a subsequent decree of the same Court dated 24th March 2014. The precise amount due in respect of the Russian judgment was stood over for separate determination.¹

¹ The case management decisions resulting this splitting of issues were approved by the Court of Appeal, *sub. nom.* Sergei Taruta v JSC VTB Bank, BVIHCMAP 2021/0002, 2021/0008, 2021/0012 (Determined 2nd June 2021).

- [2] The determination of amount was listed for hearing on 25th November 2021. Mr. Osykin, an employee of a VTB affiliate, was due to give evidence. Shortly before the hearing, however, the parties were able to agree that the sum due under the judgment was \$29,993,498.25. There is an issue as to whether interest under the **Judgment Act 1907**² should run from 15th June 2021 or from 25th November 2021. I have directed that the parties make written submissions on that point.
- [3] This left one matter to determine. VTB seeks the appointment of equitable receivers by way of final execution against Enard Investments Ltd (“Enard”), a BVI company. The application is opposed by Mr. Francis on Mr. Taruta’s behalf.
- [4] It is common ground that the shares in Enard are held 100 per cent by a Cypriot company, Arrowcrest Ltd (“Arrowcrest”). In turn Maples, who represent Mr. Taruta, accepted in a letter of 21st February 2021 that the shares in Arrowcrest were owned 100 per cent beneficially by Mr. Taruta. This raises the question whether VTB can enforce directly against Enard, or whether they have to take enforcement measures in Cyprus.
- [5] The application for the appointment of receivers was originally directed at all assets of Mr. Taruta in this Territory without properly identifying what those assets were, which is not appropriate: **VTB Commodities Trading DAC v Belfore Real Estate Ltd**.³ This has, however, been corrected. The application is now solely for the appointment of receivers over the shares in Enard.
- [6] Mr. Francis submits that since Arrowcrest is the legal and beneficial owner of the shares in Enard Mr. Taruta owns no assets in the BVI against which enforcement can be affected. This is trite law, he says, citing my decision in **Industrial Bank Financial Leasing Co Ltd v Xing Libin**,⁴ where I said:

² Revised Laws of the Territory of the Virgin Islands, cap 35.

³ [2021] ECSCJ No 564, also known as the Mazurov Case.

⁴ BVIHC (COM) 32 of 2018 (Determined 28th January 2020).

“[9] There are two forms of order which the Court makes for the appointment of an equitable receiver. As I discussed in **VTB Bank (Public Joint Stock Company) v Miccross Group Ltd and another**⁵ (**‘Miccross’**):

‘[24] There is an important difference between an interim order for the appointment of a receiver and a final order for such an appointment. The former is made in order to preserve assets for execution. It is similar to a freezing order. The latter is a form of execution in itself. To obtain the final order, a judgment creditor must prove on balance of probabilities that the asset in respect of which the receiver is appointed is owned legally or beneficially by the judgment debtor.

[25] By contrast, the Court is willing on an interim application to appoint a receiver over assets which fall within the much wider definition of assets in the standard English freezing order. This form of order applies to:

“all the Respondent’s assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent’s assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions.”

This makes an interim order potentially more onerous than a final order.”

[10] Applying that difference to the current case, the position is that the assets of Firstwealth [a BVI company] are under the *de facto* control of Mr. Xing, so that the appointment on an interim basis of an equitable receiver over those assets would be (at least potentially) legally permissible. (In practice, this will be rare, because a freezing order will generally be sufficient: see the result in **Miccross** itself, which was a case of an interim order.) The assets of Firstwealth are, however, not within the *de jure* ownership of Mr. Xing. It is trite law that the assets of a company are not the assets of even a 100 per cent shareholder. (There is an exception if the corporate veil stands to be pierced, but this will now-a-days be vanishingly rare in the light of **Prest v Petrodel Resources Ltd**⁶. No question of piercing the corporate veil arises in the current case.) Insofar as the bank seeks a final order for the appointment of a receiver over ‘any and all rights the company [Firstwealth] may have whatsoever and howsoever found’, this is misconceived in my judgment. The rights of the company are not the assets of the sole shareholder, so there is no jurisdiction to make a final order appointing a receiver over those assets.

⁵ [2020] ECSCJ No 193.

⁶ [2013] UKSC 34, [2013] 2 AC 415.

[11] Where a final order is made, what is legally permissible is in my judgment this. An equitable receiver can be appointed over the shares. He can then use his powers as receiver to replace the existing director with a new director, usually himself. He can then use his power as a director to convert the assets of the company into money. Alternatively, he can put the company into voluntary liquidation. In either case he has to have regard to the interests of third party creditors of the company.

[12] An equitable receiver can be appointed over legal rights which the judgment debtor has. This is especially so, if these are rights against which other means of execution are not available. The Privy Council (on appeal from Cayman) in **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**⁷ approved the appointment of receivers over the judgment debtor's power to revoke a Cayman trust. The exercise of the power of revocation would release assets against which the judgment creditor could execute.

[13] The principles for making an interim order are wider than those for making a final order, in that an interim order can cover more assets than a final order (*de facto* control versus *de jure* control), but narrower in that the grant of an interim order is subject to a more restrictive exercise of the Court's discretion. An interim appointment is a super-turbo-charged *Mareva*. It will only be granted where an ordinary freezing order will not do. By contrast, a final order will be made — always subject of course to the Court's discretion — whenever ordinary means of execution fail or there is some 'hindrance or difficulty' in such execution... This is wider than the narrow discretion applicable to making an interim order."

- [7] The appropriate enforcement route, Mr. Francis submits, is for VTB to go to Cyprus and obtain a charging order or receivership over Arrowcrest.
- [8] What these submissions overlook is the relevance of **Duomatic** principles⁸ to Mr. Taruta's control of first Arrowcrest and then second, through Arrowcrest, Enard. The doubts which used to exist as to whether **Duomatic** applied to beneficial owners of shares have been laid to rest by the Privy Council in **Ciban Management Corp v Citco (BVI) Ltd**.⁹ As ultimate beneficial owner of Arrowcrest, Mr. Taruta had **Duomatic** control of Arrowcrest. Equally, however, he had **Duomatic** control of Enard as a result of his **Duomatic** control of

⁷ [2011] UKPC 17, [2012] 1 WLR 1721.

⁸ See *Re Duomatic Ltd* [1969] 2 Ch 365 and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at p 280 ("a company is bound, in a matter which is *intra vires* and not fraudulent, by the unanimous agreement of its members"), approved by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at p 506.

⁹ [2020] UKPC 21, [2021] AC 122 at [47] (Lord Burrows).

Arrowcrest. That power of control is in my judgment a right recognized in law. As I held in **Xing Liban**,¹⁰ “[a]n equitable receiver can be appointed over legal rights which the judgment debtor has”, citing the Privy Council decision in **Tasarruf Mevduati Sigorta Fonu**, which approved the appointment of receivers over a judgment debtor’s power to revoke a Cayman trust. The Privy Council impliedly overruled Bannister J’s view in **Dalemont Ltd v Senatorov**¹¹ that receivers could not be appointed over a mere power.

- [9] The **Duomatic** principle does not apply if the company or companies over which the **Duomatic** power is sought to be exercised is insolvent, or will become insolvent as a result of a transfer of assets pursuant to a **Duomatic** authorization or direction. Thus, in the current case, if Arrowcrest were to become insolvent as a result of its asset, Enard, being the subject of execution, the **Duomatic** power could not be used to take control of Enard. There is, however, no evidence that Arrowcrest is insolvent or would become insolvent if receivers were appointed over the shares in Enard. Given that Mr. Taruta is the ultimate beneficial owner of both Arrowcrest and Enard, he would have been in a position in the current action to adduce evidence of any insolvency problems caused by the appointment of receivers over Enard.
- [10] Mr. Francis argues that a receiver cannot be appointed over the shares in Enard without Arrowcrest being made a party to the action. This is a purely formal objection, given that Mr. Taruta is the beneficial owner of both. However, I agree that as a technical matter it is necessary to add Arrowcrest as a party so that it is bound by the judgment. I shall direct that Arrowcrest be added as a party and have twenty-one days within which to make any applications or representations it seems fit to make. Service is dispensed with.
- [11] I stand back and consider whether it is appropriate to appoint receivers over the shares in Enard (technically the appointment is over the power held by Mr. Taruta under **Duomatic** principles to direct how the shares in Enard should be voted). There is no other means in this jurisdiction of enforcing Mr. Taruta’s judgment debt. The appointment of receivers is always discretionary. Contrary to Mr. Francis’ submissions, enforcing the judgment debt in

¹⁰ At [12].

¹¹ [2013] ECSCJ No 190 at [6].

Cyprus is not a better alternative. The purpose of enforcing against Arrowcrest would be to take control of Enard. That can be done by appointing receivers here without the pointless expenditure of time and money in pursuing proceedings in Cyprus. In my judgment it is appropriate to appoint receivers.

- [12] Given that Arrowcrest has twenty-one days to make any application it deems appropriate, I direct that the receivers should procure that any directors of Enard appointed by them should not dispose of assets of Enard, save in the ordinary course of business, for a period of twenty-one days after the making of this order.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

SRegistrar