

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM No: BVIHC (COM) 2020/0223

BETWEEN:

BRIEFLINE ASSETS LTD

Claimant

and

**(1) NIKOLAY ANATOLYEVICH FALIN
(2) BELFAST SERVICES SA**

Defendants

Appearances:

Mr. John Carrington QC and Ms. Reisa Singh of Sabals Law for the Claimant
Mr. Stuart Adair, with him Mr. Oliver Clifton and Ms Yegâne Güley of Walkers BVI
for the First Defendant
The attendance of the Second Defendant was excused

2021 June 9 and 10
June 17

JUDGMENT

[1] **JACK, J [Ag.]:** On 23rd December 2020 I granted an application made *ex parte* by the claimant (“Briefline”) for an injunction restraining the defendants (“Mr. Falin” and “Belfast” respectively) from registering any transfer of, or encumbering or diminishing the value of, the shares in Belfast or from alienating, removing or in any way disposing of, or dealing with the assets of Belfast. On 18th January 2021,

Briefline issued an application seeking a continuation of the injunction. It is this application which is now before me.

- [2] The procedural history is an unhappy one, largely due to the congestion of the lists in the Commercial Court. The injunction was amended on 31st December 2020. The initial return date on the injunction was listed on 19th January 2021. As is common, this was a short appointment where I gave directions. These included a provision that time for service of the defendants' defences be extended until 28 days after the handing down of the judgment on Briefline's continuation application. The application was adjourned for a two-day hearing to the first convenient date after 1st March 2021. Regrettably 9th and 10th June was the first suitable date.
- [3] In the meantime, on 26th February 2021 Mr. Falin applied for an injunction restraining Briefline from misrepresenting the meaning and effect of the 23rd December injunction and ordering Briefline to correct any misrepresentations made and for some variations of my order of 23rd December as continued. Unfortunately I was not available to hear the matter. On a certificate of urgency being filed, it came on for hearing before my brother Wallbank J on 9th March. Due to an inadequate time estimate, Mr. Falin's application had to be adjourned for further hearings and has not yet been determined. Both sides were anxious not to delay the hearing of the continuation application, so I heard the matter notwithstanding the outstanding application being heard by Wallbank J. The Commercial Court Users' Group may wish to consider what measures might sensibly be taken to avoid this inefficient use of the Court's limited resources.
- [4] Belfast is separately represented to Mr. Falin. On 8th June 2021, Forbes Hare wrote to the Court in these terms:

"Belfast has considered the issues that need to be dealt with at the Hearing and is of the view that the issues that concern Belfast also concern Mr. Falin. Mr. Falin has filed extensive evidence and a skeleton argument and Belfast believes he will be making substantial submissions at the Hearing. Belfast's position in relation to those issues is an analogue of Mr Falin's position. Accordingly, Belfast does not consider it to be cost effective,

proportionate or an efficient use of the Court's time, for it to attend to simply repeat or adopt the submissions to be made by Mr. Falin. In the circumstances, Belfast has written to each of the Claimant and the First Defendant to propose the following course subject to the Court's agreement:

- (a) For Belfast to be excused attendance at the Hearing, but to attend for the delivery of judgment and/or at any hearing at which consequential matters are to be considered;
- (b) That notwithstanding its non-attendance, Belfast should be bound by any orders the Court may make at the Hearing as though it had been represented at the Hearing;
- (c) That notwithstanding its non-attendance, Belfast should have the benefit of an order as to its costs in the event that the Claimant's injunctive relief is discharged, or, otherwise (for example in the case of a variation), that the question of Belfast's entitlement to its costs should be determined upon the delivery of judgment; and
- (d) In the event of the injunctive relief being discharged, Belfast should (in the usual way and notwithstanding its non-participation at the Hearing) be entitled to call on the undertaking in damages set out in the Order dated 23 December 2020.

The Claimant... has responded to Belfast's proposal and indicates that it has no objection to the proposals at (a) and (b) above. The Claimant has indicated that issues of costs should be determined on the delivery of the Court's judgment and has reserved its position in respect of the matter set out at (d) above."

I acceded to Forbes Hare's request.

Briefline's case

[5] Briefline's case is put as follows in Mr. Carrington QC's skeleton:

"2. Briefline's underlying claim (brought in these proceedings by way of Claim Form and Statement of Claim dated 21 December 2020...) is that a Russian businessman [Mr. Falin], has wrongfully retained Briefline's 100% shareholding ['the Shares'] in [Belfast], a BVI company... The beneficial owner of Briefline is Mr. Thorstenn.

3. Accordingly, Briefline seeks (i) declarations of trust, rescission or other relief in relation to a 'Transfer Back Agreement' pursuant to which it transferred the Shares to Mr. Falin, and (ii) rectification of the share register of Belfast under s.43 of the **BVI Business Companies Act 2004**¹ (as amended) so that it is re-registered as sole member.

¹ No 16 of 2004, Laws of the Virgin Islands.

4. In addition to his refusal to return the Shares to Briefline, Mr. Falin has taken various steps which have given Briefline serious concern that he intends to use his current control over the Belfast group to enrich his own group of companies (including Maximum Invest Holdings Limited... at the expense, and to the severe detriment, of Belfast. One example is Mr. Falin's attempt — restrained by intervention from the Moscow 'Arbitrazh' (Commercial) Court — to use his control over Belfast to transfer at an undervalue one of its majority-owned valuable subsidiary companies, Zheleznodorozhnye Aktiv LLC ("ZHDA"), to Maximum Invest. Mr. Zotov, a representative of Briefline (see further below), estimates the net value of ZHDA to be approximately €100 million.

5. In December 2020, Briefline sought urgent injunctive relief from this Court. The *ex parte* injunction was granted by Jack J to 'hold the ring' in relation to the Shares...

6. After filing the claim and obtaining the *ex parte* injunction, Briefline learned that sometime prior to 3 December 2020 (when Briefline filed a stop notice in respect of the Shares), Mr. Falin arranged for the Shares to be transferred to a newly-incorporated company in St Lucia [I interpolate: it is in fact called Dublin Trade Ltd] in respect of which he claims to be sole member. Briefline also discovered that Mr. Falin has acted in breach of the *ex parte* injunction. As a result, it has made a contempt application against Mr. Falin in these proceedings, which is yet to be heard...

12. It is now common ground that the Transfer Back Agreement — an oral agreement entered into sometime in early December 2018 (on Briefline's case) or late November 2018 (on Mr. Falin's case) — is at the heart of this dispute...

13. Briefline explains the position, in summary, as follows:

(1) The stated purpose of the Transfer Back Agreement, as discussed by [Dmitry Anatolyevich Zotov ('Mr. Zotov')] (who was then acting on behalf of Briefline and Mr. Khorkov, the then ultimate beneficial owner of Belfast) and Mr. Falin at the time it was entered into, was to transfer the Shares to Mr. Falin temporarily to give the appearance that the group of businesses under Mr. Falin's control included ZHDA and SpetsLogistika. Mr. Falin represented that this would improve his negotiating position with banks and leasing companies and therefore allow his businesses to negotiate better payment terms.

(2) Thus, Mr. Falin would receive (effectively be lent) the Shares on the understanding that the arrangement was temporary and the Shares were to be returned to Briefline on demand. To that end, Mr. Falin was to sign an undated share transfer form and issue an irrevocable [power of attorney]

in favour of a Briefline nominee to ensure that Belfast continued to remain under Briefline's control.

(3) However, in breach of that agreement (which, Briefline contends, was used by Mr. Falin fraudulently to camouflage his true aim: to conduct a 'corporate raid' on Belfast), Mr. Falin, among other things, refused to return the Shares and tried to transfer ZHDA into his own group. He has since attempted to take control over SpetsLogistika.

14. Mr. Falin's version of events is rather different:

(1) He contends that Mr. Zotov wanted to 'distance himself' from Belfast, ZHDA and SpetsLogistika because of an investigation into him in connection with another company, TransFin-M JSC ('TFM') (where Mr. Zotov was general director). He contends that Mr. Zotov was ultimate beneficial owner of Belfast at the time.

(2) He also suggests that ZHDA and SpetsLogistika were originally his companies, and he had transferred a majority interest in them to Mr. Zotov in/around 2012/13 because of (unparticularised) illegitimate financial pressures placed upon him.

(3) Mr. Falin says the key purpose of the Transfer Back Agreement was to allow him to remove ZHDA from the Belfast company structure — i.e. when the Shares were returned to Briefline, the Belfast group would no longer include ZHDA. He says that under the agreement, he was to be given a year to effect the transfer.

(4) Mr. Falin says that Mr. Zotov asked for payment of €6m. Mr. Falin says that the consideration given by him for the agreement was of equivalent value:

- (i) forgiveness by SpetsLogistika (majority-owned by Belfast; Mr. Falin holds a 33.3% stake through Valleyview Advisory) of loans which it had made to TransVagonLogistic LLC ('TVL'); and
- (ii) provision of loans to Ms. Tatyana Nikolaevna Nikiforova — who Mr. Falin claims is a 'close associate' of Mr. Zotov."

[6] Briefline's Statement of Claim pleads the Transfer Back Agreement as follows:

"5. In or about late 2018, during a lunch in Matryoshka, a restaurant in Moscow, [Mr. Falin] approached Mr. Zotov, who acted on the instructions of Mr. Khorkov as the ultimate beneficial owner of [Briefline] and on behalf of [Briefline], with a proposed deal under which [Briefline] would permit [Mr. Falin] to become registered as the shareholder of [the Belfast shares]. [Mr.

Falin] represented to [Briefline] through Mr. Zotov that the intention of [Mr. Falin] was to demonstrate to banks and leasing companies with which he was dealing that he had consolidated the Russian subsidiaries of [Belfast] with [Mr. Falin's] other assets so that his businesses would be able to procure better lending terms.

6. [Mr. Falin] further represented to [Briefline] that he would hold the Shares as bare nominee for [Briefline] with [Briefline] at all times retaining the full beneficial interest in the Shares.”

- [7] The pleading then goes on to say that this was a fraudulent misrepresentation and that Briefline rescinded the Transfer Back Agreement. At para 14 it pleads the “Khorkov letter” to which I shall come and says that it “instructed Ms. Van Zyl to cancel the share certificate No 8 (in favour of Mr. Falin). Thereafter on 20th March 2019 Ms. Van Zyl made a board resolution to revoke the share transfer, the share certificate No 8 and to reinstate share certificate No 7 (in Briefline’s favour).

Mr. Falin’s case

- [8] An important element of Mr. Falin’s case is the assertion that Mr. Zotov and people associated with him, including Mr. Khorkov, Magnus Thorstenn (“Mr. Thorstenn”) and Elena Denisova (also known as Lena Mishkina) (“Ms. Denisova”) were the controllers of Briefline and — until Belfast lost the arbitration to which I shall come — Belfast. I shall return to my findings on this.

- [9] Mr. Adair says:

“8. Briefline purports to bring (a) contractual claims in respect of an oral agreement [‘the Transfer Back Agreement’] that was concluded during meetings between Mr. Falin and Mr. Zotov in ‘late 2018’... and (b) a claim that it is the beneficial owner of the shares in Belfast. It has produced no documentary evidence at all to support those assertions. However, contemporaneous documentary evidence that was not drawn to the attention of the Court on 23rd December 2020 renders those claims completely untenable:

(1) Briefline alleges that Mr. Zotov was acting as its agent in concluding the Transfer Back Agreement, but has failed to plead or disclose in evidence that, as is clear from contemporaneous documents, Briefline was not

incorporated until 2nd November 2018 and was not inserted into the structure as the shareholder of Belfast until some time after the conclusion of the Transfer Back Agreement;

(2) Briefline's claim that it has been the beneficial owner of the shares in Belfast since 30th November 2018 is contradicted by contemporaneous documentary evidence, which shows that (a) Briefline was not introduced into the transaction until 11th December 2018, and was only introduced by the Controllers as a nominee shareholder, (b) Mr. Falin acquired the beneficial ownership of the shares in Belfast and (c) the Controllers procured that Mr. Falin was provided with a certificate of incumbency confirming that he was the beneficial owner of the shares in Belfast.

9. In breach of the duty of full and frank disclosure Briefline owed when making its *ex parte* application for the Injunction on 23rd December 2020, Briefline failed to draw the attention of the Court to a very large volume of highly material evidence that undermines the key elements of the case that Briefline is advancing.

10. The documentary evidence now placed before the Court by Mr. Falin establishes that the Controllers have a history of concealing important evidence and misleading tribunals and courts. This conduct and other matters referred to below give rise to very real concerns regarding the *bona fides* of these proceedings and the veracity of the evidence filed and served on behalf of Briefline for the purposes of the hearing on 23rd December 2020 and generally.

11. Mr. Falin's case has always been that Mr. Zotov is the beneficial owner of Briefline. [Mr. Zotov's first affidavit] contains an admission at paragraph 48(a) that he (Mr. Zotov) is 'indeed the UBO of Belfast', thereby confirming Mr. Falin's evidence and contradicting Briefline's pleaded case that Mr. Thorstenn is the UBO of Briefline and Belfast. This admission raises serious questions regarding the role of Mr. Thorstenn in these proceedings, particularly given the Controllers established practice of using 'nominee beneficial owners'."

[10] In his oral submissions, Mr. Adair added that Mr. Zotov had recently been arrested for fraud in connection with the TFM investigation. This was not disputed by Mr. Carrington QC, although he pointed out that Mr. Zotov had not been convicted of anything to date.

The legal test for granting an interlocutory injunction

- [11] The injunction in issue here contains both a proprietary element, in respect of the shares in Belfast, and a freezing order element, in respect of the assets of Belfast. Technically the first hurdle of the **American Cyanamid**² test for a proprietary injunction is slightly lower (“serious question to be tried”) than the first hurdle for a freezing injunction (“good arguable case”). As to the latter, in **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**,³ before Mustill J and the English Court of Appeal, it was 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 per cent chance of success.”
- [12] Although there is this technical distinction, I have never heard of a case where it has been held that a party satisfied the **American Cyanamid** test, but not the **Niedersachsen** test (or *vice versa* for that matter, although this might be thought logically impossible). At any rate on the facts of the current case, I find Briefline either succeeds on both or fails on both.
- [13] Once an applicant crosses the first hurdle, the Court must then consider whether damages would be an adequate remedy (no one suggests that here) and lastly the balance of convenience. “If the scale appears very evenly balanced it is then legitimate to take into account the strength or weakness of [the applicant’s] case.”⁴ However, it is well-established that the Court should not carry out any form of mini-trial on an interlocutory application. The Court has to exercise a discretion balancing all these points.

² *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

³ [1983] 1 WLR 1412 (CA only); [1984] 1 All ER 398, (Mustill J) at p 400, (CA) at p 415.

⁴ *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at p 784 (Scott LJ).

Full and frank disclosure

- [14] The duties of an applicant on an *ex parte* application to make full and frank disclosure were not in dispute. In **Great Panorama International Ltd v Qin Hui and others**,⁵ I set them out as follows:

“[70] 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**.⁶

“(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 it 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 application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J⁷ of the possible effect of an **Anton Piller** order; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

(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

⁵ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020).

⁶ [1988] 1 WLR 1350 at p 1356, citations omitted.

⁷ *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38.

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.

(7) 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.'"

[71] This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari**⁸ and most recently in **Paraskevaides and another v Citco Trust Corp and others**,⁹ 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 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.

⁸ [2005] ECSCJ No 46, Civil Appeal No 2 of 2005 (determined 27th June 2005).

⁹ [2021] ECSCJ No 107, BVIHCMAP 2018/0046 (determined 30th March 2020). The citation given for Addari in Paraskevaides is to a later appeal in the same case, but the judgment in the previous footnote is the one intended.

[32] 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.

[33] 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. 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 being sought.”

[15] However, I need to bear in mind the observations of Toulson J in **Crown Resources AG v Vinogradsky**,¹⁰ as approved by the English Court of Appeal in **Kazakhstan Kagazy Plc v Arip**.¹¹

“...[I]ssues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for nondisclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit

¹⁰ Unreported, 15th June 2001.

¹¹ [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36].

provisionally) on issues which should be more properly reserved for the trial itself...

Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion...

I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees... In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion."

Illegality

[16] It will be recalled that the purpose of the Transfer Back Agreement is pleaded as being so that Mr. Falin could represent "to banks and leasing companies with which he was dealing that he had consolidated the Russian subsidiaries of [Belfast] with [Mr. Falin's] other assets so that his businesses would be able to procure better lending terms." Any such representation would in my judgment have been fraudulent. In other words, Briefline's pleaded case is that it entered the Transfer Back Agreement as part of a conspiracy to defraud banks.

[17] This is a matter which I raised with Mr. Carrington QC at the *ex parte* hearing on 23rd December 2020. The law on illegality is not entirely clear in this jurisdiction. As I said in **Ali Ganjaei v Sable Trust Ltd**:¹²

"The UK Supreme Court in **Mirza v Patel**,¹³ in a six-three split,¹⁴ held that deciding whether illegality barred a claimant from asserting a right required a multi-factorial approach. The majority refused to follow the House of Lords decision in **Tinsley v Milligan**,¹⁵ which held that the question was to be determined as a matter of how the cause of action was pleaded. If a

¹² [2021] ECSCJ No 466, BVIHC (COM) 2020/0182 (15th February 2021) at para [4]. In *Ganjaei* I wrongly asserted that the Privy Council cases were not *cited*. I should have said that they were not *discussed* by the Supreme Court.

¹³ [2016] UKSC 42, [2017] AC 467.

¹⁴ Or five-four, depending on how one counts Lord Neuberger's judgment.

¹⁵ [1994] 1 AC 340.

claimant needed to plead the illegal matters to found his cause of action, then he lost; if he did not, he won (subject of course to proving his pleaded case). The difficulty for this Court is that there are at least three Privy Council decisions which support the **Tinsley v Milligan** approach: **Petherpermal Chetty v Muniandi Servai**,¹⁶ **Singh v Ali**¹⁷ and **Palaniappa Chettiar v Arunasalam Chettiar**.¹⁸ It is unclear whether this Court is bound to follow those Privy Council decisions or treat them as impliedly overruled by the UK Supreme Court decision.

- [18] Mr. Carrington QC argued at the most recent hearing that Briefline did not need to plead the conspiracy to defraud banks, so that even on the **Tinsley** approach, the claim would not be barred by illegality. On the **Mirza** approach, Briefline was more sinned against by Mr. Falin than a sinner itself, so that on a multi-factorial appraisal of its conduct, Briefline should not be debarred from claiming a return of the shares.
- [19] I am not sure any of that is right. Firstly, Briefline has not amended its pleadings to avoid the **Tinsley** problem. Secondly, amendment would not necessarily solve the difficulty. The Court is bound to take notice of illegality of its own motion when it comes to the Court's attention. A classic example is a contractual dispute between employer and employee. If it comes to light that some of the wages are paid cash-in-hand in order to defraud the Revenue, then the Court is obliged to take notice of the point and refuse to enforce the contract.¹⁹ Thirdly, even taking the **Mirza** multi-factorial approach, it is not clear that Briefline would necessarily be able to obtain restitution (although that was the result in **Mirza**). In particular, Mr. Falin says he has arranged payment of the €6 million consideration. Thus, whereas **Mirza** was a case of an unexecuted illegal contract, this was an executed contract.
- [20] What, however, convinces me that it would be wrong to decide this application against Briefline on grounds of illegality, is that Mr. Adair does not seek a decision on this basis. Mr. Falin's position is that there was no illegality whatsoever. He

¹⁶ (1908) LR 35 Ind App 98.

¹⁷ [1960] AC 167.

¹⁸ [1962] AC 294.

¹⁹ See, for example, *Salvesen v Simons* [1994] IRLR 52, [1994] ICR 409 (Employment Appeal Tribunal).

agreed to pay Mr. Zotov €6 million for the shares in Belfast, so he could extract ZHDA from the corporate structure. That, he says, was a legitimate transaction. Without being able to determine the facts, it would in my judgment be wrong to find illegality on an interlocutory basis, where one of the parties (ironically the one who would benefit from a finding of illegality) denies any such behaviour. Accordingly, I shall turn to the other issues.

The share transfer documents and the arbitration

[21] It is now common ground that there was a set of four documents dated 5th December 2019 comprising: (1) a share transfer form for the Belfast shares executed by Briefline in favour of Mr. Falin; (2) a resolution of the sole director of Belfast, Monica Van Zyl (“Ms. Van Zyl”) approving the transfer to Mr. Falin of the Belfast shares; (3) share certificate No 8 issued in Mr. Falin’s name and signed by Ms. Van Zyl; and (4) a register of members, signed by Ms. Van Zyl, showing Mr. Falin as the sole shareholder in Belfast. These documents only came to light in the course of the arbitration which I shall describe shortly.

[22] Ms. Van Zyl was the nominee director of Belfast provided by Gracire Consultants DMCC,. She took her instructions in relation to Belfast from Andersen Business Services (CY) Ltd (“Andersen”), a company service provider notionally in Cyprus, but also represented in Moscow. On 20th March 2019 Ms. Van Zyl passed a board resolution of Belfast purporting to cancel Share Certificate No 8 and to remove Mr. Falin from the register of members. On 6th June 2019 she issued a fresh register of members which expunged all mention of Belfast having had Mr. Falin as a member.

[23] There is a dispute as to the circumstances in which, what has been described as, “the Khorkov letter” came to be written and dated 29th December 2018. It purports to rescind the share transfer on the basis that no agreement had been reached on the share price. The arbitrators, in the award to which I shall come, held at para 124 that “the letter was backdated and the allegation it contains is entirely unsupported by any other documentary or witness evidence.” Ms. Van Zyl in her

evidence to the Tribunal said that she had never seen it and it played no part in her making the 20th March board resolution.

- [24] The Khorkov letter is inconsistent with the circumstances in which Vistra (BVI) Ltd, Belfast's registered agent, came to make a certificate of incumbency in favour of Mr. Falin. By an email of 27th December 2019, Andersen asked Vistra to sign and apostillise the certificate. This instruction to Vistra was (as appears from the evidence given in the arbitration) given on Ms. Denisova's instructions to Andersen. On 10th January 2020 Ms. Denisova (using her maiden name of Mishkina) wrote to Mr. Kunaev attaching the certificate of incumbency, the original of which was to be sent by air. 10th January 2020 post-dates the date on which Briefline is said to have rescinded the Transfer Bank Agreement.
- [25] Briefline was ostensibly the sole shareholder in Belfast from 30th November 2018. Various Telegram messages passing between Ms. Denisova and Mr. Kunaev show, however, conclusively that there was backdating. Briefline was first introduced into the transaction on 11th December 2018. It was going to be solely a nominee.
- [26] Mr. Falin says he and Mr. Zotov fell out in June 2019, following a meeting in Cyprus on 19th June 2019, which failed to resolve matters. On the flight back to Russia Mr. Zotov indicated that he wanted to retain control of ZHDA and SpetsLogisticka. On 26th July 2019 Mr. Falin commenced an arbitration against Belfast. Article 24 of Belfast's articles of association provides for disputes by shareholders to be arbitrated under the BVI International Arbitration Centre rules.
- [27] Belfast's first reaction was to challenge the jurisdiction of the arbitration panel. This was on the basis that Mr. Falin was not and had never been a member of Belfast and thus could not take advantage of the arbitration provision in Belfast's articles. That was in my judgment a dishonest submission made to the arbitration panel by Belfast. Belfast must have been well aware that Mr. Falin had at least an arguable case that he had, at least for a time, been a shareholder. Belfast dishonestly suppressed the share transfer documents which would have shown that he was

entitled to arbitrate the dispute. (A similar dishonest stratagem was adopted in Cypriot litigation, where Belfast put forward an expert opinion on BVI law from Stephen Rubin QC. The opinion expressed was completely vitiated by the fact Mr. Rubin was not told about share certificate No 8. Belfast were obviously seeking deliberately to mislead the Cypriot court.)

[28] The arbitration panel comprised: Mr. Nicholas Fletcher QC, as presiding arbitrator; Mr. Stephen Moverley Smith QC, nominated by Mr. Falin; and Mr. David Chivers QC, nominated by Belfast. They heard the matter over the five days from 5th October 2020 to 9th October 2020. They delivered a partial final award on 27th November 2020. By this they held (para 126) that the 20th March resolution was invalid and that “Belfast cannot re-write its Register of Members with retrospective effect.” They declared: (a) that the actions of Belfast in purporting to remove Mr. Falin from its register of members and to cancel his share certificate were unlawful and of no effect; (b) that the register of members dated 5th December 2019 was valid; (c) that Mr. Falin was and at all times since 5th December 2018 had been a member of Belfast; and (d) that a resolution made by Mr. Falin on 23rd June 2020 to remove the existing directors of Belfast and appoint himself in their stead was valid.

[29] The award was expressed to be subject to any orders which this Court might make under section 43 of the **Business Companies Act** to give effect to a share transfer in favour of Briefline. There had been an attempt to extend the arbitration on an *ad hoc* basis to include any claims by Briefline, but Belfast had objected to Briefline being made a party to the arbitration, so this never occurred.

Who were the beneficial owners

[30] A key question in this matter is who the beneficial owners of Belfast and Briefline were. Mr. Thorstenn’s first affidavit says that in November 2018 Mr. Zotov was acting as a representative of Briefline acting “on the instruction of Mr. Khorkov... the then ultimate beneficial owner of [Briefline].” In his affidavit of 22nd December 2020, Mr. Thorstenn says: “I am the current beneficial owner of [Briefline] and acquired this status in October 2019.”

[31] In various proceedings in Moscow in January 2021 Mr. Thorstenn is represented as being “one of the beneficial owners of” *inter alia* ZHDA. (Who else was a beneficial owner is not stated.) This can only be on the basis of his alleged beneficial ownership of Briefline. These Russian court applications were brought by Mr. Zotov purportedly on Mr. Thorstenn’s behalf.

[32] In his witness statement of 9th March 2021, Mr. Zotov says:

“There is nothing misleading about the statement contained in my appeal of the Moscow Arbitrazh Court’s decision. As Briefline is entitled to be registered as the shareholder of Belfast, I am indeed the UBO of Belfast. In fact, had it not been for Mr. Falin’s fraudulent transfer of the [Belfast] shares to Dublin, I would have become both *de jure* and *de facto* UBO of Belfast.”

(Subsequently, in his third affidavit, Mr. Zotov seeks to correct this on the basis that it was a grammatical error, but this is wholly unconvincing.)

[33] On 6th December 2018, Andersen invoiced Belfast in respect of a change of beneficiary and change of shareholder in Belfast. In the assignment of beneficiary rights, the transferor was described as Victor Beskibalov. He “being the sole beneficiary in [Belfast] and the Owner of 100%... of the beneficiary rights to the total number of shares issued by the Company and outstanding on the date hereof” transferred all his beneficiary rights to Mr. Falin. (The certificate of incumbency showing Mr. Falin as sole shareholder and beneficial owner was dated 28th December 2018, reflecting this change in beneficial ownership.)

[34] Earlier on 12th July 2018, Vistra due diligence documentation showed that the beneficial owner of Belfast was Tatiana Zaikina (who is also known as Nikiforova). An identical document of the same day showed that the beneficial owner of Belfast was Alexander Kotin. On 30th November 2018, Ms. Zaikina transferred the beneficial interest in 66.7% of Belfast to Mr. Khorkov. The same day, Mr. Kotin transferred the beneficial interest in 33.3% of Belfast to Mr. Khorkov. (This may

explain the making of the two, apparently contradictory, documents on 12th July 2018.)

[35] At the arbitration, Ms. Zaikina gave evidence that she was not in fact the beneficial owner of Belfast, but had signed the documents at Mr. Khorkov's request because of her "rather good relations with him".

[36] I cannot give any credence to these documents as showing the movement of the ultimate beneficial ownership of Briefline and Belfast. They are obvious window-dressing. Take Mr. Thorstenn's assertion that in October 2019 he was *the* beneficial owner. Well, how? If Briefline was the beneficial owner of Belfast, then that beneficial ownership was potentially very valuable. What did Mr. Thorstenn pay for it? We have no idea. He is an Icelandic lawyer practising in New York. He had no connection with Russian railroads, on which the business of ZHDA centred. Why did he acquire this beneficial ownership? I remind myself that (if there was any truth to the assertion of beneficial ownership) he cannot, as a matter of law, be a nominee, for if he were a nominee he would not be the beneficial owner.

[37] How does Mr. Zotov become the beneficial owner? Did he pay Mr. Thorstenn? If not, why not? Again, a complete blank. Documents are created showing a transfer of the beneficial ownership on 30th November 2018 to Mr. Khorkov. Yet six days later, someone completely different, Mr. Beskibalov, transfers the beneficial ownership to Mr. Falin.

[38] The grossly unsatisfactory evidence as to beneficial ownership is summed up by Ms. Zaikina when she said:²⁰ "I'm not sure how you can qualify, you know, the realness of beneficiary owner." I cannot attach any weight to this paper trail of beneficial ownership. (Mr. Falin can of course rely on his legal title to the Belfast shares: **Chen v Ng**.²¹ He does not need to show his root of beneficial title.)

²⁰ Transcript, day 2, page 44.

²¹ [2017] UKPC 27.

[39] I am very mindful that on an application of the current type, to continue an injunction, I must not carry out a mini-trial. On the other hand, I cannot shut my eyes to the obvious. As a result of an application in New York under 23 USC § 1782, Mr. Thorstenn produced a “categorical privilege log”. Item 2 covers a date range from 19th November 2019 to 17th December 2020. Counsel involved are shown as; Mr. Kourin of the Moscow law firm, Sokolov, Maslov & Partners; Harneys in the BVI; and Kinanis LLC, the Cypriot law firm acting in the Cyprus litigation. The holders of the privilege are described as Briefline and Belfast. The privilege asserted was attorney-client, joint client and work product.

[40] In my judgment Briefline and Belfast were acting together and were both under the *de facto* control of Mr. Zotov. The contrary is not seriously arguable.

Res judicata

[41] This gives rise to an issue as to whether some form of *res judicata* arises from the arbitration award. In **Re Lenux Group Ltd**,²² I discussed the case of **House of Spring Gardens Ltd v Waite**.²³ In that case, the plaintiff had sued three men, William Waite, Seamus Waite and Gordon McLeod, in Ireland and, after trial, had recovered judgment for nearly £3½ million. An appeal by all three defendants to the Irish Supreme Court failed. Subsequently, the two Waites issued proceedings in Ireland attacking the judgment against them on the basis that it had been obtained by fraud. That action was dismissed after a trial.

[42] The plaintiff then brought an action against all three men in England seeking to enforce the Irish judgment. All three sought to defend the claim on the basis that the first Irish judgment had been obtained by fraud. The plaintiff obtained summary judgment against them at first instance. The matter went to the Court of Appeal, which had little difficulty dismissing the Waites’ appeal against the summary

²² *JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd* [2021] ECSCJ No 445, BVIHC (COM) 2020/0188 (19th January 2021)

²³ [1991] 1 QB 241.

judgment, since the Waites were bound by *res judicata* arising from the second Irish judgment on their fraud allegation. As regards McLeod, Stuart-Smith LJ said:

"He was not a party to the action; but an estoppel will bind those who are privy to the parties bound: **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)**.²⁴ The requisite privity is said to be a privity of either blood, title or interest: *per* Lord Reid in the **Carl Zeiss** case, at p 910. The only relevant one is privity of interest. It is not easy to detect from the authorities what amounts to a sufficient interest... A mere interest in the outcome of the litigation is not sufficient. In **Gleeson v J Wippell & Co Ltd**,²⁵ Sir Robert Megarry V-C propounded this test:

'but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest."'

He continued, at p 516:

'A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in *terrorem* of other and more stalwart possible defendants, but as a decisive weapon against them.'

There is a further principle which in my judgment supplements what was said in that case by the Vice-Chancellor. It is to be found in the judgment of the Privy Council in **Nana Ofori Atta II v Nana Abu Bonsra II**,²⁶ where Lord Denning said:

'Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted

²⁴ [1967] 1 AC 853.

²⁵ [1977] 1 WLR 510.

²⁶ [1958] AC 95 at pp 102-103.

from a principle stated by Lord Penzance in **Wytcherley v Andrews**.²⁷ The full passage is in these words:

“There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done *bona fide* in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.”

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see **Farquharson v Seton**.²⁸ But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense.’

...

How are these principles to be applied in this case? All three defendants were joint tortfeasors, having acted in breach of the duty of confidence in relation to the confidential information imparted to them and in breach of the plaintiffs' copyright in the cutting patterns for the vest. The judgment against them was joint and several. If the Waites' action to set aside Costello J's judgment had succeeded, that judgment would have been set aside *in toto*, not just against the Waites; it obviously could not stand. Even if (which I do not accept) the judgment against Mr. McLeod did not automatically fall in the event of the Waites' succeeding, it is plain that in the English proceedings the plea of estoppel or abuse of process would have prevented the plaintiffs pursuing the claim on Costello J's judgment against Mr. McLeod.

²⁷ (1871) LR 2 P&D 327 at p 328.

²⁸ (1828) 5 Russ 45.

Mr. McLeod was well aware of those proceedings. He could have applied to be joined in them, and no one could have opposed his application. He chose not to do so and he has vouchsafed no explanation as to why he did not. Mr. Swift says he was not obliged to do so; he was not obliged to go to a foreign jurisdiction; he could wait till he was sued here. He speaks as if Mr. McLeod was required to go half-way round the world to some primitive system of justice. That is not so. He had to go to Dublin, whose courts, as the judge said, are perfectly competent to deal with this matter. Moreover, it was a process that was good enough for the Waites. Instead, he was content to sit back and leave others to fight his battle, at no expense to himself. In my judgment that is sufficient to make him privy to the estoppel; it is just to hold that he is bound by the decision of Egan J.”

- [43] In the current case Briefline were invited to join the arbitration on an *ad hoc* basis. Due to Belfast’s refusal to agree to the expansion of the arbitration that did not happen. Since at that time both Briefline and Belfast were under the joint control of Mr. Zotov, in my judgment **House of Spring Gardens** is directly applicable. Mr. Zotov decided for tactical reasons that Briefline should distance itself from the arbitration in case (as of course occurred) the decision went adversely to Belfast. In my judgment Briefline should be treated as Belfast’s privy, so as to be bound by the determinations in the arbitration award.
- [44] The argument that Briefline did not have enough time to prepare for the arbitration is disingenuous, given that Belfast and Briefline were jointly instructing the same firms of lawyers throughout the relevant period.
- [45] Even if I were wrong in that, I would still in my judgment be entitled to have regard to the findings of fact in the award. In **VTB Bank v Micccros Group Ltd**,²⁹ I held:

“[84] This leaves the question whether VTB 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 & Co Ltd**, as confirmed in **Rogers v Hoyle**³⁰ and by the Privy Council in

²⁹ BVIHC (COM) No 2018/0067 (23rd January 2020).

³⁰ [2014] EWCA Civ 257, [2015] QB 265.

Calyon v Michailaidis³¹, 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.'

[85] However, there appears to be an exception to this rule in the case of interlocutory applications. In **Sabbagh v Khoury**³² 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 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 v Berezovsky**³³. There, when considering the question of whether or not there was a serious issue to be tried for

³¹ [2009] UKPC 34, 2007-09 Gib LR 321.

³² [2014] EWHC 3233 (Comm), applied by me in two cases: *Advalorem Value Asset Fund Ltd v Redford* at para [16] (Supreme Court of Gibraltar, decision of 4th September 2015, unreported) and *Re Wardour Trading Ltd; Cohen v Nekrich* 2016 Gib LR 46 at para [40].

³³ [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242.

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 v Michailaidis**... [a]nd **Ferrexpo v Gilson Investments**³⁴...

[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 v 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 v Michailaidis**...).'

[86] In my judgment 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."

[46] Now here it is true that Briefline would be proposing to call different witnesses to those called in the arbitration proceedings. However, that is a result of Belfast's forensic decisions in those proceedings. Further the arbitration panel were able to reach their decisions in large measure on documentary evidence. Exactly the same documents will be used in these current proceedings. The tribunal was a distinguished body. It dealt with the issues carefully and reached a conclusion which

³⁴ [2012] EWHC 721 (Comm), [2012] 1 Lloyd's Rep 588 at para [51].

in my judgment was incontestable. It would in my judgment be perverse wholly to disregard the findings of the arbitrators.

The pleaded case

- [47] I turn then to consider whether Briefline has shown a good arguable case or a serious question to be tried. It will be recalled para 5 of the Statement of Claim pleads that Mr. Zotov was acting on the instructions of Mr. Khorkov, the UBO of Briefline. I do not find this averment reaches either hurdle. Mr. Zotov was not acting on Mr. Khorkov's instructions, nor was he acting on behalf of the Briefline. It then pleads that at the Moscow restaurant that day it was proposed that Briefline would permit Mr. Falin to become registered with Briefline's shares in Belfast. Again that is simply not possible. Briefline was not then the shareholder in Belfast. It is therefore equally impossible that at the restaurant Mr. Falin made any representation to Briefline, which only started to play any rôle in the matter on 11th December 2018.
- [48] The pleading then alleges the fraudulent misrepresentation and the rescission of the Transfer Back Agreement by the Khorkov letter. However, Ms. Van Zyl's cancellation of share certificate No 8 (in favour of Mr. Falin) by the 20th March 2019 board resolution was not a result of the Khorkov letter, which she had never seen.
- [49] The Statement of Claim thus does not show a case on the facts. Now Briefline could of course amend its pleadings to try and set out a viable case. However, it is now over five months since I granted the *ex parte* injunction and it has not done so. I have to decide this application on the basis of the pleading as it stands. On the Statement of Claim as currently pleaded, in my judgment no arguable case is shown on the facts.
- [50] I do not consider it legitimate to second-guess how Briefline might amend its case. Even if, for example, it asserted that Mr. Zotov was acting on his own behalf rather than on behalf of Mr. Khorkov, the other problems of Briefline not yet having any involvement would remain. Whether it might be possible to construe a

representation as being a continuing one, would require some further facts to be pleaded. Looking at matters in the round, particularly in the light of the dishonesty which I have identified, any case made by Briefline is likely to be a weak one. On the balance of convenience, I would refuse a continuation of the injunction, even if Briefline had crossed the first **American Cyanamid** and **Niedersachsen** hurdles.

Full and frank disclosure

[51] I turn then to deficiencies in the full and frank disclosure made by Briefline on the *ex parte* application. The skeleton provided for that hearing said this:

“57. In light of the *ex parte* nature of this Application, Claimant is fully aware of its duty of full and frank disclosure to the Court. In this regard:

(1) First, the Court may have concerns as to the applicable law of the Transfer Back Agreement given its apparent connections with Russia...

(2) Second, the Transfer Back Agreement is oral in nature and its contents and interpretation is large an evidential issue, which can only be fully explored at trial. Nevertheless:

(a) The general principle is now well established that, on an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure: **Sukhoruchkin v van Bekestein**.³⁵

(b) In light of the centrality of the contents of the Transfer Back Agreement to AP's claims, the court should not attempt to resolve the disputed questions of fact or law relating to it but to assess it against the totality of the evidence. In this case, the threshold test is clearly satisfied.

(3) [This deals with the cross-undertaking in damages, but I do not need to consider it.]

(4) Fourth, the Court may also be aware of the fact that an Arbitral Award was handed down on 27 November 2020 in which R1 was recognised as a shareholder of R2 by reason of the 2018 Transfer and a director by reason of a resolution he passed on 23 June 2020. However:

³⁵ [2014] EWCA Civ 399 at para [32].

(a) The Arbitrators did not (and was not called upon to) deal with any of the issues canvassed above relating to the Transfer Back Agreement.

(b) Claimant was not a party to the Arbitration — it was a dispute between R1 and R2 with no representations having been made by Claimant.

(c) Moreover, the Arbitrators saw fit to include a caveat that their conclusion might subsequently be affected by any order the BVI court might make under s.43 of the Business Companies Act. As such, the ownership of the Shares remains a live issue.

(5) Fifth, it is possible that R1 may seek to explain the Transfer Back Agreement differently from how the Claimant has presented its claim. However, the possible versions of his response are unlikely to explain in any satisfactory manner (i) his execution of the Second Share Transfer Form in December 2018; and (ii) his attempts to transfer ZHDA at an undervalue and to destroy the value of ZHDA.

(6) Sixth,... R1 may complain about the delay in the Claimant seeking this interim relief.”

[52] As to the first point, I do not find this a non-disclosure. There is no issue of foreign law raised by Mr. Falin. Likewise the third and sixth points are not in issue.

[53] As to the second point, I agree that an oral agreement is necessarily an evidential issue. However, it is trite that the existence and terms of an oral agreement must be considered against the background of the contemporaneous documentation. I was taken to virtually none of the documentary evidence on which Mr. Adair relies. It is not good enough for Mr. Carrington QC to say that going through all the documentation would have put an excessive burden on the Court. If it had to be done, it had to be done. Particularly serious non-disclosure in my judgment was the failure to draw my attention to the Telegram messages, the timeline for the issue of shares in Belfast to Briefline, the transcripts of the evidence in the arbitration and the particular findings in the award.

[54] As to the fourth point, no fair disclosure is made in my judgment. As to (a), the Tribunal did make some findings in relation to the Transfer Back Agreement. These

findings should in my judgment have been drawn to my attention. At para 103, for example, the award says:

“Despite its assertion through counsel that the arrangement with Mr. Zotov was ‘thoroughly dishonest and illegal’, Belfast has not made out its case that the Transfer Bank Agreement was fraudulent. The precise nature of that Agreement is very unclear and the Tribunal is not satisfied that it has been told the whole story. What is clear to the Tribunal is that it cannot know what the agreement actually was that led to the transfer of the shares to Mr. Falin in December 2018 or the execution by him of the post-dated Second Share Transfer back to Briefline. Belfast admits that the Transfer Bank Agreement is outside its knowledge.”

- [55] The finding that the Agreement was not fraudulent should have been drawn to my attention expressly. Moreover, as I have found above, it is not true that Belfast had no knowledge of Briefline’s case. As the privilege log shows, Belfast and Briefline were both jointly instructing counsel during the whole of the arbitration. Nothing of that was said to me either.
- [56] As to (b), as I have found above, Briefline were invited to join the arbitration. I was not told that on the *ex parte* application. Nor was I told anything about the connection between Briefline and Belfast which has led to me making a finding that a **House of Spring** estoppel *per rem judicatam* arose. No suggestion was made that the two companies might have been under *de facto* joint control.
- [57] No complaint is made in relation to (c).
- [58] As to the fifth point, this does not present Mr. Falin’s case in any sort of way. Briefline knew a lot about Mr. Falin’s case from its access to the transcripts of the arbitration hearing. Nothing was put forward about the back-dating, for example. Nor was any disclosure made of the dishonest submission made out at the outset of the reference that the arbitrators had no jurisdiction because Mr. Falin had never been on the register of members.

[59] This was in my judgment a bad case of non-disclosure. I do not need to investigate the division of fault between counsel and the lay client. It suffices to say that, even if the grant of an injunction was otherwise mandated, I would have discharged the current injunction and refused to regrant it. Although Mr. Adair was guilty of rhetorical overkill when he described the non-disclosure as being on “an industrial scale”, this was a serious matter of non-disclosure. There was simply no fair presentation of Mr. Falin’s case.

Conclusion

[60] Accordingly I refuse Briefline’s application for a continuation of the injunction I granted on 23rd December 2020.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar