

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2020/0188

**IN THE MATTER OF LENUX GROUP LIMITED
AND IN THE MATTER OF THE BUSINESS COMPANIES ACT, 2004 (AS AMENDED)**

BETWEEN:

**[1] JSC MEZHDUNARODNIY PROMYSHLENNIY BANK
[2] STATE CORPORATION "DEPOSIT INSURANCE AGENCY**

Claimants

AND

LENUX GROUP LIMITED

Defendant

Appearances:

Mr. Murray Laing for the Claimants
The Defendant did not appear

2021: January 14
January 19

JUDGMENT

[1] **JACK, J [Ag.]**: By a fixed dated claim form issued on 5th November 2020, the claimants seek rectification of the register of members of the defendant ("Lenux"), a BVI company, and consequential relief. The application is in substance to recognise a judgment given and orders made by the English High Court in long-running litigation between the claimants and Sergei Viktorovich Pugachev ("Mr. Pugachev").

- [2] Mr. Pugachev was the founder of the first claimant (“Mezhprom Bank”), which became one of Russia’s largest private banks. Following the global financial crisis in 2008-09, the bank became insolvent. The second claimant (“the DIA”) was appointed as its liquidator. The DIA’s investigations suggested that Mr. Pugachev had unlawfully extracted the equivalent of US\$1 billion from the bank. It started civil proceedings in Russia and obtained a judgment for that amount in roubles. Subsequently the claimants issued proceedings in England to enforce the Russian judgment. Default judgment was given in 2016.
- [3] Mr. Pugachev’s case has always been that he is a victim of a vendetta by the Russian state. In 2015 he commenced an arbitration in the Hague under a bilateral investment treaty between France and Russia in which he complained various of his assets had been wrongfully expropriated by the Russian state. It is unclear what has occurred to those proceedings, but they are not relevant for current purposes.
- [4] After obtaining the English default judgment, the claimants commenced proceedings in the English High Court against five trusts, all governed by New Zealand law. The only trust of relevance to the current application is the Green Residence Trust. This was ostensibly settled by Victor Pugachev, Mr. Pugachev’s eldest son, and was ostensibly a discretionary trust for the benefit of Mr. Pugachev and members of his family. The current trustee is Miharo Limited (“Miharo”), a company incorporated in New Zealand. Miharo holds all the shares in Lenux. Lenux in turn holds all the shares in a Russian company, Korporatsiva Obligaz LLC, which in turn owns real estate in the Gorki 10 village near Moscow. The property comprises a large country house, a guest-house and extensive lands.
- [5] As well as Mr. Pugachev himself, the defendants to these English proceedings included Miharo, Victor Pugachev and three minor children of Mr. Pugachev (represented by their mother as litigation friend). The three minor children were represented by leading counsel. The other defendants did not appear at trial. The

primary relief sought by the claimants, so far as relevant, was a declaration that Miharo held the Lenux shares on bare trust for Mr. Pugachev.

[6] At the outset of the case the claimants obtained world-wide freezing orders from the English Court against, *inter alia*, Miharo and were given leave to serve Miharo with the freezing order and the proceedings outside the jurisdiction. Miharo challenged the making of the freezing order against it, but expressly reserved its right to challenge the jurisdiction of the English Court. The challenge to the freezing order went as far as the English Court of Appeal, but failed. Shortly before the time for Miharo to issue its application contesting the jurisdiction, its solicitors came off the record. Thereafter Miharo took no further part in the action.

[7] The action was tried by Birss J (as he then was) over eight days in July 2017. He gave judgment in favour of the claimants on 11th October 2017.¹ By order of 30th January 2018 the judge ordered:

“3. Within 14 days of service of the Notification of Transfer:

a. [Miharo] shall execute the Lenux Transfer [the stock transfer form transferring the Lenux shares to the Mezhprom Bank].

b. [Mr. Pugachev] shall do all things necessary to procure that [Miharo] shall execute the Lenux Transfer.

c. [Miharo] and [Mr. Pugachev] shall deliver to the Claimants’ solicitors the Lenux Transfer executed in accordance with paragraphs (a) above together with 2 notarised copies thereof.

d. [Miharo] and [Mr. Pugachev] shall, in addition to paragraphs (a)–(c) above, do all things necessary to procure the transfer to the Claimants and/or the Nominee(s) (in accordance with the Notification of Transfer) of the legal title held by [Miharo] in Lenux.

...

6. If [*inter alia* Mr. Pugachev and Miharo] fail to comply with paragraphs 1 to 4 above, as the case may be, Master Price (or any other Master of the High Court) shall be authorised to sign or execute any documents necessary to effect the transfer of the shares to the Claimants or the Nominee(s).”

¹ [2017] EWHC 2426 (Ch).

The order went on to define a method whereby the value of the shares would be assessed and credited against the claimants' judgment debt. (This is an unusual order, but no appeal appears to have been brought against it.)

[8] Mr. Pugachev and Miharo did fail to comply with their obligations under para 3 of the order. Subsequently, on a date which is unclear, Master Price executed the Lenux Transfer pursuant to para 6 of the order.

[9] These are the facts relied upon to justify the relief sought from this Court. There is a technical difficulty. Lenux has been struck off the register of companies on 1st November 2018 for non-payment of fees. Its registered agent resigned with effect from 4th March 2020. There is thus no means of registering any transfer of shares in Lenux. The claimants therefore seek an order for rectification of the register of shareholders and the making of a new register of members, so that they (or at least Mezhprom Bank) have *locus standi* to apply to restore Lenux to the register of companies. The Court has the power to make an order for rectification and for the making of a new register of members where the equitable title to shares has passed but the legal title has not: **Wanda Fong Jerri v Meridian International Holdings Ltd**,² distinguishing **Nilon Ltd v Royal Westminster Investments SA**.³

[10] When this matter came before me on 3rd December 2020, I raised with Mr. Laing, who appears for the claimants, the question whether, as a matter of BVI law, the English Court had jurisdiction over Miharo. Rule 43 of **Dicey Morris & Collins on the Conflict of Laws**⁴ provides that:

“Subject to Rules 44 to 46 [which are irrelevant], a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

² [2020] ECSCJ No 192, [2019] ECSCJ No 399, BVIHC (COM) 2019/0135 (4th December 2019 and 4th June 2020).

³ [2015] UKPC 2.

⁴ 15th Ed, 2012.

Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case—If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.”⁵

- [11] Miharo was never present in England and Wales, so the first case does not apply. It was never a claimant or counterclaimant in the English proceedings, so the second case does not apply either. There was no agreement as to the English Court having jurisdiction, so the fourth case does not apply. The only head on which Mr. Laing could rely was therefore the third case.
- [12] Mr. Laing submitted that the English Court did have jurisdiction. He referred me to the (English) **Civil Procedure Rules 1998**. He relied (so far as relevant to the claims in respect of the Green Residence Trust) on Practice Direction 6B para 3.1(3) (necessary and proper party), para 3.1(15) (resulting trust for Mr. Pugachev), and para 3.1(10) (enforcement of judgment). These correspond in general terms to our CPR 7.3(2)(a)(ii), 7.3(8) and 7.3(5) respectively.
- [13] I fully accept that the English Court, *in accordance with its own rules on jurisdiction*, had jurisdiction over Miharo. (Indeed, it is not for this Court to examine whether a foreign court had jurisdiction under the foreign court’s own rules on jurisdiction.) The English Court’s jurisdiction under its own rules is, however, irrelevant to whether it had jurisdiction in accordance with the *BVI rules of private international law*. It has long been recognised that there is an asymmetry: this Court will not recognise the long-arm jurisdiction of a foreign court, notwithstanding that this Court exercises its own long-arm jurisdiction on the same basis as the foreign court.

⁵ Section 3 of the BVI Reciprocal Enforcement of Judgments Act 1922 (Cap 65) is to the same effect.

- [14] In my judgment, the claimants have failed to show that Miharo submitted to the jurisdiction of the English Court. Its challenges to the world-wide freezing orders were subject to its protest as to the jurisdiction. The fact that it withdrew from participation in the English proceedings prior to making a formal challenge to the jurisdiction is irrelevant. There must be some positive act showing that Miharo accepted the jurisdiction of the English Court, if it is to be treated as having submitted to that jurisdiction. Accordingly, the claimants fail to show that the English Court had jurisdiction under **Dicey's** third case.
- [15] I should add that this Court would not have recognised the validity of Master Price's execution of the share transfer form in any event. An order under section 39 of the **Senior Court Act 1981** (UK)⁶ is a form of execution of a judgment. The only forms of execution permissible within this jurisdiction are those authorised by the Courts of this Territory. The English Court has no power to authorise execution in the Virgin Islands. (If Miharo had submitted to the jurisdiction of the English Court, then it may be arguable that it was impliedly accepting that the English Court could properly authorise an agent — in this case, Master Price — to execute documents on its behalf, but since it did not the point is moot.)
- [16] After indicating my views on the above arguments of Mr. Laing, I drew his attention to **House of Spring Gardens Ltd v Waite**.⁷ 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.
- [17] 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

⁶ 1981 c 54.

⁷ [1991] 1 QB 241.

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 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)**.⁸ 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**,⁹ 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**,¹⁰ 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

⁸ [1967] 1 AC 853.

⁹ [1977] 1 WLR 510.

¹⁰ [1958] AC 95 at pp 102-103.

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 from a principle stated by Lord Penzance in **Wytcherley v Andrews**.¹¹ 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**.¹² 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

¹¹ (1871) LR 2 P&D 327 at p 328.

¹² (1828) 5 Russ 45.

have prevented the plaintiffs pursuing the claim on Costello J's judgment against Mr. McLeod.

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."

[18] In my judgment, in the current case the trustee and the beneficiaries shared a common interest in establishing that the Green Residence Trust was a proper discretionary trust and in defeating the claimants' assertion that the trust assets were held on bare trust for Mr. Pugachev. In my judgment this is a quintessential example of privity of interest. Miharo was perfectly happy to sit back and let the minor beneficiaries argue the case. It is common sense that they stand and fall together.

[19] It follows that I should recognise the judgment of Birss J and the order of 30th January 2018. Although, for the reasons I have set out above, this Court cannot recognise the validity of the transfer of shares executed by Master Price, the effect of the judgment and order is that Miharo holds the shares in Lenux on bare trust for the claimants. In accordance with **Wanda Fong Jerrit**, therefore, I will direct the rectification of the register of members and direct the creation of a new register of members to replace whatever extent register there may be.

[20] This leads to a technical issue. The claimants have not added Miharo as a party to the action. As I discussed in **Starr Investments Cayman II Inc v Ou Wen**

Lin,¹³ it may be possible to make an order under CPR 42.12 (service of orders on non-parties), so that Miharo is bound by this judgment unless it applies to become a party. This would avoid the need to add Miharo as a party. Mr. Laing was keen to adopt this approach instead of having to serve Miharo as a party in New Zealand. It does not seem to me that making an order under CPR 42.12 prejudices Miharo, so long as the time for applying to be made a party is extended to 35 days after service of the copy of the order by analogy with the time for a defendant served abroad to enter an appearance. The claimants should also serve Miharo with a copy of this judgment.

[21] It follows that the order for rectification cannot take effect until the expiry of the 35 days from service. Accordingly that is the order which I shall make.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹³ [2020] ECSCJ No 197, BVIHC (COM) 2018/0225 (8th June 2020).