

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

**TERRITORY OF VIRGIN ISLANDS
BVIHCMAP 2021/0002
BVIHCMAP 2021/0008
BVIHCMAP 2021/0012**

**INTERLOCUTORY APPEALS UNDER RULE AND 62.10
OF THE CIVIL PROCEDURE RULES 2000 FROM THE
HIGH COURT OF THE VIRGIN ISLANDS BVIHCV(COM)
2014/0062**

BETWEEN:

SERGEY TARUTA

Appellant

and

JSC VTB BANK

Respondent

Before:

The Hon. Dame Janice M. Pereira DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Francis of Maples and Calder for the Appellant
Mr. Grant Carroll and Mr. Daniel Mitchell of Ogier for the Respondent

2021: June 2.

Commercial Court Appeal - Recognition and enforcement of foreign judgments - Case management powers of trial judge - Whether judge erred in ordering split trials to deal with recognition and enforcement of foreign judgment - Whether judge erred in refusing the respondent's application to amend defence - Whether an application for amendment to plead foreign law must be supported by expert evidence - Whether judge erred in dismissing respondent's application to compel appellant to comply with request for further information- Conflict of Laws - Whether judge erred in striking out expert witness opinion - Whether expert opinion on foreign law necessary when considering BVI's concepts of natural justice and

REASONS FOR DECISION

- [1] **WEBSTER JA [AG]:** On 2nd June 2021 we heard three interlocutory appeals by the appellant, Sergey Taruta (“**Mr. Taruta**”), against the orders made by the learned trial judge, the Honourable Justice Adrian Jack J (“**Jack J**” or “**the Judge**”), in proceedings in the court below in claim number BVIHCV(COM) 2014/0062. We dismissed the three appeals and promised to give reasons for our decisions. We now do so.
- [2] The three appeals that were before the Court are:
- (i) BVIHCVMAP 2021/0002 – Sergey Taruta v JSC VTB Bank – an appeal against the Judge’s order made on 11th January 2021 to dismiss Mr. Taruta’s application to amend his defence and to compel the respondent to respond to his request for further information (“**the Amendment/RFI appeal**”)
 - (ii) BVIHCVMAP 2021/0012 – Sergey Taruta v JSC VTB Bank – an appeal against the Judge’s order made on 23rd April 2021 striking out the expert witness opinion of Dmitry Chernyy filed by Mr. Taruta on 12th April 2021 (“**the Strike Out Appeal**”).
 - (iii) BVIHCVMAP 2021/0008 – Sergey Taruta v JSC VTB Bank – an appeal against the order of the Honourable Justice Mr. Gerhard Wallbank (“**Wallbank J**”) made on 22nd March 2021 dismissing Mr. Taruta’s application for a stay of the proceedings in the court below pending the determination of an appeal against the order of Jack J made in the Amendment/RFI Appeal (“**the Stay Appeal**”).

The appeals and the disputes between the parties have a common background and they were heard together. This decision deals with all three appeals in the order set out in this paragraph.

A. Appeal No 2 of 2021 – The Amendment / RFI Appeal

- [3] The respondent, JSC VTB Bank (“**the Bank**”) is an open joint stock company registered to do business in the Russian Federation and was at all times a licensed Russian bank. The second defendant in the proceedings in the court below and the appellant in these appeals is Mr. Taruta. He is a Ukrainian citizen and businessman. The first defendant in the court below was Mr. Alexander Katunin, a Russian citizen and businessman (“**Mr. Katunin**”). The claim against Mr. Katunin was discontinued on 24th July 2019.
- [4] Eniseisky Plywood Mill Limited Liability Company is a company registered in the Russian Federation and carried on business as manufacturers of softwood veneer and plywood (“**the Borrower**”). Between May 2008 and December 2011, the Borrower entered into various loan agreements with the Bank. Repayment of the monies advanced to the Borrower was guaranteed by Mr. Katunin and Mr. Taruta (together “**the Guarantors**”) under the terms of a contract of guarantee between the Bank as lender and the Guarantors dated 15th December 2011 (“**the Guarantee**”). The Guarantors agreed to be jointly liable to the Bank for the obligations of the Borrower under the loan agreements in an amount not exceeding US\$30,000,000.00. The Borrower went into an insolvency procedure in Russia in August 2014.
- [5] The Guarantee provides in clause 4.10 that disputes or disagreements arising out of the Guarantee that are not settled by the parties shall be settled in accordance with the current legislation in the Meshchansky District Court of Moscow. Clause 4.16 provides that the notices can be sent by telegraph (among other ways) to the address provided by a party to the contract. Mr. Taruta provided an address in Ukraine for the service of notices.

- [6] The Borrower defaulted on the repayment of the loans and the Bank demanded payment of the amounts due under the Guarantee from the Guarantors. The Guarantors did not comply with the demand for payment and the Bank filed a claim against them in the Meshchansky District Court and obtained judgment on 28th February 2014 against the Guarantors jointly for US\$30 million and individually default interest of US\$18,000.00 against Mr. Katunin and US\$9,000.00 against Mr. Taruta (**"the Russian Judgment"**). Mr. Taruta's appeal to the Russian Appeal Court (the Judicial Panel of the Moscow City Court) and the further appeal to the Cassation Court (the Presidium of the Moscow City Court) were unsuccessful. It was not disputed that the Russian Judgments are final and binding and cannot be further challenged in the courts of Russia.
- [7] The Russian Judgment remained wholly unsatisfied and on 23rd May 2014 the Bank filed a claim against the Guarantors in the Commercial Division of the High Court of the Virgin Islands (**"BVI"**) claiming the monies due under the Judgment, no doubt because they were aware or had reason to believe that the Guarantors owned assets in the BVI in the form of shares in BVI companies. On 26th May 2014, the BVI Court granted a freezing injunction against Mr. Taruta. The subsequent disclosure from the freezing injunction confirmed that Mr. Taruta owns a BVI company which in turn owns indirectly valuable assets in Russia.
- [8] Mr. Taruta filed his defence on 7th November 2014 and the Bank filed a reply to the defence on 24th November 2014. The Bank applied for summary judgment on 28th August 2014. The application was not heard and the Bank did not take any further steps in the claim for six years. In September 2020, Mr. Taruta applied for summary judgment against the Bank.
- [9] The claim came up for case management before Jack J on 28th October 2020 and 18th November 2020. At the first case management conference on 28th October 2020, the Judge adjourned both summary judgment applications and ordered a trial of the claim. At the second case management conference on 18th November 2020, the

Judge issued directions for the trial of the claim. Learned counsel for Mr. Taruta, Mr. Adrian Francis, applied for permission to amend his defence and for the Bank to provide answers to a request for information served on 16th November 2020 (**“the RFI”**). The Judge dealt with the application to amend the defence by ordering that Mr. Taruta could apply for permission to amend on or before 4 pm on 9th December 2020. He ordered a stay of the RFI until further order of the Court.

- [10] Mr. Taruta filed applications for permission to amend his defence and to compel the Bank to comply with the RFI on 9th December 2020 and 10th December 2020 respectively. Both applications were heard by Jack J on 11th January 2021. At the completion of the hearing the learned Judge delivered an oral decision dismissing both applications and ordering Mr. Taruta to pay the costs of the applications. The Judge also denied Mr. Taruta’s application for leave to appeal. A single judge of the Court of Appeal granted leave to appeal on 16th February 2021.

The Appeal

- [11] The notice of appeal lists five generic grounds of appeal:
- (i) Errors of law.
 - (ii) Errors of fact.
 - (iii) Failing to take into account relevant considerations.
 - (iv) Irrelevant considerations.
 - (v) Findings plainly wrong which no reasonable judge could have made.

The notice sets out under each ground of appeal the specific complaints against the decisions of the Judge and how he arrived at his decisions. The main issues that arise from the grounds of appeal and counsels’ oral and written submissions are:

- (a) The Judge’s decision to order that the claim be tried in two stages, namely, the claim to recognise the Russian Judgment as a judgment of the BVI court followed by separate proceedings to enforce payment of the amounts due under the Judgment. This was a fundamental issue before the court and the Judge’s decision to order a split trial impacts other issues raised in the notice of appeal.

- (b) The Judge's dismissal of Mr. Taruta's application to amend his defence.
- (c) The Judge's dismissal of Mr. Taruta's application to compel the bank to comply with the request for further information.
- (d) The Judge's refusal to attach any weight to a judgment of the Commercial Court of the Krasnoyarsk Territory dated 13th August 2014 in proceedings between the Bank and Mr. Katunin in which the Russian Court ruled that any amount due under the Guarantee was to be paid in Russian Rubles at the rate of exchange with the US dollar on 13th August 2014, the date when the Borrower went into an insolvency procedure.

The Court's approach to challenges to case management decisions

- [12] The Judge in this case was dealing with a claim for the common law recognition of the Russian Judgment. The claim was opposed because it was said that the Judgment had been obtained in breach of the rules of natural justice and BVI public policy, and the amount due under the Judgment was disputed. As appears below, the Judge decided to try the issue of recognition in the first stage of the trial and the assessment of the amount due under the Judgment in the second stage. This was a decision that was entirely within the Judge's discretion in managing the case. This Court has repeatedly said that case management decisions are the province of the trial judge and should be accorded the highest respect by appellate courts. The basic principles have been set out and repeated in many decisions of this Court and for convenience we will repeat what was said in **Shallan Overseas Limited v Primefuels Investments Limited and others**¹ –

“It is now settled law that an appellate court should not interfere with the case management decision by a trial judge unless the decision was plainly wrong. This Court acknowledged this principle in *Aqueduct Limited and another v Faelesseje and another* where Baptiste JA noted at paragraph 21–

“In ordering as she did, the learned judge was in essence making a case management decision. A case management decision is

¹ BVIHMCAP2019/0005 (delivered 18th September 2020, unreported).

peculiarly that of the first instance judge. As Lady Justice King stated in *Re U (children)*

'It has always been the case that a case management decision is peculiarly that of the first instance judge and the Court of Appeal will be slow to interfere with such a determination.'

Baptiste JA also relied on the Supreme Court decision of **HRH Prince Abdulaziz v Apex Global Management Ltd and another**² where Lord Neuberger made a similar pronouncement, emphasising that it is inappropriate for an appellate court to interfere with a case management decision unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree."³

We bore these principles in mind when considering the Judge's decision to order split trials.

The split trial order

- [13] The starting point in considering the Judge's decision to order a split trial is the pleadings. The statement of claim commences in paragraph 1 with a clear statement that –

"This is an action by the Claimant at common law to enforce a Judgment made by the Meshchansky District Court of Moscow (the "Russian Court") dated 28 February 2014 (the "Judgment") and a Decree of the Meshchansky District Court of Moscow dated 24 March 2014 (the "Decree") (together, referred to as the "Russian Judgments") against the Defendants. Certified translations of the Russian Judgments are exhibited at pages 1 to 11 of the Schedule to this Statement of Claim."

This was followed by details of the loans by the Borrower, the default in the repayment and the Bank's demands on the Guarantors to pay the amounts due under the Russian Judgment. Paragraphs 13 to 16 deal with the issue of enforcement of the Judgment as follows:

"13. The Judgment was finalized on 28 February 2014 and no appeal was filed by the Defendants within the deadline or at all. Similarly, no appeal was filed by the Defendants against the Decree within the deadline or at all. By reason of the foregoing, the Russian Judgments are binding on the Defendants and are final and conclusive at common law.

² [2014] UKSC 64.

³ Ibid at paragraph 13.

14. By reason of the matters pleaded at paragraphs 12.10 to 12.12 (inclusive) above, the Russian Judgments are *in personam* and for a specific sum at common law.

15. By reason of the matters pleaded at paragraph 11 above, the Russian Court had jurisdiction to grant the Russian Judgments, since the Defendants submitted to the jurisdiction of the Russian Court by contractual means.

16. By reason of the matters pleaded at paragraphs 12 to 15 above, the Defendants' liability (individually and jointly) to the Claimant under the Russian Judgments are determined and incontrovertible. The Claimant is therefore entitled to a determination of this Court that the Defendants are indebted to the Claimant in accordance with the terms of the Russian Judgments and are estopped from arguing the contrary."

[14] Finally, the Bank claimed, inartfully, damages for the amounts owing under the Russian Judgment, both in the claim form and in paragraphs 17-19 of the statement of claim. The substance of the claim was not for damages but for the recovery of the debt created by the Russian Judgment. The fact that the Bank claimed the judgment debt as damages does not affect the substance of the claim which is for recognition and enforcement at common law of the judgment debt created by the Russian Judgment. The Court does not accept Mr. Taruta's submission that this was a standard claim for damages for breach of contract and that the Bank must prove in the BVI claim the amounts that it has lost as a result of Mr. Taruta's breach of contract.

[15] It is trite that the BVI court has jurisdiction at common law to recognise and enforce a money judgment obtained in foreign proceedings. The power to do so is set out in Halsbury's Laws of England -

"A judgment in personam of a foreign court of competent jurisdiction is capable of recognition and enforcement in England [BVI]. Apart from statute such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the

amount of the foreign judgment. The debt so created is a simple contract debt and not a specialty debt, and is subject to the appropriate limitation period".⁴

[16] Mr. Taruta did not dispute the Court's general power to recognise and enforce a foreign judgment properly obtained. His defence to the claim as set out in the defence filed in 2014 is that the Russian Judgment is impeachable and should not be recognised or enforced in the BVI because it was obtained in breach of the rules of natural justice and is against BVI public policy. He claimed that he was not served with the Russian proceedings and he only became aware of the Russian Judgment from a news report on or about 22nd May 2014 relating to a freezing injunction against him in the BVI. Therefore, he was deprived of the opportunity to be heard and the recognition or enforcement of the Judgment in these circumstances would be against BVI public policy. The Bank's position is that the Russian claim was served on Mr. Taruta at the address provided in the Guarantee for service of notices and the District Court accepted this as proper service of the claim. The Russian Appeal Court dismissed Mr. Taruta's appeal against the judgment of the District Court on grounds that included that he was properly notified of the hearing before the Russian court. The Cassation Court confirmed the decisions of the District Court and the Appeal Court.

[17] The preceding paragraph summarises the issues that were joined between the parties on the claim when the matter came up for case management in October and November 2020. The Court was being asked to either recognise the debts created by the Russian Judgment as a judgment of the BVI Court or refuse such recognition on the grounds of breach of natural justice and BVI public policy. At the October hearing Mr. Taruta sought permission to amend his defence to include recoveries allegedly made by the Bank on the amounts due under the Russian Judgment between the filing of the claim in 2014 and the October 2020 hearing. Mr. Taruta also asked the Judge to order the Bank to respond to the RFI that was served on the Bank's lawyers on 16th November 2020. As stated above, the Judge gave Mr.

⁴ Halsbury's Laws of England Volume 19 (2011) paragraph 416.

Taruta permission to apply by 4 pm on 9th December 2020 to amend his defence and he stayed the RFI until further order of the court.

- [18] The terms of the Judge's order on 18th November 2020 give the first insight into how he was managing the case. The fifth recital of the order reads -

"AND UPON READING the Request For Information on behalf of the Second Defendant to the Claimant on 16 November 2020 (the "Request for Information") and the Court finding that the questions contained therein are not relevant to any dispute in the proceedings."

Thus, the Judge took the position from as early as the November 2020 case management hearing that the issue of the amounts recovered (if any) on account of the judgment debt as requested in the RFI were not relevant to the dispute in the claim which was for recognition of the Russian Judgment as a judgment of the BVI Court.

- [19] The Judge's order of 11th January 2021 puts beyond doubt that he intended to deal only with the recognition of the judgment at the trial. The third and fourth recitals read:

"AND UPON the Court directing that the trial in these proceedings shall determine whether a Russian Judgment obtained by the Claimant against the Defendants on 20 February 2014 (the "Russian Judgment") shall be amenable for enforcement at common law in this Territory.

AND UPON the Court and the Parties recognising that the Claimant's recovery under its claim (if successful) shall be limited to the judgment debt that has not previously been offset and remains due and owing under the Russian Judgment."

- [20] The transcript of the hearing on 11th January 2021 also reveals the Judge's management of the case. In delivering his decision the Judge said –

"This is not a matter which comes fresh before the Court. It was a matter which was discussed on the 19th of November last year when there were cross applications for summary judgment, and on that occasion I determined that the question of recovery in other proceedings is one for the enforcement stage, not for the liability stage.

Now that may or may not have been right, but the decision there was never appealed and in the light of Mr. Carroll's concession it seems to

me there's no prejudice to Mr. Taruta by taking the position that questions of recovery in other proceedings should be determined at the enforcement stage rather than at the liability stage. And indeed Mr. Francis in his submissions suggested that if one was going to take that approach then one was really seeking an order for a split trial where one was going to have the trial of liability and then the trial of quantum subsequently.

It's very much a distinction without a difference in that either way it's common ground between the parties that Mr Taruta is entitled to credit for any recoveries which reduced the overall indebtedness of the principal to less than \$30 million.

In those circumstances it seems to be that there's no need to revisit the order which I made on 19 November. It's sufficient to have a recital in the order on this application which recites what is conceded by Mr. Carroll, that these matters are not going to be determined finally because it will always be open to Mr Taruta to say that there has been recovery in any other proceedings, given that there is no need to have an answer to the request for further information at this point.”⁵

[21] The Judge's orders on 18th November 2020 and 11th January 2021 establish the following principles regarding his management of the case:

- (i) The upcoming trial would deal with the issue of the recognition of the Russian Judgment as a judgment of the BVI Court. This is what the Judge described as the liability stage.
- (ii) It was conceded by learned counsel for the Bank, Mr. Grant Carroll, that Mr. Taruta will be given credit for all recoveries made by the Bank on account of the debt created by the Russian judgment.
- (iii) The amount of such recoveries may be determined at the second stage of the trial which the judge described as the enforcement stage.

Challenges to the split trial order

[22] Mr. Francis submitted that the Judge committed several errors in coming to his decision to order separate trials for the issues of liability and enforcement.

⁵ Internal page 22 line 6 – page 23 line 14.

- [23] Mr. Francis referred firstly to the pleadings and submitted that this was a claim in damages and the Judge should have ascertained by trial the amount that remained outstanding under the Russian Judgment before entering the BVI judgment. The Court has already dealt with this point and found that this was a claim for recognition of the Russian Judgment that created a debt and the Judge was entitled to treat it as such and leave the issue of the amount that remains due under the Judgment to be dealt with in the enforcement proceedings.
- [24] The Court did not accept Mr. Francis' further submission that as a matter of law in a claim for recognition of a foreign judgment it is necessary to investigate whether the loss represented by the judgment has in fact incurred and whether the obligation to pay the amount of the foreign judgment remains outstanding. Mr. Francis did not support his position with reference to any decided cases and in any event, the Court finds that this submission distorts the recognition procedure at common law. All that the claimant needs to do is to present a judgment from a foreign court of competent jurisdiction that is final and conclusive on the merits. The defendant/judgment debtor can raise any of the limited defences to such a claim such as breach of natural justice. If the claim is successful, the court will recognise the judgment as a judgment of the BVI court for the amount of the judgment. Issues of the amount to be recovered are dealt with at the enforcement stage. This is not to say that in an appropriate case a BVI judge cannot deal with issues of liability and quantum at the recognition stage. But this, like the decision to order split trials, is a case management decision to be made by the judge in his discretion depending on the facts and circumstances of the case.
- [25] Mr. Taruta's complaint that he will be prejudiced by the entry of judgment for US\$30 million when that amount is not due to the Bank is not made out. The Judge took note of the Bank's concession that it will give credit for any recoveries made on account of the judgment debt in the enforcement proceedings and Mr. Carroll confirmed in his oral submissions that there will be absolutely no double recovery by the Bank.

- [26] In all the circumstances the complaint that the Judge erred in ordering split trials is not made out.

The application to amend the defence

- [27] On 9th December 2020, Mr. Taruta applied to amend his defence. A party to a claim in the Commercial Court can apply to amend its statement of case at any time and the judge hearing the application can in his or her discretion grant or refuse the application. The considerations guiding the judge or master hearing the application are set out in Rule 23.1 (3) of the **Civil Procedure Rules 2000** ('CPR 2000'). The amendments that Mr. Taruta sought to add to his defence are the following three paragraphs:

"12. The proceedings against Mr Taruta in the Virgin Islands do not serve any useful purpose because the Claimant cannot show that it can reasonably expect any benefit from a judgment of the BVI Court. The Claimant has made full recoveries against other, principal and secondary, obligors, between 2013 and 2020, and has been fully compensated for its damages arising out of the Loan Agreements.

13. As a matter of Russian law a guarantor's liability to a creditor cannot exceed the liability of the principal debtor. The Claimant is put to strict proof that it has suffered damages of US\$30 million as a result of the Second Defendant's non-payment pursuant to the Guarantee, which is not admitted.

14. Alternatively, if, which is denied, the Russian Judgment is enforceable and has not been satisfied by previous recoveries from other obligors, the Second Defendant's liability to the Claimant is no greater than RUB1,068,717,000, the dollar exchange rate applied by the Ruling of the Commercial Court of the Krasnoyarsk Territory dated August 13, 2014 (RUB 35.6239 x 30,000,000) on the date of the introduction of the supervision procedure in respect of the principal debtor."

- [28] The Judge dismissed the application for the reasons set out in his judgment. He noted that the proposed paragraphs 13 and 14 plead matters that depend on Russian law and that the application was not supported by expert evidence of Russian law. The statements of Russian law are in the affidavit of Mr. Carl Moran, a lawyer practising in the BVI, not an expert in Russian law. Jack J noted that the allegation in paragraph 13 was vague, suggesting that Mr. Taruta's liability under

the Guarantee could not, as a matter of Russian law, exceed that of the Borrower. The Judge reviewed the evidence of Mr. Moran and noted that what Mr. Taruta was alluding to in the proposed paragraph 13 was that as a matter of Russian law, the Borrower's obligation to repay the loans ended when the Borrower was dissolved in the insolvency procedure in Russia. The consequential effect was that Mr. Taruta's obligations, as Guarantor, also ended with the dissolution of the Borrower. The Judge observed that the notion that a Guarantor's liability was extinguished by the dissolution of the principal debtor was absurd and in the absence of expert evidence of Russian law of this remarkable proposition he was *"[w]holly unpersuaded that the defence has any realistic prospect of success."*⁶

- [29] The proposed paragraph 14 of the defence is to the effect that if the Russian Judgment is enforceable, it should not be for US\$30 million. It should be converted to 1,068,717,000 Russian Rubles based on the exchange rate on the date of the introduction of the insolvency procedure of the Borrower and applied by a ruling of the Commercial Court of the Krasnoyarsk Territory dated 13th August 2014. However, there was no expert evidence that the insolvency of the Borrower would automatically convert the US\$30 million in the Russian Judgment to Russian Rubles. The judge found –

"In the absence of any evidence to that effect, in my judgment I have to proceed on the basis that Mr. Taruta's liability is \$30 million, which is what is stipulated for with the Bank. In all circumstances it doesn't seem to me that paragraph 14 is one which needs to be added."

As with the proposed amendment to paragraph 13 of the defence, the Judge was satisfied that he should not allow an amendment to plead a Russian judgment of another court to support an allegation that could be used to vary the terms of the Meshchansky District Court judgment that he was required to recognise. The possibility that the amount that is actually due under the Judgment may be different because of the exchange rate issue, like the issue of recoveries by the Bank, may be considered at the enforcement stage.

⁶ Transcript page 25.

- [30] It may not be necessary for every application for an amendment to plead foreign law to be supported by expert evidence of the issue of foreign law, but in this case the fundamental problems that the Judge had with the proposed amendments were that they raised either an absurd point which did not have a realistic prospect of success (paragraph 13) and a highly unusual method of changing the terms of a judgment of one Russian court by reference to a judgment of another Russian court (paragraph 14). In both cases the Judge found that evidence of Russian law was necessary to support the unusual requests for amendments.
- [31] The proposed amendment of paragraph 12 is less complicated. The amendment sought to introduce a pleading in relation to the alleged recoveries made by the Bank since the Judgment was entered. The Judge's decision (which we affirm), that issues of the amounts actually due under the Judgment will be dealt with in the enforcement proceedings means that it is unnecessary to amend the defence to deal with the recoveries.
- [32] The application to cause the Bank to respond to the RFI meets the same fate as the proposed amendment to paragraph 12 of the defence. The requested information relates to the alleged recoveries and this will be dealt with at the enforcement stage. The application in respect of the RFI was therefore dismissed.
- [33] The Judge, having decided to dismiss the application for amendments on substantive grounds, also considered the criteria for considering applications for amendments in CPR 20.1(3). He set out CPR 20.1(3) in its entirety and considered each criterion as it applied to the case. We will make only brief comments on this part of the Judge's decision having already accepted his refusal of the amendments on substantive grounds. The judge found that Mr. Taruta was not prejudiced by the refusal and that it was not in the best interests of the administration of justice to allow the amendments. He also found that the application was not made promptly even though it was made within the period

allowed by the 18th November 2020 order. The Judge set out his reasons for coming to what may appear to be a harsh finding on the lack of promptness of the application but he went on to make it clear that the finding was “[N]ot necessarily fatal to his [Mr. Taruta’s] application.”

[34] In all the circumstances we find that the Judge refused the amendment application on the material that was before him. He did not commit any error of principle and his decision was well within the bounds of reasonable disagreement. The same is true of his decisions to order a split trial and to refuse the RFI. We therefore dismissed appeal number BVIHCVMAP 2021/0002 - the Amendment/RFI appeal - with costs to the Bank to be assessed if not agreed within 21 days of the date of the decision.

[35] **Appeal No 12 of 2021 – The Strike Out Appeal**

The strike out appeal is an appeal against the decision of the learned judge made on 23rd April 2021 striking out the expert witness opinion of Mr. Dmitry Chernyy filed by Mr. Taruta on 12th April 2021. The general background to the appeal is set out in paragraphs 3-8 of the judgment in Amendment/RFI Appeal and defined terms in the said judgment continue to apply.

[36] The specific background to this appeal is that during the case management hearing on 18th November 2020 Jack J ordered that “*The parties have permission to file and exchange any further expert evidence of foreign law on the issue of the enforceability and validity [of the Russian judgment].*” The order also contained directions for the filing of the expert evidence, meetings of the experts and for their attendance at the trial for cross examination.

[37] The report of Mr. Chernyy commented on several aspects of the proceedings in the courts in Russia with particular emphasis on the procedures applied by the courts in entering the Russian Judgment and the appeals therefrom.

[38] On 16th April 2021, the Bank applied to strike out Mr. Chernyy's report on procedural grounds and also because it went beyond the Judge's direction that the expert evidence should be directed to the enforceability and validity of the Russian Judgment. The Bank also asserted that Mr. Chernyy's evidence will not assist the Court with the matters that are relevant to the trial. The application was heard by the learned judge on 23rd April 2021. It was vigorously opposed by Mr. Francis on behalf of Mr. Taruta.

[39] The Judge considered and applied the well-known common law principles that a money judgment of a foreign court of competent jurisdiction that is final and conclusive on the merits can be recognised in the BVI, and that recognition can be resisted if the defendant/judgment debtor can prove that the judgment was obtained in breach of the rules of natural justice and was therefore contrary to BVI public policy. The breach of natural justice and public policy must be judged by the Virgin Islands' concepts of natural justice. The Judge concluded that the matters in paragraph 9 of Mr. Taruta's defence, which are the core of the defence, are:

"[M]atters which this Court is perfectly well able to recognise as being potential breaches of BVI public policy and BVI natural justice"⁷

The Judge then referred to the requirement in Part 32.2 of the CPR 2000 that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly and concluded -

"In the current matter, in my judgment, it is not necessary to have this evidence of Russian law. The matters in paragraphs 9 (a) to (e) of the defence are such that those can be determined without any resort to expert evidence of Russian law. In those circumstances, I accede to the claimant's application to strike out the Defendant's expert evidence."⁸

The Judge had a wide discretion in considering the application which he exercised by striking out Mr. Chernyy's expert report. He also refused Mr. Francis' oral application for leave to appeal.

⁷ Transcript of oral decision 23rd April 2021 page 21 lines 1-3.

⁸ Transcript of oral decision 23rd April 2021 page 21 lines 13-19.

The Appeal

[40] Mr. Taruta was granted leave to appeal by a single judge of the Court of Appeal. The notice of appeal challenged the Judge's order and alleged that he erred by:

- (i) Finding that he could determine the issues raised in paragraph 9 of the defence without any evidence of Russian law (ground 1).
- (ii) Expressly or impliedly finding that the matters considered by the Russian courts relating to Russian law, practice and procedure are irrelevant in determining whether the proceedings in Russia viewed as a whole offended against the Virgin Islands' concepts of natural justice (grounds 2 and 3).
- (iii) Expressly or impliedly finding that the questions addressed by Mr. Chernyy in his report were solely directed to questions of whether the Russian judgments were contrary to Russian public policy and Russian notions of natural justice (ground 4).

The grounds of appeal overlap and we will deal with them together.

[41] The essence of Mr. Taruta's defence is in paragraph 9 of the defence in the following terms –

- “(a) Mr. Taruta was not served with the Russian Proceedings, duly or at all.
- (b) Mr. Taruta was not notified in accordance with the applicable law, being the procedure set out in the Minsk Convention, of the time and place or the hearings that resulted in the Russian Judgments (the "Russian Hearings").
- (c) Mr. Taruta did not have actual knowledge, or notice, of the time and place of the Russian hearings.

(d) As a result of the foregoing matters, the Russian Hearings took place in Mr. Taruta's absence and without his interest being represented; and

(e) Accordingly, Mr. Taruta was deprived of the opportunity to be heard."

[42] Mr. Francis did not dispute that the relevant conflict of law rule in the Virgin Islands is that the issues of natural justice and public policy raised in paragraph 9 of the defence must be determined by the BVI's concepts of natural justice and public policy. However, he submitted that there were errors in the Russian proceedings that denied Mr. Taruta the opportunity of being heard and were in breach of his natural justice rights. In the circumstances, the BVI Court could not make a fully informed decision on the defence if it does not hear expert evidence of Russian law, practice and procedure.

[43] Mr. Francis relied on rule 52 of **Dicey Morris and Collins ("Dicey")**⁹ which states that "A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice." It is common ground that this rule applies in the BVI. The essence of Mr. Francis' submissions is that in considering the concepts of BVI natural justice the Court can, and should in appropriate cases, take account of expert evidence of foreign law on important issues in the foreign proceedings leading up to the judgment. He relied extensively on the commentary on rule 52 in **Dicey**¹⁰. The commentary includes paragraph 14-163:

"In the celebrated passage in his judgment in *Pemberton v Hughes* (a case on the recognition of a foreign divorce decree), Lord Lindley observed: "If a judgment is pronounced by a foreign court within its jurisdiction and in a matter with which it is competent to deal, English courts will never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice." This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign

⁹ Dicey, Morris and Collins on the Conflict of Laws (15th edition, 2018).

¹⁰ Ibid.

law, is not impeachable on that ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England [BVI] or did not admit evidence which is admissible in England [BVI] or otherwise followed a practice different from English [BVI] law.” (Emphasis added)

[44] Mr. Francis submitted that where there is an error of substance in the foreign court then the Virgin Islands court can have regard to that error in deciding whether there was a breach of Mr. Taruta’s natural justice rights. For this he relied on the further commentary on rule 52 in **Dicey**¹¹ –

“*Adams v Cape Industries Plc* appears to have been the first English case in which the defence of breach of natural justice was established in relation to a judgment *in personam*. The Court of Appeal held that the defence of breach of natural justice was not limited to the requirements of due notice of the hearing to a litigant and opportunity to put a case to the foreign court. It confirmed that the basic question was that stated in *Pemberton v Hughes*, namely whether there was a procedural defect which constituted a breach of the English court’s view of substantive justice, which would depend on the nature of the proceedings under consideration. The principle was applied in *Masters v Leaver* where the Court of Appeal considered that a substantial failure to follow its own procedure for an assessment of damages meant that proceedings before a Texas court had led to a judgment in denial of substantial justice.

A mere procedural irregularity would not offend English concepts of substantial justice. In *Adams v Cape industries Plc* a foreign judgment for damages in default of appearance, and notice was given to the defendants of the application for a default judgment on an unliquidated claim. Under United States law (as under English law) the assessment of damages is effected (even in cases of default) by the court, but the United States judge did not hold any form of hearing, and the judgment was not based on an objective assessment by the judge of the evidence. The Court of Appeal did not decide that a lack of judicial assessment of damages is per se a breach of natural justice; but it is a breach where the foreign legal system contains provision for judicial assessment and the judgment debtor therefore has a reasonable expectation that there will be a judicial assessment.

The case is therefore an example of a breach of natural justice outside the categories of notice and opportunity to be heard, because the judgment debtors were given notice and an opportunity to contest the quantum of damages; they did not take the opportunity because they did not wish to submit to the jurisdiction of the foreign court.”

¹¹ Ibid. Paragraph 14-164.

- [45] We agree that the commentary in **Dicey** allows the BVI Court, when dealing with natural justice issues in a recognition of foreign judgment application, to consider issues in the foreign court other than failure to give notice and an opportunity to be heard. The cases cited by the learned editors of Dicey support this position. In **Adams v Cape Industries Plc**,¹² the defendant was aware of the pending default judgment procedures and chose not to attend. The Court of Appeal in England found that the breach of his natural justice rights was the judge's assessment of the damages without a formal hearing in breach of the procedural rules in Texas. The breach in **Masters and others v Leaver**¹³ was that the damages were assessed by a judge contrary to the court's prior order that the defendant had the option to decide whether the damages be assessed by a judge or jury. We do not think that these cases establish any broader principle than that the recognising court (BVI) can consider issues of alleged breaches of natural justice that go beyond failure to give notice to the defendant and an opportunity to be heard.
- [46] Mr. Francis took the matter further and submitted that the commentary in rule 52 of **Dicey** and the cases of **Adams v Cape industries plc**¹⁴ and **Masters v Leaver**¹⁵ show that what happens in the foreign court can be relevant to the issue of assessing whether Mr. Taruta's natural justice rights have been violated. It is not purely a matter of BVI law and the Court has the power in some cases to review what took place in the foreign court. Applied to this case, he submitted that Mr. Chernyy's evidence is relevant to the issue of natural justice and the Judge should not have struck it out. It could be used at the trial to determine if, on the facts, there had been a denial of substantive justice in the Russian proceedings.
- [47] Jack J did not have such a lofty view of Mr. Chernyy's evidence. He considered the effect of the **Dicey** commentary and the cases cited and observed at page 20 of the transcript that –

¹² [1990] Ch. 433.

¹³ [2000] The Times 5 August 1955.

¹⁴ Supra note 12.

¹⁵ Supra note 13.

“The high point, in my judgment [of Mr. Taruta’s case], is what is said there about the *Adams and Cape Industries* matter and the *Masters and Leaver* matter and it may be that if this were a case in which it was said that the failures which are identified in paragraphs 9(a) to (e) of the Defence were matters which are affected very substantially by the rules of Russian procedure, then there would be some scope for saying that one needs to have expert evidence of Russian law. However, the matters in paragraph 9(a) to (e) are matters which this court is perfectly well able to recognise as being potential breaches of the BVI public policy and BVI natural justice.”

[48] We note that the matters pleaded in sub-paragraphs (a) to (e) of paragraph 9 of the defence relate to allegations of failure to give notice of the hearing in the Russian court and that Mr. Taruta was deprived of the opportunity to be heard. The alleged irregularities do not go beyond these issues. They are the kind of procedural matters that are specifically referred to in the extract from **Dicey** and in **Adams v Cape Industries** as issues that ought to be resolved by the foreign court. In this case, those issues were raised in the District Court by Mr. Taruta as a part of his challenge to the Russian Judgment and repeated in the Appeal Court. In both instances the Russian Courts ruled against him and the decisions were affirmed by the Cassation Court. In the circumstances, it was well within the power and discretion of Jack J to find that these were procedural irregularities that can be resolved by reference to BVI standards of natural justice and public policy and it was not necessary to admit the expert evidence of Mr. Chernyy.

[49] The Judge did not commit an error of principle in striking out the expert evidence of Mr. Chernyy and his decision was not outside the ambit of reasonable disagreement, nor was it blatantly wrong. In the circumstances we dismissed the appeal and ordered the appellant to pay the costs of the appeal.

C - Appeal No 8 of 2021 – The Stay Appeal

[50] This appeal raises a very short point. On 4th March 2021, Mr. Taruta applied for a stay of the proceedings in the court below pending the determination of his appeal to this Court against the order of Jack J dated 11th January 2021 in the Amendment/RFI Appeal. The application was heard by Wallbank J on 22nd March

2021. Wallbank J delivered an ex-tempore order dismissing the application with costs to the Bank. Mr. Taruta was dissatisfied with Wallbank J's decision and appealed to the Court of Appeal. On 26th March 2021, Mr. Taruta applied to this Court for a stay of the proceedings in the lower court in Claim No. BVIHCV(COM) 2014/0062. The relief sought in the application overlaps with the relief that was refused by Wallbank J on 22nd March 2021 and is now the subject of the appeal being considered (the Stay Appeal). The 26th March 2021 application was heard on paper on 30th March 2021 by Baptiste JA as a single judge of the Court of Appeal. Baptiste JA dismissed the application. Mr. Taruta did not apply under CPR 62.16A, as he was entitled to do, to set aside or vary the decision of the single judge. That left standing only the appeal against Wallbank J's order made on 22nd March 2021 refusing a stay of the proceedings in the court below pending the outcome of the Amendment/RFI appeal. The Amendment/RFI was dismissed by this Court on 2nd June 2021. As such, the Stay Appeal became redundant as it sought the same relief as the stay application that was dismissed by the single judge on 30th March 2021. The attempt to revive the Stay Appeal was not viewed as an efficient use of the Court's time and resources. We therefore dismissed appeal number BVIHCVMAP 2021/0012 - the Stay Appeal - with costs to the Bank to be assessed if not agreed within 21 days of the date of the decision.

Disposal

- [51] For the reasons set out above we dismissed the three appeals on 2nd June 2021 with costs to the respondent in all three appeals.

I concur.
Dame Janice M. Pereira DBE
Chief Justice

I concur.
Hon. Davidson Kelvin Baptiste
Justice of Appeal

By the Court

Chief Registrar