

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

**TERRITORY OF THE VIRGIN ISLANDS
BVIHCMAP2021/0004**

BETWEEN:

**[1] EMMERSON INTERNATIONAL CORPORATION
[2] MIKHAIL ABYZOV**

Appellants

and

**[1] VIKTOR VEKSELBERG
[2] GOTHELIA MANAGEMENT LIMITED
[3] INTEGRATED ENERGY SYSTEMS LIMITED**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

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

Appearances:

Mr. Philip Marshall QC with Mr. Robert Weekes, Mr. Ajay Ratan and Ms. Colleen Farrington for the Appellants
Mr. Simon Birt QC with Ms. Arabella di Iorio, Mr. Michael Bolding and Mr. Shane Quinn for the 1st and 3rd Respondents

2021: March 9 and 10;
October 6.

Interlocutory appeal — Anti-suit injunction — Worldwide freezing order (WFO) — Exercise of discretion by a judge — Whether the judge erred by failing to find that Mr. Vekselberg has de jure or de facto control of some of the Cyprus Claimants to direct them to withdraw the Cyprus proceedings and the WFO — Whether the judge erred by failing to find that the Cyprus proceedings are vexatious or oppressive — Whether the judge erred by failing to find that there was sufficient overlap between the Cyprus claim and the BVI claim, that the Cyprus claim has a real or substantial connection with the BVI, and that the BVI is clearly the natural and appropriate forum for trying the Cyprus claims — Whether Mr. Vekselberg was in breach of his assurance to the BVI court that he has not commenced and has no intention to commence any proceedings in any jurisdiction against the appellants which

relate to the issues to be determined in the BVI proceedings — Whether the judge could have granted anti-suit relief in relation to the WFO only without granting relief in respect of the Cyprus proceedings — Whether the judge erred by declining to take into account that the Cyprus claimants committed serious and material non-disclosures in applying for and obtaining the WFO — Whether the judge erred in not finding that the WFO was an impermissible interference with the receiver appointed by the BVI court and did not cause prejudice to the appellants — Whether the judge was wrong not to take account of the complete absence of any provision in the WFO dealing with the extraterritorial effect of the order

In or about 2006 Mr. Viktor Vekselberg (“Mr. Vekselberg”), and persons associated with him (“the Renova parties”), engaged in negotiations with Mr. Mikhail Abyzov (“Mr. Abyzov”) and persons associated with him (“the Abyzov parties”) to form a joint venture regarding the assets of the Renova Group in Russia. The negotiations and consequently the formation of the joint venture failed, resulting in complex and protracted litigation between the Abyzov parties and the Renova parties in the Territory of the Virgin Islands (the “BVI”), Russia and more recently Cyprus.

The litigation in Cyprus was commenced by Brookweed Trading Limited (“Brookweed”), Gothelia Management Limited (“Gothelia”), Integrated Energy Systems Limited (“IES Cyprus”), LLC T Plus Invest (“T Plus Invest”), and CJSC KES-Holding (“KES-Holding”), together “the Cyprus claimants”. The Cyprus claimants are shareholders of PAO T Plus, a public company based in Russia (“T Plus”). T Plus is a defendant by way of counterclaim and ancillary claim in the BVI proceedings. The first three Cyprus claimants, Gothelia, IES Cyprus and Brookweed, are Cypriot companies owned by Renova-Holdings Rus (“RHR”) which is 90% owned by Mr Vekselberg. Mr. Vekselberg is not a party in the Cyprus case. In the period leading up to October 2018, T Plus was engaged in negotiations with the Gazprom Group of Companies regarding a potential merger between Gazprom and T Plus. On 2nd October 2018, Mr. Andre Titarenko wrote a letter on behalf of Emmerson to the General Director of Gazprom and on 9th November 2018 he wrote a second letter to the General directors of T Plus and RHR, and the two audit firms that were valuing the assets of T Plus for the purpose of the merger (“the Titarenko letters”). The letters commented adversely on Mr. Vekselberg and the Renova Group as potential business partners. The Cyprus claimants filed the equivalent of a generally endorsed writ against Mr. Titarenko, Mr. Abyzov and Emmerson (“the Cyprus defendants”) in the District Court of Limassol, Cyprus

(“the Cyprus claim” or “the Cyprus proceedings”) alleging that the Titarenko letters caused the collapse of the negotiations with the Gazprom Group and claiming €436 million in damages.

On 16th July 2020, the Cyprus claimants applied ex parte for a freezing order to prevent the Cyprus defendants from disposing of their assets up to the value of the claim in the Cyprus proceedings (“the WFO”). The WFO was granted on 17th August 2020. The Cyprus defendants’ applied in Cyprus to discharge the WFO and their response in the BVI was to apply for an anti-suit injunction against Mr. Vekselberg, IES Cyprus and Gothelia (“the respondents”). The application sought orders that (i) IES Cyprus and Gothelia discontinue the Cyprus proceedings, (ii) Mr. Vekselberg cause Brookweed, KES-Holding and T Plus Invest to discontinue the Cyprus proceedings, and (iii) a worldwide anti-suit injunction be granted restraining the respondents from commencing or continuing or taking any steps in proceedings against Emmerson or Mr Abyzov in any court or tribunal other than the BVI in respect of any of the issues arising for determination in the proceedings in the lower court. Brookweed, KES-Holding and T Plus Invest are not parties in the proceedings in the court below but are said to be controlled by Mr. Vekselberg. Wallbank J heard the application on 15th December 2020 and 11th January 2021, and on 8th February 2021 refused the relief sought.

The appellants were dissatisfied with several of the judge’s findings of fact and law and his decision to dismiss the application. They appealed to this Court on several grounds which canvas the following issues: (i) whether the judge erred by failing to find that Mr. Vekselberg has sufficient de jure or de facto control of Brookweed, Gothelia and IES Cyprus to direct them to withdraw the Cyprus proceedings and the WFO; (ii) whether the judge erred by failing to find that the Cyprus proceedings are vexatious or oppressive; (iii) whether the judge erred by failing to find that there was sufficient overlap between the Cyprus claim and the BVI claim, that the Cyprus claim has a real or substantial connection with the BVI, and that the BVI is clearly the natural and appropriate forum for trying the Cyprus claim; (iv) whether Mr. Vekselberg was in breach of his assurance to the BVI court that he has not commenced and has no intention to commence any proceedings in any jurisdiction against the appellants

that relate to the issues to be determined in the BVI proceedings; (v) whether the judge could have granted anti-suit relief in relation to the WFO only without granting relief in respect of the Cyprus proceedings; (vi) whether the judge erred by declining to take into account that the Cyprus claimants committed serious and material non-disclosures in applying for and obtaining the WFO; (vii); whether the judge erred in not finding that the WFO was an impermissible interference with the receiver appointed by the BVI court and did not cause prejudice to the appellants and (viii) whether the judge was wrong not to take account of the complete absence of any provision in the WFO dealing with the extraterritorial effect of the order (a Babanaft proviso).

Held: dismissing the appeal and ordering the appellants to pay the respondents' costs of the appeal to be assessed at no more than two-thirds of the amount awarded in the court below unless such costs are agreed within 21 days of the date of this judgment, that:

1. The granting of an anti-suit injunction is an exercise of discretion by the judge hearing the application and the role of the Court of Appeal in reviewing the exercise of that discretion is limited. The test is in two stages – (i) the trial judge must have made an error, and (ii) as a result his or her decision was outside the generous ambit of reasonable disagreement or was blatantly wrong.

West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80, Revised Laws of the Virgin Islands applied; **Dufour and Others v Helen Air Corporation Ltd and Others** (1996) 52 WIR 188 followed; **Hadmor Productions and others v Hamilton** [1983] 1 A.C. 191 at 220 followed; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 followed.

2. The application for an anti-suit injunction must show that (i) the court has personal jurisdiction over the person to be restrained; (ii) that the injunction, if granted, will be in the best interests of justice; and (iii) that commencing or continuing the foreign proceeding is vexatious or oppressive or will interfere with the process of the BVI court. The requirement of vexatious or oppressive conduct must be decided on a case-by-case basis. In determining whether the commencement or continuation of

the foreign proceeding is vexatious or oppressive the court will look at (i) whether the claim is entirely lacking in merit or bogus; (ii) the overlap between the issues in the BVI proceeding and the foreign proceeding; (iii) the impact, if any, of the injunction on the principles of international comity; (iv) the conduct of the parties; and (v) all the circumstances of the case.

Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp [2009] 2 All ER (Comm) 213 considered; **Masri v Consolidated Contractors International (UK) Ltd and others (No 3)** [2009] QB 503 considered; **Kenneth M. Krys et al v Stichting Shell Pensioenfonds BVIHCVAP2011/036** (delivered 17th September 2012, unreported) followed; **Stichting Shell Pensioenfonds v Krys and another** [2015] AC 616 followed; **Deutsche Bank AG and another v Highland Crusader Offshore partners LP and others** [2010] 1 WLR 1023 considered.

3. In considering whether to restrain a party from commencing or continuing proceedings in a foreign court the local court can consider the merits of the foreign proceedings, but (i) it is only one of the factors to be considered, (ii) it should only be decisive where on the face of it the foreign claim is hopeless, bogus or entirely without merit, and (iii) all the circumstances, including international comity, must be considered in deciding whether to exercise discretion by granting an injunction. The judge reviewed the Cyprus claim and decided that on its face it was not bogus, hopeless or entirely without merit. He did not, and was not required to, decide the merits of the claim. He correctly concluded that the merits of the claim are best judged by the Cyprus court in the context of the full range of the evidence in the claim.

Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another [1987] AC 871 considered; **Midland Bank plc and another v Laker Airways Ltd. and others** [1986] QB 689 considered; **Peruvian Guano Co. v Bockwoldt** (1883) 23 Ch. D. 225 considered; **Deutsche Bank AG and another v Highland Crusader**

Offshore partners LP and others [2010] 1 WLR 1023 considered; **Masri v Consolidated Contractors International (UK) Ltd and others (No 3)** [2009] QB 503 distinguished; **Elektrim SA v Vivendi Holdings 1 Corp**; **Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp** [2009] 2 All ER (Comm) 213 distinguished.

4. Mr. Vekselberg does not have, directly or indirectly, a controlling interest in T Plus Invest and KES-Holding. Further, these companies are not BVI companies and are not parties to the BVI proceedings. The learned judge found correctly that the BVI court does not have jurisdiction over these parties and that there was no evidence that Mr. Vekselberg had sufficient control of KES-Holding and T Plus Invest to order him to cause them to withdraw the Cyprus proceedings. Therefore, T Plus Invest and KES-Holding could continue the Cyprus claim without Brookweed, Gothelia and IES Cyprus and it would be pointless to grant the anti-suit injunction sought against the respondents. Moreover, the addition of a best endeavours clause to the order would not cure the fundamental defect that it was refused by the judge and by this Court for lack of evidence, and making the order would not serve a useful purpose.

Emmott v Michael Wilson and Partners Limited [2018] 2 All ER (Comm) 737 considered; **Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another** [1987] AC 871 considered.

5. There is no evidence of the extent, if any, of the reduction of the value of the Cyprus claim if it is discontinued by Brookweed, Gothelia and IES Cyprus and therefore this cannot form a basis for interfering with the judge's decision. Further, if an applicant is not entitled on the evidence to an anti-suit injunction it is not logical that his entitlement would improve because the value of the claim against him is reduced. The fact that the value of the claim has a consequential effect on the monetary cap of the WFO is a part of the practice regarding the granting of such injunctions.
6. The judge's findings that the claims are 'completely different', that the Cyprus claim has no connection with the BVI, and that the BVI is not the appropriate forum for the

trial of the Cyprus claim are all based on evidence that was before the court. In this case the issues do not overlap and the BVI is not the natural or appropriate forum for the trial of the issues in the Cyprus claim. There is no basis for this Court to interfere with the judge's findings.

Masri v Consolidated Contractors International (UK) Ltd and others (No 3) [2009] QB 503 considered; **Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp** [2009] 2 All ER (Comm) 213 considered.

7. The judge considered the non-disclosures and in his discretion he left the final determination of their effect to the Cyprus court. It cannot be said that he committed an error of principle in not finding that the disclosures made the Cyprus claim vexatious or oppressive.
8. Mr. Vekselberg was the only member of the Renova parties before the court when the assurance was given and is the only person referred to in the undertaking. None of the companies that he controls were parties to the litigation. Therefore, the judge to whom the undertaking was given and who has had conduct of the majority of the proceedings in the BVI litigation, cannot be faulted for finding that the assurance was not breached by the continuation of the Cyprus proceedings which were not commenced and are not being conducted by entities that are controlled by Mr. Vekselberg. Further, the issues in the Cyprus proceedings are completely different from the issues in the BVI proceedings. As such, the judge did not err in his interpretation and treatment of the assurance.
9. Despite acknowledging the risk of the WFO interfering with the receiver appointed by the BVI court, the judge found, as he was entitled to do, that there was no evidence of actual interference or damage to the appellants and in all the circumstances of the case, he did not regard this as a sufficient ground for granting

the anti-suit injunction. This was an exercise of discretion by the judge taking a holistic view of the application which does not warrant appellate interference.

10. The judge could have made an order in respect of the WFO only. However, in a new development after the hearing of the appeal, the receiver filed a Notice of Completion of the Receivership confirming that the receivership of Emmerson had been completed and was at an end. This means that the potential for interference with the order of the BVI court appointing the receiver is no longer a live issue in this appeal and it is not necessary to make an order regarding the receivership.
11. In all the circumstances of this case, the failure to include a Babanaft proviso in the WFO is not sufficiently serious to warrant the grant of an anti-suit injunction. Issues like the width of the WFO can be resolved by the Cyprus court which has jurisdiction in this matter.

JUDGMENT

- [1] **WEBSTER JA [AG]:** On 12th October 2020 Emmerson International Corporation (“Emmerson”) and Mr. Mikhail Abyzov (“Mr. Abyzov”) applied for an anti-suit injunctive relief against three of the parties in the proceedings in the court below namely, Viktor Vekselberg (“Mr. Vekselberg”), Gothelia Management Limited (“Gothelia”) and Integrated Energy Systems Limited (“IES Cyprus”) (together “the respondents”). The first limb of the application is for an order that Gothelia and IES Cyprus to discontinue proceedings commenced by them and three other companies in the District Court of Limassol, Cyprus under action number 608/2020 (“the Cyprus claim” or “the Cyprus proceedings”). The other three companies are Brookweed Trading Limited (“Brookweed”), CJSC KES-Holding (“KES-Holding”), and LLC T Plus Invest (“T Plus Invest”). They are not parties in the proceedings in the court below but are said to be controlled by Mr. Vekselberg. The second limb of the application is for an order that Mr. Vekselberg to cause Brookweed, KES-Holding and T Plus Invest to discontinue the Cyprus proceedings. Finally, the application

sought a worldwide anti-suit injunction restraining the respondents from commencing or continuing or taking any steps in proceedings against Emmerson or Mr. Abyzov in any court or tribunal other than the Territory of the Virgin Islands (the “BVI”) in respect of any of the issues arising for determination in the proceedings in the lower court. Wallbank J heard the application on 15th December 2020 and 11th January 2021, and on 8th February 2021 refused the relief sought. This is an appeal against the decision of the learned judge.

Background

- [2] I will refer in this decision to the appellants, Emmerson and Mr. Abyzov, as “the Abyzov parties”, and Mr. Vekselberg, Gothelia, IES Cyprus and Brookweed as “the Renova parties”. These definitions are for convenience only and are not meant to convey findings as to the persons and entities making up the two groups from time to time. Brookweed, T Plus Invest, KES-Holding, Gothelia and IES Cyprus are referred to together as “the Cyprus claimants”.
- [3] The Renova parties are the owners of substantial assets in the energy industry in Russia. In or about 2006 they engaged in negotiations with the Abyzov parties to form a joint venture regarding the assets of the Renova Group in Russia. The negotiations leading to the formation of the joint venture failed and the joint venture was not formed. This resulted in complex and protracted litigation between the Abyzov parties and the Renova parties in the BVI, Russia and more recently Cyprus. The BVI claim was commenced by the Renova parties in December 2013. In the ensuing seven years the BVI proceedings have become extremely complex and now involves 35 parties, claims by the Renova parties, counterclaims by the Abyzov parties, and ancillary claims by the Abyzov parties. Following numerous interlocutory applications in the Commercial Court, appeals to this Court and to the Privy Council, and a vacated trial date in 2018, the parties are now proceeding towards trial in the Commercial Court.

- [4] The Abyzov parties assert that one of the strategies of the Renova parties in the BVI litigation is to commence satellite litigation in jurisdictions other than the BVI to derail the BVI proceedings. They make this allegation by reference to two cases commenced by Mr. Vekselberg against the Abyzov parties in the Gagarinsky District Court in Moscow in February 2019 and August 2019. Following hearings in the District Court and the Courts of Appeal in Moscow, both actions were dismissed. On 26th May 2020 Wallbank J heard an application by the Abyzov parties for an anti-suit injunction to restrain the Renova parties from prosecuting in any way, proceedings in Russia or elsewhere, except in the BVI, against Emmerson or the Abyzov parties. On 2nd June 2020 Wallbank J dismissed the application. The appeal from that decision was heard contemporaneously with this appeal and a separate judgment for that appeal will be delivered.

The Cyprus Claim

- [5] The Cyprus claimants are shareholders of PAO T Plus, a public company based in Russia ("T Plus"). T Plus is a defendant by way of counterclaim and ancillary claim in the BVI proceedings. T Plus is a leader in the field of energy in Russia. The first three claimants, Gothelia, IES Cyprus and Brookweed, are Cypriot companies owned by Renova-Holdings Rus ("RHR") which is 90% owned by Mr Vekselberg. Gothelia, IES Cyprus and Brookweed together own a minority of the shares in T Plus. KES-Holding is a Russian company that owns 32.34% of the shares of T Plus. The fifth claimant, T Plus Invest, is a Russian company that owns 8.6% of the shares of T Plus. T Plus Invest is a direct shareholder of T Plus and, somewhat circuitously, T Plus owns the shares in T Plus Invest. T Plus Invest is not a party in the BVI proceedings and T Plus is not a party in the Cyprus proceedings.
- [6] The majority of the shares in KES-Holding were formerly owned by IES Cyprus. In September 2018 IES Cyprus transferred its majority shareholding in KES-Holding to Merol Trading Limited ("Merol"), a Cyprus company controlled by unrelated Israeli investors. The transfer of the shares to Merol was challenged by Emmerson and in

a written judgment dated 19th June 2019 Jack J found, inter alia, that there was no evidence that the transfer was made otherwise than at arms-length and was not an attempt to dissipate assets.¹ There has been no appeal from this decision. As a result of the transfer, RHR (through its control of IES Cyprus, Gothelia and Brookweed) lost its majority shareholding in T Plus.

- [7] The defendants in the Cyprus claim are Mr. Andre Titarenko, Mr. Abyzov and Emmerson. Mr. Vekselberg is not a party in the Cyprus case.
- [8] In the period leading up to October 2018 T Plus was engaged in negotiations with the Gazprom Group of Companies regarding a potential merger between Gazprom and T-Plus. On 2nd October 2018 Mr. Titarenko wrote a letter on behalf of Emmerson to the General Director of Gazprom and on 9th November 2018 he wrote a second letter to the General directors of T Plus and RHR, and the two audit firms that were valuing the assets of T Plus for the purpose of the merger (“the Titarenko letters”). The letters commented adversely on Mr. Vekselberg and the Renova Group as potential business partners describing them variously as persons who act in bad faith, who have fraudulently misappropriated Emmerson’s funds, and who have huge financial exposure in the BVI litigation. The Cyprus claimants filed the equivalent of a generally endorsed writ against the Cyprus defendants alleging that the Titarenko letters caused the collapse of the negotiations with the Gazprom Group and claiming €436 million in damages.
- [9] On 16th July 2020 the claimants in the Cyprus proceedings applied ex parte for a freezing order to prevent the Cyprus defendants from disposing of their assets up to the value of the claim in the Cyprus proceedings (“the WFO”). The order was granted on condition that the claimants file a bank guarantee of €250,000.00. The guarantee was provided and a freezing injunction was granted on 17th August 2020.

¹ Hearing Bundle F tab 10 e-page 152 para. 95.

[10] The respondents in the Cyprus proceedings (Mr. Abyzov, Emmerson and Mr. Titarenko) have applied to dismiss the claim and to discharge the WFO and the proceedings are continuing. Their response in the BVI was to apply for the anti-suit injunction referred to above that was refused by Wallbank J and is the subject of this appeal. In coming to his decision to dismiss the application the learned judge made the following important findings of fact and law:

- (i) Mr Vekselberg does not control the majority shares of KES-Holding and T Plus Invest and does not have de jure or de facto control of these companies to direct them to withdraw the Cyprus proceedings.²
- (ii) Further, these companies are not BVI companies and are not parties to the litigation in the BVI and the BVI court cannot take jurisdiction over them.³
- (iii) Although Mr. Vekselberg, through his controlling interest in the parent company, RHR, controls the majority of the shares of the other three claimants in the Cyprus proceedings, Gothelia, Brookweed and IES Cyprus, there is no evidence that these companies act on his instructions. In any event, the action could be continued by the other two claimants, KES-Holding and T Plus Invest, over whom the court does not have jurisdiction.⁴
- (iv) Although Mr. Cheremikin is a close associate of Mr. Vekselberg and has overall responsibility for conducting the Cyprus proceedings on behalf of the claimants, there is no evidence that he acts exclusively on Mr. Vekselberg's instructions and there is no evidence that an anti-suit injunction against Mr. Vekselberg would prevent Mr. Cheremikin from conducting the Cyprus proceedings in accordance with the

² See paragraph 87 of Wallbank J's judgment.

³ See paragraphs 104, 109, 112, and 119 line 14-15 of Wallbank J's judgment.

⁴ See paragraph 101 of Wallbank J's judgment.

instructions of those managing the affairs of the Cyprus claimants, namely the boards of directors or their equivalent controlling bodies.⁵

- (v) The court should not order Mr. Vekselberg to use his best endeavours to cause the Cyprus claimants to discontinue the Cyprus proceedings.⁶
- (vi) There is no sufficient overlap or similarity of issues between the BVI proceedings and the Cyprus proceedings to justify the grant of an anti-suit injunction restraining the Cyprus proceedings and the BVI is not the more appropriate or natural forum for the claims advanced in Cyprus.⁷
- (vii) The worldwide freezing injunction in Cyprus risks interfering with the receivers appointed by the BVI court but in all circumstances the court should not order the respondents to discontinue the Cyprus proceedings.⁸
- (viii) The launch of the Cyprus proceedings does not constitute a collateral attack on the orders and judgments of the BVI court.⁹
- (ix) There was no breach of the later assurance given to the BVI court by Mr. Vekselberg in May 2020 and the point was not determinative but only one amongst several other discretionary factors.¹⁰
- (x) The court must be cautious about reaching conclusions on the merits of proceedings in a foreign court, in this case Cyprus, and should be

⁵ Supra No. 4.

⁶ See paragraphs 103-104 of Wallbank J's judgment.

⁷ See paragraph 119 of Wallbank J's judgment.

⁸ See paragraphs 106-112 of Wallbank J's judgment.

⁹ See paragraphs 113-117 of Wallbank J's judgment.

¹⁰ See paragraph 122 of Wallbank J's judgment.

slow to reach conclusions that such proceedings are hopeless or bogus or instituted for an improper purpose.¹¹

The judge's order also effectively dismissed the third limb of the application for a worldwide anti-suit injunction against the respondents.

- [11] The appellants were dissatisfied with the findings of the learned trial judge listed in the preceding paragraph and other aspects of his decision and filed a notice of appeal on 26th February 2021. The notice of appeal lists 13 grounds of appeal, all of which challenge the findings of the learned trial judge listed above and his decision to dismiss the application. I will incorporate the grounds of appeal in dealing with the challenges to the judge's findings.

Appeal against the exercise of discretion

- [12] The power of the High Court to grant injunctions is contained in section 24 of the **West Indies Associated States Supreme Court (Virgin Islands) Act**¹² which provides that the court may grant an injunction '*..in all cases in which it appears to the Court or Judge to be just or convenient*'. The granting of an injunction, including an anti-suit injunction, is an exercise of discretion by the judge hearing the application and the role of the Court of Appeal in reviewing the exercise of discretion by the trial judge is limited. The limited role of the Court of Appeal is illustrated by the often-quoted dictum of Chief Justice Sir Vincent Floissac in **Dufour and Others v Helen Air Corporation Ltd and Others**¹³ where the learned Chief Justice said:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and consideration; and (2) that as a result of the error or degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

¹¹ See paragraph 123(3) of Wallbank J's judgment.

¹² Cap 80 , Revised Laws of the Virgin Islands.

¹³ (1996) 52 WIR 188 at pp. 190-191.

The test is in two stages – (i) the trial judge must have made an error, and (ii) as a result his or her decision was outside the generous ambit of reasonable disagreement or was blatantly wrong.

[13] In the context of an interlocutory injunction Lord Diplock had this to say in **Hadmor Productions and others v Hamilton**¹⁴ -

“Before advert[ing] to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.”

¹⁴ [1983] 1 A.C. 191 at 220.

[14] Finally on this point, the Privy Council issued a timely reminder in January this year in **Ming Siu Hung and others v J F Ming Inc and another**¹⁵, on appeal from this Court, where Lord Briggs stated –

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism.”

[15] In reviewing the learned judge’s exercise of discretion to refuse the anti-suit injunction I will be guided by the principles of judicial restraint set out in the cases referred to in the preceding three paragraphs and by other decisions of this court dealing with reviewing the exercise of discretion by a trial judge.

General principles – Anti-suit injunctions

[16] Before dealing with the issues in this case it may be helpful to refer to some of the general principles relating to anti-suit injunctions with particular reference to the facts of the case. In its most basic form an anti-suit injunction is an order of the court restraining a party over whom it has personal jurisdiction from beginning or continuing proceedings in a foreign court. The application must show that (i) the court has personal jurisdiction over the person to be restrained; (ii) that the injunction, if granted, will be in the best interests of justice; and (iii) that commencing or continuing the foreign proceeding is vexatious or oppressive or the foreign proceeding will interfere with the process of the BVI court.

[17] The first requirement of personal jurisdiction over the person to be restrained is straightforward and easily determined from case to case. In this case the persons to be restrained are the respondents who are subject to the court’s jurisdiction. The second requirement, that the grant of the injunction must be in the interest of justice, is not as easily defined but is identifiable when it is present and obvious when it is

¹⁵ [2021] UKPC 1.

not. It guides the court, having considered all the circumstances of the matter, in deciding whether to grant or refuse the injunction in the interests of justice.

Vexatious or oppressive conduct

- [18] The requirement of vexatious or oppressive conduct is not susceptible to easy definition and must be decided on a case-by-case basis. In the **Elektrim SA v Vivendi Holdings 1 Corp; Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp**¹⁶ Lawrence Collins LJ noted that –

“The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier.”

- [19] In determining whether the commencement or continuation of the foreign proceeding is vexatious or oppressive the court will look to the following circumstances:

- (i) Whether the claim is entirely lacking in merit or bogus.
- (ii) The overlap between the issues in the BVI proceedings and the foreign proceeding.
- (iii) The impact, if any, of the injunction on the principles of international comity.
- (iv) The conduct of the parties.
- (v) All the circumstances of the case.

- [20] A good example of the working of these principles is **Masri v Consolidated Contractors International (UK) Ltd and others (No 3)**¹⁷, a decision of the Court of Appeal in England. The claimant succeeded in a claim for damages against foreign defendants who had submitted to the jurisdiction of the English court. The defendants then commenced a fresh claim in Yemen disputing their liability to the claimants. The claimants applied in the English proceeding for an injunction restraining the defendants from pursuing proceedings against them abroad on the

¹⁶ [2009] 2 All ER (Comm) 213.

¹⁷ [2009] QB 503.

ground that the Yemeni proceedings were vexatious and oppressive and an attempt to re-litigate the issues that were determined in the English proceedings or to evade the judgment of the English court. The judge agreed and granted the injunction. The defendants appealed to the Court of Appeal. In dismissing the appeal, Lawrence Collins LJ noted at paragraph 95 of his judgment –

“But the present case is not a case where the foreign court has given a judgment with which an English injunction will be inconsistent. It is simply a case in which the judgment debtors [the defendants] are seeking to relitigate abroad the merits of the case which, after a long trial, they have lost in England. In my judgment it is a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the English court in litigation to which the judgment debtors submitted.”

This case is a good illustration of the court using the anti-suit injunction to prevent vexatious and oppressive conduct in the form of relitigating issues already decided by the English court.

Interference with the court's process

- [21] Proof of vexatious or oppressive conduct is, arguably, not required when the commencement of the foreign proceeding interferes with the due process of the court or is an attempt to gain an unfair advantage in the procedure or proceedings before the BVI court. A good example of this is where a creditor starts proceedings in a foreign court that interferes with the BVI court's insolvency jurisdiction and its policy of orderly and fair distribution among creditors of the insolvent estate, be it personal or corporate. In **Kenneth M. Krys et al v Stichting Shell Pensioenfonds**¹⁸ this Court restrained proceedings brought by a creditor in the Netherlands which, if successful, would have given it security over the debtor's assets in the Netherlands and priority in the overall distribution of estate of the insolvent company that was being liquidated in the BVI. The unanimous decision of the Court was delivered by Pereira JA who acknowledged that an injunction granted in these circumstances does not require oppressive or vexatious conduct. At paragraph 33 she noted -

¹⁸ BVIHCVAP2011/036 (delivered 17th September 2012, unreported).

“It seems to us that both Lord Rix (in the Glencore case) and Lord Goff (in the Airbus case) tacitly recognised that the jurisdiction [to grant an anti-suit injunction] is available where the conduct of the claimant by pursuing the foreign proceedings would interfere with the ‘due process of the court’ or where it is required to protect the policies of the local forum, as a separate and distinct consideration although when looked at from the other end of the spectrum, it may very well be viewed as an abuse of process.”

The decision of the Court of Appeal was affirmed by the Privy Council.¹⁹ The advice of the Board was delivered by the joint opinion of Lord Sumption and Lord Toulson who stated at paragraph 25:

“The Board is not prepared to say that Shell acted vexatiously or oppressively by invoking the jurisdiction of the Dutch courts, but for the reasons that it has given, this does not prevent the issue of an anti-suit injunction.”

- [22] I am satisfied, as submitted by Mr. Phillip Marshall QC, that the Court can grant an anti-suit injunction without proof of vexatious or oppressive conduct by the respondents if by commencing or continuing the Cyprus claim they interfered with the process of the BVI court. I will deal with this issue further when I consider grounds 6, 7 and 10 of the notice of appeal dealing with alleged interference with the process of the BVI courts.

Exclusive jurisdiction and arbitration clauses

- [23] Another category of cases where it is not necessary to prove vexatious or oppressive conduct is where the foreign proceedings are brought in breach of an exclusive jurisdiction clause in a contract between the parties.
- [24] The parties to commercial contracts frequently agree to submit disputes arising under their contract to either arbitration or the exclusive jurisdiction of a particular court. Where there is such a stipulation and one of the parties seeks to commence or continue proceedings abroad in breach of the arbitration or exclusive jurisdiction clause the courts are likely to hold that party to his agreement and restrain him from

¹⁹ Stichting Shell Pensioenfonds v Krys and another [2015] AC 616.

proceeding with the foreign claim without proof that the foreign proceeding is vexatious or oppressive. Conversely, where there is no arbitration or exclusive jurisdiction clause (as in this case) the applicant must prove that the foreign proceeding is oppressive or vexatious to restrain the other party from pursuing his undoubted right to sue in another court. This is the point made by Lord Toulson in the **Deutsche Bank AG and another v Highland Crusader Offshore partners LP and others**²⁰ –

“But where the court is not enforcing a contractual right under English law, the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and, in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. In other words, there must be a good reason why the decision to stop the foreign proceedings should be made by an English judge rather than a foreign judge, and cases where justice requires the English court to intervene will be exceptional.”

Lord Toulson returned to the role of the English (BVI) court at paragraph 109 when he said –

“..[E]ach court should ordinarily be left to determine the suitability of the litigation before it and should be chary of attempting to interfere with the other court’s decision...”²¹

Wallbank’s reasoning on the role of the BVI courts when dealing with an application to halt proceedings in a foreign court reflects the views of Lord Toulson in the **Deutsche Bank case**.

- [25] A final general point is that though an anti-suit injunction is a useful tool in appropriate cases, the courts have repeatedly warned against the misuse of the power for several reasons including that it denies a litigant access to the courts and it is indirectly an interference with the jurisdiction of a foreign court.

²⁰ [2010] 1 WLR 1023 at paragraph 56.

²¹ Ibid at para. 109.

[26] With these general principles and the rules about judicial restraint in reviewing the exercise of discretion by a trial judge in mind I will now consider the grounds of appeal. The thirteen grounds of appeal in summary form are:

Ground 1 - The learned judge declined to deal with the merits of the Cyprus proceedings. Had he done so he would have found that the Cyprus proceedings were bogus and entirely without merit.

Ground 2 - The judge did not take into account the serious and material non-disclosure of material facts by the Cyprus claimants in applying for and obtaining the WFO.

Ground 3 - The judge erred in not finding that Mr. Vekselberg exercised sufficient control over the Cyprus claimants to cause them to withdraw the Cyprus proceedings and the WFO.

Ground 4 - The judge having found that Mr. Vekselberg did not have sufficient *de facto* control over the Cyprus claimants he should have ordered Mr. Vekselberg to use his best endeavours to discontinue the Cyprus proceedings and the WFO.

Ground 5 - The judge failed to appreciate that ordering Mr. Vekselberg to cause the Cyprus claimants over whom he had *de jure* control (Gothelia, IES Cyprus and Brookweed) to withdraw from the Cyprus proceedings would have had the useful purpose of reducing the amount of the claim and the monetary cap of the WFO.

Ground 6 - The judge erred in not finding that the WFO was an impermissible interference with the receiver appointed by the BVI court and that this was sufficient of itself to grant anti-suit relief.

Ground 7 - Alternatively, the judge erred in finding that there was no evidence that the WFO was causing any prejudice to the appellants or the receiver.

Ground 8 - The judge failed to take into account that he could have granted anti-suit relief in relation to the WFO only without granting relief in respect of the Cyprus proceedings.

Ground 9 - The judge failed to take into account the complete absence of any provisions in the WFO qualifying its extraterritorial effect. Had he done so he would have found that this was sufficient to justify the relief sought by the appellants.

Ground 10 - The judge erred in not finding that the Cyprus proceedings involved a collateral attack on the BVI courts' judgments and processes sufficient to justify the grant of an anti-suit injunction.

Ground 11 - The judge erred in concluding that the BVI court cannot tell how the Cyprus claimants will eventually plead their claim and erred in his treatment of the Cyprus claimants' failure to disclose full details of the service issue on T Plus and the existence of the order of Adderley J when they applied in Cyprus for the WFO.

Ground 12 - The judge erred in finding that there was no sufficient overlap of issues between the Cyprus claim and the BVI claim to justify the relief sought; that the case did not have real or substantial connections with the BVI; and that the BVI is not clearly the more appropriate or natural forum for the Cyprus claim.

Ground 13 - The judge erred in concluding that Mr. Vekselberg was not in breach of the assurance that he gave to the BVI court on 26th May 2020.

[27] For convenience only I will not deal with the grounds of appeal in the order that they appear in the notice of appeal. Grounds 1, 3, 4, 5, 10, 11, 12 and 13 are focused on directing the Cyprus claimants who are also parties in the BVI proceedings (Gothelia and IES Cyprus) to withdraw the Cyprus claim and/or on Mr. Vekselberg to cause all the Cyprus claimants (including Brookweed, KES-Holding and T Plus Invest) to

withdraw the Cyprus claim or to use his best endeavours to get them to do so. I will deal with these grounds first. The remaining grounds 2, 6, 7, 8 and 9 are more focused on the WFO and securing its withdrawal.

Ground 1 - Merits of the Cyprus Proceedings

[28] Mr. Marshall QC marshalled the arguments for the appellants. He submitted on the first ground that Wallbank J erred by not considering the inherent weaknesses and bogus nature of the unparticularised Cyprus claim. Had he done so, that of itself would have been sufficient to find that the foreign proceedings were vexatious or oppressive, such that an anti-suit injunction should be issued. He relied on the **Elektrim case, Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another**²² and **Midland Bank plc and another v Laker Airways Ltd. and others**²³ to show that the English (BVI) court can review the foreign claim and restrain it if it is found on the preliminary review to be vexatious and oppressive.

[29] In the **Elektrim case** the parties were involved in litigation regarding the conditions attached to bonds issued by an associated company of Elektrim and guaranteed by Elektrim. Both the conditions of the bonds and the trust deed were governed by English law. The bond issue contained a 'no-action clause' whereby only the trustee of the issue was entitled to take enforcement action against the issuer of the bonds. A bondholder could only take action if the trustee failed to do so. The respondent, a bondholder, commenced proceedings in Florida against Elektrim and the trustee alleging fraud. Elektrim and the trustee applied in England for an anti-suit injunction to restrain the Florida proceedings relying inter alia on the no-action clause in the conditions of the bonds and the trust deed. The trial judge found that the proceedings were in substance proceedings to enforce the provisions of the conditions of the bonds and the trust deed. Further, the claim was caught by the no-action clause and therefore was vexatious and bound to fail. The judge granted the injunction and the Court of Appeal dismissed Elektrim's appeal, finding that the claim in Florida, though

²² [1987] AC 871.

²³ [1986] QB 689.

stated to be for fraud, was in substance a claim for breach of contract that mirrored existing proceedings in England and the judge's approach to the no-action clause was correct. On the issue of the merits of the claim Lawrence Collins LJ said –

“120. I accept that, in considering whether the cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the judge should not conduct a summary determination on the English law principles without regard to the fact that the foreign system pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal, if it can be cured by amendment.

121. But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be skeptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus) ...The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of discretion.

122. I accept Elektrim's submission that VH1 has not identified any basis for a conclusion that the judge erred in principle in finding that the claims in the Florida proceedings against Elektrim were hopeless. Consequently, I agree with the judge that an injunction would have been appropriate on this ground even if the no-action clause had not applied.”

[30] In **Société Nationale Industrielle Aerospatiale v Lee Kui Jak**²⁴ Lord Goff referred to **Peruvian Guano Co. v Bockwoldt**²⁵ where Jessel MR gave as an example of vexatious proceedings as one ‘when the proceedings are so utterly absurd that they cannot possibly succeed’.

[31] In **Midland Bank v Laker Airways** the English Court of Appeal determined that the foreign claim brought by Laker Airways in the United States was vexatious and continued the injunction obtained by Midland Bank. At page 700 Lawton LJ observed that *‘[i]n [his] judgment, the weakness of the evidence is a factor which can be taken into account, together with other more weighty factors, in deciding whether conduct*

²⁴ [1987] AC 871 at page 893(H).

²⁵ (1883) 23 Ch.D. 225.

is unconscionable'. The '*more weighty factors*' in the case included that the plaintiffs had no relevant presence in the United States and had not submitted to the jurisdiction, and the activities in relation to the defendant airline (Laker Airways) were part of a business in England that was intended to be governed by English law.

[32] Mr. Simon Birt QC, who appeared for the respondents, did not dispute that the court can consider the weakness of the foreign proceedings when exercising discretion to grant or refuse an anti-suit injunction. His over-arching response to the submission is that the Cyprus proceedings are not on a preliminary review without merit and the issue of the merits of the claim is for the District Court in Limassol. Further, it would be a serious breach of international comity for this court to make findings on the merits of the claims. This would be particularly inappropriate in this case where: (i) the Cyprus claim is unrelated to any of the claims that are currently before the BVI court; (ii) it has no real connection with the BVI and is not governed by BVI law; and (iii) the BVI is not the natural forum for the trial of the Cyprus claim.

[33] Mr. Birt QC referred to the **Deutsche Bank case** where Toulson LJ pointed out that:

“...the principle of [international] comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter.”

Consistent with this dictum, Lawrence Collins LJ said in the **Elektrim** case –

“[A]n application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed...”²⁶

²⁶ [2009] 2 All ER (Comm) 213 at paragraph 84.

Lord Collins' statement is particularly relevant in this appeal where full particulars of the claim have not been filed, the pleadings are not closed and the claims are entirely different.

- [34] In paragraph 31 above I referred to the judgment of Lawton LJ where he was considering the weakness of the evidence in the foreign proceedings in the **Midland Bank v Laker Airways**. He followed this comment immediately with the following:

“To treat the weakness of the evidence as a separate and distinct ground for adjudging that the threatened conduct in a case such as this is unconscionable raises difficult problems...It would be wrong, so it seems to me, for English judges to regard themselves as examining magistrates, deciding whether the plaintiff in the United States court had made out a case fit for trial. That is a function of the United States judge after the conclusion of the pre-trial discovery. Cases might occur, as Lord Diplock recognised in the *British Airways* case [1985] A.C. 58, 86, in which it was plain that the United States suit was bound to fail so that the making of it was frivolous and vexatious. In such cases an English court could interfere; but they are likely to be rare”

- [35] Mr. Birt QC submitted and I agree that the authorities show that in considering whether to restrain a party before the court from commencing or continuing proceedings in a foreign court the local court can consider the merits of the foreign proceedings, but (i) it is only one of the factors to be considered, (ii) it should only be decisive where on the face of it the foreign claim is hopeless, bogus or entirely without merit, and (iii) all the circumstances, including international comity, must be considered in deciding whether to exercise discretion by granting an injunction.

- [36] Mr. Birt QC addressed his position by reference to two other points. Firstly, the Cyprus court, which is the proper court to determine the merits of the claim, has effectively made a preliminary ruling on the merits of the claim by granting the worldwide freezing injunction. By analogy with the BVI law such an order would not have been made if the Cyprus court was not satisfied that the Cyprus claimants have a good arguable case on the merits.

[37] Secondly, it was not correct to say that Wallbank J *'declined to take into account the merits of the claim'*. The learned judge dedicated four pages of his judgment at paragraph 46 to setting out the details of the alleged weaknesses of the claim. He then noted at paragraph 84 that the claim was not yet pleaded or particularised and that it was common ground that there was no procedural requirement in Cyprus for the claimants to file particulars. He continued *'It would thus be inappropriate for this Court to attempt a definitive assessment of the merits of the Cyprus Claims as is urged by the Applicants'*. This, in my opinion, is very different from saying that the judge did not take account of the merits of the claim. It is apparent that the judge reviewed the claim and decided that on its face it was not bogus, hopeless or entirely without merit. He did not, and he was not required to, decide the merits of the claim. He left that exercise to the District Court in Cyprus.

[38] The learned judge did not stop there. He continued by dealing with the submission by the appellants that the Cyprus claims are pleaded in broad terms and are bogus because there is no allegation of falsity in support of the tort claims. In paragraphs 85 and 86 he said –

“[85] A second feature that suggests caution is that the claim has been expressed in the claim form in very wide terms. These claims do not on their face require there to have been any false statements on the part of the Cyprus defendants, as suggested by the Applicants. The claims there expressed are commensurate with the ancient principles for the English court of ‘trespass upon the case’, which had a relatively low standard of unconscionability as their key. This Court should not presume that the modern elements for such a tort (or range of torts) in Cyprus are necessarily the same as under BVI law. They might not be. Neither was I addressed on this aspect, even with respect to BVI law, during submissions. None of the documents I was taken to in relation to the Cyprus Proceedings set out the elements for the legal tests under Cyprus law that the Cyprus Claimants would need to satisfy in order to succeed with their claims, or indeed to demonstrate that they have a good arguable case. Such an omission (if that was indeed an omission in Cyprus) would be unusual for an application for a freezing order before this Court. But this Court should not – at this stage at least – try to supply such apparent omissions with assumptions that Cyprus substantive law, practice and procedure are the same as here. The BVI is not Cyprus and justice is administered differently there.

[86] I also have to remember that although the Applicants have concluded that Mr. Vekselberg and his team have set out to vex and/or oppress them, this Court must judge matters before it on the strength of the available

evidence. This is as fundamental as it is primordial. This also means that the Court must be sensitive to those matters on which there is no evidence.”

[39] I do not think that the judge should be faulted for his approach to the issue of whether the Cyprus claim was bogus. He was entitled to conclude, as he did, that the merits of the claim are best judged by the Cyprus court. The lynchpin of the Cyprus claim is the two Titarenko letters and Wallbank J correctly left the interpretation and effect of these letters to be judged by the Limassol District Court in the context of the full range of the evidence in the claim. I note that the judge was not assisted on the issue of merits by expert evidence of Cyprus law.

[40] The judge also found that the claim in Cyprus was not a parallel claim and was entirely different from the BVI proceedings, an issue that I will address in further detail below.²⁷

[41] Mr. Birt QC pointed out that the Cyprus claim was also based on conspiracy which by analogy with BVI law would be a lawful means conspiracy that does not require proof of unlawful acts or falsity, only a predominant intention to harm the other side. I note that the intention to harm is a predominant theme of the Cyprus claim²⁸ and Ms. Monoyiou should not be held to the use of the expression ‘unlawful actions’ in paragraph 32 of her affidavit. The allegation is, by BVI standards, a lawful means conspiracy but this is a matter for the Cyprus Court and I make no definitive finding on the type of conspiracy that will be pursued in Cyprus. Suffice it to say that *ex facie* there is a pleaded claim in conspiracy.²⁹

[42] The allegation of a bogus claim in this case is also distinguishable on the facts from the cases relied on by the appellants. In **Masri No 3** the defendants sought to re-litigate the same issues that were decided against them in the English proceedings in fresh proceedings in Yemen. In **Elektrim** the filing of the claim in Florida was found

²⁷ See paragraphs 62 - 66 below.

²⁸ See for example paragraphs 32 and 60 of the affidavit of Ms. Antonia Monoyiou filed on 16th July 2020 in support of the application for the WFO.

²⁹ The Cyprus claim is in the record at Joint Hearing Bundle volume F3(1) E-page 71.

to be in breach of the no-action clause in the contract between the parties and the claim was hopeless. In the current appeal there is evidence, albeit disputed, that the conduct of the respondents in the Cyprus proceedings interfered with and brought about the failure of the negotiations and there is no evidence or finding that the proceedings are hopeless. Further, there is no sufficient overlap of the issues in the two claims. The learned judge was correct in not making a finding on the merits of the Cyprus proceedings at this stage but rather leaving that function to the District Court in Limassol.

[43] I would dismiss ground 1 of the notice of appeal.

Ground No 3 – Mr. Vekselberg’s control of the Cyprus Claimants

[44] The essence of this ground of appeal is that the judge erred in not finding that Mr. Vekselberg was in a position to cause KES-Holding and T Plus Invest to discontinue the Cyprus proceedings and relied on this as the primary basis for dismissing the application.

[45] In paragraphs 5 and 6 above I set out in summary form the ownership structure of the parties involved in the Cyprus proceedings. In short, Mr. Vekselberg has a controlling interest in RHR which in turn owns Gothelia, IES Cyprus and Brookweed. Mr. Vekselberg does not have, directly or indirectly, a controlling interest in the other two Cyprus claimants - T Plus Invest and KES-Holding. A peculiar feature about the injunction sought by the appellants is that KES-Holding and T Plus Invest are not BVI companies and are not parties to the BVI proceedings. Wallbank J found correctly that the BVI court does not have jurisdiction over these parties and made no orders that would affect them. There is also the further issue of whether Mr. Vekselberg has effective control of the decision-making of the other three claimants.

[46] The judge analysed these issues comprehensively at paragraphs 87-105 of his judgment. Bearing in mind that the injunction sought was directed in part at Mr. Vekselberg for him to cause three of the Cyprus claimants over whom the court does not have jurisdiction to withdraw the Cyprus claim, this was an exorbitant application

for a very serious mandatory order. The judge treated the issue of Mr. Vekselberg's control of the companies as a central issue in the case. In fact, he commenced his analysis at paragraph 87 by saying –

“This brings me to the first fatal flaw in the Applicants’ case”. There is no evidence that Mr. Vekselberg controls KES Holding and T Plus Invest, so as to be able to cause them to discontinue the Cyprus proceedings. That is a fundamental problem for the Applicants because if the Cyprus proceedings can be continued by one or more of the Cyprus claimants, there would be no point ordering the other Claimants to discontinue their claims. That is so, because the Cyprus Defendants would ordinarily continue to be troubled by the Cyprus claims and the Cyprus WFO. If an injunction will be pointless, it would not be just or convenient to grant it. Put differently, such an injunction will not serve the ends of justice.

The judge summed up his findings on the issue of Mr. Vekselberg's lack of control of T Plus Invest and KES-Holding at paragraph 99 of his judgment –

“The sum total of this summary review of the evidence is twofold:

- (1) It is uncontroversial that Mr. Vekselberg has no formal majority controlling interest in KES-Holding or T Plus Invest; and
- (2) There is no evidence Mr. Vekselberg has *de facto* control or effective decision making influence over KES-Holding or T Plus Invest.”

[47] In short, the judge found that there was no evidence on which he could find that Mr. Vekselberg had sufficient control of KES-Holding and T Plus Invest to order him to cause these companies to withdraw the Cyprus proceedings. Therefore, the companies could continue the claim and it would be pointless to grant such an injunction. I agree with this conclusion. In **Emmott v Michael Wilson and Partners Limited**³⁰ Sir Terrence Etherton MR referred to **Société Nationale Industrielle Aerospatiale v Lee Kui Jak** where Lord Goff listed as one of the criteria for getting an anti-suit injunction that *‘[The] injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy’*. T Plus Invest and KES-Holding are not subject to the jurisdiction of the BVI court and the court would be powerless to enforce compliance with any order that it makes in respect of these companies. At best, action could be taken against Mr. Vekselberg if it could be shown that he did not take steps to ‘cause’ these

³⁰ [2018] 2 All ER (Comm) 737 at paragraph 37.

companies to withdraw the claim. But even if this was done the claims could continue which would defeat the purpose of the injunction.

[48] I agree entirely with the judge's conclusions – it would be a serious judicial overreach for a BVI judge to order Mr. Vekselberg to cause entities that are not subject to the jurisdiction of the court to withdraw proceedings in a foreign court. Such an order would be *brutum fulmen*. This Court does not act in vain or make ineffective orders.

[49] Wallbank J also dealt with the two alternative positions on the issue of control suggested by the appellants. Firstly, that Mr. Vekselberg could be ordered to cause Mr. Cheremikin who is running the litigation in Cyprus on behalf of the Renova parties, to withdraw the claims. They argue that this order would be effective because Mr. Cheremikin is Mr. Vekselberg's long-time close associate and he would act on Mr. Vekselberg's instructions. This argument was rejected by the learned judge at paragraph 101 of his judgment -

“The flaw in this argument is that there is no evidence that it is only from Mr. Vekselberg that Mr. Cheremikin can take instructions. The Applicants' case concept narrowly treats Mr. Vekselberg as the only person who effectively controls all five Cyprus Claimants. I have seen no evidence that Mr. Vekselberg has the exclusive authority of those controlling KES-Holding or T Plus Invest to instruct Mr. Cheremikin to continue or discontinue proceedings on their behalf. Moreover, if it is that all the Cyprus Claimants have delegated their litigation management to Mr. Cheremikin, then, if Mr. Vekselberg is forced to drop out of the communication chain, there would be nothing in principle preventing Mr. Cheremikin from obtaining instructions directly from the Boards of Directors of those companies. Indeed, that is what one would ordinarily expect. In short, there is no evidence that an anti-suit injunction against Mr. Vekselberg would be effective to prevent Mr. Cheremikin from conducting the Cyprus Proceedings in accordance with the instructions of those managing the affairs of the companies that are not formally controlled by Mr. Vekselberg. Consequently, there is no evidence that such an injunction would serve a useful purpose.”

This is a complete answer to the suggestion that Mr. Vekselberg should be ordered to cause Mr. Cheremikin to withdraw the claim.

[50] The appellants' second alternative position is that if the court is concerned about Mr. Vekselberg's inability to cause KES-Holding and T Plus Invest to withdraw the Cyprus claim the court could make the order with a proviso that Mr. Vekselberg is only required to use his best endeavours to cause the said companies to withdraw the Cyprus claim. This submission was rejected by the judge and I will deal with it when I come to deal with ground 4.

[51] As regards IES Cyprus, Gothelia and Brookweed (which is not a party in the BVI proceedings), the judge noted at paragraph 98 of his judgment that Mr. Jeremy Andrews, a solicitor and deponent for the Renova parties, said in evidence that these companies are subsidiaries of RHR, a company controlled by Mr. Vekselberg, but that that does not mean that Mr. Vekselberg makes all the decisions relating to the companies. This is consistent with BVI corporate law principles – important decisions such as commencing or withdrawing litigation are made by the directors and there is no evidence of how the decision to commence the Cyprus proceedings was made.

[52] The judge's overall finding on the issue of control is that he would not direct Mr. Vekselberg to cause the Cyprus Claimants to withdraw the Cyprus proceedings as there is no evidence that he has sufficient de facto control of T Plus Invest and KES Holding to withdraw the claim and the injunction would not serve a useful purpose because the claim would continue. He declined the appellants' alternative position to order the parties over whom he has jurisdiction (IES Cyprus and Gothelia) to withdraw their portion of the claim because he was not aware of any policy or other good reason to scale down the Cyprus proceedings.³¹

Sub-grounds in Ground 3

[53] Ground 3 contains further arguments challenging the judge's refusal to grant the anti-suit injunction. In sub-ground 3.1 the appellants submitted that the judge erred by focusing on whether Mr. Vekselberg was formally authorised to continue the

³¹ See discussion on ground 5 in paragraphs 60-61 below.

Cyprus proceedings – they say that he should have focused on whether Mr. Vekselberg was in fact in a position to cause the companies to discontinue the claim. I do not think this is a correct interpretation of the judge's decision. He found that the appellants made bold statements about Mr. Vekselberg being in control, but there was no real evidence of decisions made by him as the person in control of the companies. The judge's finding of fact cannot be faulted.

[54] Similarly, there is no evidence to support the allegation in sub-ground 3.2 that the judge did not take account of the fact that the Cyprus claim could not have been started and could not have progressed without the support of Mr. Vekselberg and /or his agents (including Mr. Cheremikin). The difficulty with this allegation, and it runs through much of the appellants' case, is that it is not supported by the evidence and there is no evidence of who made the decision to start the Cyprus proceedings. As the judge pointed out in paragraph 76 of his judgment it may very well be that Mr. Vekselberg has sufficient control of the Cyprus claimants to have started and continued the claim, but that is not the evidence. Bold assertions are not enough. The court can only act on the evidence.

[55] I have already dealt with the allegation at subparagraph 3.3 that the judge was justified on the evidence, or the lack thereof, to find that Mr. Cheremikin did not act solely on the instructions of Mr. Vekselberg. The reference in subparagraph 3.3 to the judge's finding (at paragraph 101 of the judgment) that there would be nothing to prevent Mr. Cheremikin from acting on the instructions of the various boards of directors of T Plus and KES- Holding is an inference that the judge was entitled to draw in the absence of any evidence to the contrary.

[56] The allegation at subparagraph 3.4 that it was irrational for the judge to find that injuncting KES-Holding and T Plus Invest would deprive them of a potentially valuable asset, namely, the cause of action in Cyprus, is not made out. The judge was entitled to find that the Cyprus claim is not bogus or completely lacking in merit, and is being pursued by the Cyprus Claimants. Therefore, restraining the claim

would result in the loss of a potentially valuable asset. The judge's finding on this issue is contained in paragraph 102 of his judgment –

“[102] Lack of evidence of Mr. Vekselberg's alleged control of KES-Holding and T Plus Invest raises another consideration. Ordinarily, majority shareholders have a majority stake in the value of their companies. There is no evidence that that is not the case here. It would then be seriously high-handed and unjust for this Court to attempt to deprive companies of their potentially valuable assets (causes of action) merely on a presumption, without proper evidence, disclosure or a trial, that those companies are really controlled by someone else. There is no evidence that Mr. Vekselberg retains the authority with respect to KES-Holding or T Plus Invest to write off their potentially valuable asset that is the cause of action in the Cyprus Proceedings.”

[57] I agree with the judge's conclusion on this issue. I would dismiss ground 3 of the notice of appeal in its entirety.

Ground 4 – Ordering Mr. Vekselberg to use best endeavours

[58] Ground 4 is somewhat parasitic on this Court's finding on ground 3. In other words, if this Court is concerned about making an order against Mr. Vekselberg for him to cause the Cyprus claimants to withdraw the Cyprus claim because of the lack of sufficient evidence of *de facto* control of the claimants, it could make the order and qualify it by requiring Mr. Vekselberg to use his best endeavours to cause the companies to withdraw the claim. The appellants submitted that the learned judge erred in not making such an order because Mr. Vekselberg does have *de facto* control over the companies and making such an order would be no more than requiring him to ask KES-Holding and T Plus Invest to withdraw the claim. The difficulty with this submission is that the addition of a best endeavours clause to the order does not cure the fundamental defect that it was refused by the judge and by this Court for lack of evidence and making the order would not serve a useful purpose.

[59] I have also considered the alternative position of making a stand-alone best endeavours order, that is, an order that Mr. Vekselberg must use his best endeavours to cause the Cyprus claimants to withdraw the Cyprus claim.

However, having refused to make a substantive order directly against Mr. Vekselberg, and having regard to the need for certainty in making a mandatory order that could subject the person ordered to contempt proceedings, this is not a viable option and I would not make such an order.

Ground 5 – Discontinuing the claims of Gothelia, IES Cyprus and Brookweed

[60] On this ground the appellants submitted that the judge erred by finding that no useful purpose would be served by discontinuing the claim by Gothelia, IES Cyprus and Brookweed. The appellants contend that if these three companies discontinue the claim the value of the claim would be reduced. There is no evidence of the extent, if any, of the reduction of the Cyprus claim if it is discontinued by the three companies. The judge considered this issue at paragraph 105 of his judgment and concluded that the court was neutral about the size of the claim and that there was no policy that the quantum of a claim should be kept low.

[61] I do not think that there is any basis for interfering with the judge's decision. If an applicant is not entitled on the evidence to an anti-suit injunction it is not logical that his entitlement would improve because the value of the claim against him is reduced. The fact that the value of the claim has a consequential effect on the cap of the WFO is a part of the practice regarding the granting of such injunctions.

Ground 12- Overlap of the claims and related issues

[62] The appellants complain in ground 12 that the judge erred in not finding that (i) there was sufficient overlap between the Cyprus claim and the BVI claim; (ii) the Cyprus claim has a real or substantial connection with the BVI; and (iii) the BVI is clearly the natural and appropriate forum for trying the Cyprus claims. As a result, the judge failed to appreciate that the Cyprus claim is a collateral attack on the judgments and orders of the BVI court.

[63] Wallbank J dealt with these issues at paragraph 119 of his judgment. The paragraph has important findings and I set it out in full -

“[119] As the Respondents have argued and shown, the substantive claims in Cyprus and in this jurisdiction are completely different. They are not parallel proceedings. Nor do the claims made in Cyprus have any real or substantial connection with the BVI. The case of alleged unlawful interference (or some similar tort) with negotiations or commercial relations with Gazprom does not arise in these present proceedings. The Cyprus Proceedings do not, in that sense, concern ‘the same subject matter’ as these BVI proceedings. It is right that the Cyprus Claimants pray in aid certain aspects of these proceedings by way of allegations of fact in the Cyprus proceedings but it cannot be said that there is a true overlap of issues. At best they are ‘related’, in so far as some of the parties are the same in both jurisdictions and there is some cross-reference between these proceedings and those in Cyprus. KES-Holding and T Plus Invest have (to the extent that they do in fact have) causes of action which they have the right to pursue in Cyprus independently of these proceedings. This Court has no jurisdiction over these companies. This Court cannot tell them they should bring those claims here or that they should discontinue their claims in Cyprus. I do not agree that the BVI is clearly the more appropriate or natural forum for the claims advanced in Cyprus. The core issue in the Cyprus Proceedings whether or not the Applicants unlawfully or improperly interfered with T Plus’ negotiations with Gazprom do not arise in these proceedings and have very little connection with this jurisdiction. Neither do I agree that justice requires that the claimants in the foreign court should (or in the case of KES Holding and T Plus Invest could) be restrained from proceeding there.”

- [64] It is apparent from a reading of paragraph 119 that the judge made findings on the three issues in this ground of appeal and it is not difficult to see why the judge made these findings. The BVI claim concerns issues arising out of a failed joint venture before 2013 when the BVI claim was launched. The Cyprus claim contains allegations of interference with business relations and damages for conspiracy and related torts said to have been committed in 2020 in the context of negotiations that took place in Russia between the Renova parties and the Gazprom Group concerning a merger between the two groups of companies. The claims are ‘completely different’ and the Cyprus claim has nothing to do with BVI other than that some of the parties are already involved in litigation in the BVI and there is an order about service on T Plus that is mentioned in the Cyprus claim and is being resolved in the BVI. However, these are described by Mr. Birt QC as background issues and the real issues in the claims do not overlap.

[65] The judge's findings that the claims are 'completely different', that the Cyprus claim has no connection with the BVI, and that the BVI is not the appropriate forum for the trial of the Cyprus claim are all based on evidence that was before the court.

[66] The finding of no overlapping issues is an important consideration in an application for an anti-suit injunction as is shown by the cases referred to above – **Elektrim, Masri No 3** and many others. The issue is important because one of the aims of an anti-suit injunction is to prevent the re-litigation of decided issues. Generally, a litigant should not be vexed with having to deal with the same issue in different proceedings. Where the issues are common to both proceedings the BVI court will review the foreign proceeding to see if it is vexatious or oppressive of the defendant. If it is, the court will be inclined to halt the foreign proceedings, especially where the local court is the natural and appropriate forum for dealing with the matter. In this case the issues do not overlap and the BVI is not the natural or appropriate forum for the trial of the issues in the Cyprus claim. There is no basis for this Court to interfere with the judge's findings.

Grounds 2, 10 and 11 – Non-disclosure by the Cyprus Claimants; collateral attack on the BVI proceedings

[67] In ground 2 the appellants complain that the judge erred by declining to take into account that the Cyprus claimants committed serious and material non-disclosures in applying for and obtaining the WFO, and that this was strong evidence of oppression and vexation sufficient to justify the relief sought by the appellants. The items of non-disclosure are;

- (a) The announcement by T Plus that the negotiations with the Gazprom Group were continuing.
- (b) The decision of Adderley J ordering that T Plus was properly served and properly joined in the BVI proceedings.

The Press Announcement

- [68] The Cyprus claim is based on an allegation that the Titarenko letters caused the breakdown of the negotiations with the Gazprom Group. The Titarenko letters were issued in October and November 2018. The negotiations broke down in February 2020.³² However, there was a press announcement by T Plus in May 2020 that the negotiations were continuing. This is an obvious inconsistency that requires an explanation. The press announcement was not disclosed by the Cyprus claimants in the application for the WFO in July 2020. This was an obvious non-disclosure. The substantive issues relating to the effect of the Titarenko letters and the press announcement are before the court in Cyprus to be resolved in the Cyprus proceedings.

The Adderley Order

- [69] There was a further non-disclosure in the application for the WFO. The Cyprus court was not told that there was an order, albeit *ex parte*, that service on T Plus was proper and that it was properly joined as a party to the BVI proceedings. What the claimants told the Cyprus court appears in paragraph 74 of Ms. Antonia Monoyiou's affidavit filed on 16th July 2020 in support of the application for the WFO where she deposed –

“As I am advised by Mr Cheremikin, Gazprom was already aware of the BVI Proceedings and did not seem to be concerned about them, with the result that negotiations were proceeding smoothly. However, Abyzov and Titarenko tried to create the impression that T Plus was one of the main defendants and that the latter was likely to be called upon to pay huge sums with the issuance of any judgment. In fact, T plus was irregularly included in the proceedings, it was not properly served and was not part of those proceedings at the date of Titarenko's letters, but only appeared in the proceedings in order to challenge its inclusion in the proceedings and the allegations concerning service as well as the charges against it, as they were raised before the court in the British Virgin Islands.” (Emphasis added)

³² Paragraph 10 of the affidavit of Antonia Monoyiou filed in July 2020 in support of the application for the WFO.

[70] The background to this issue is that on 21st June 2018 Wallbank J granted leave to the Abyzov parties to serve the BVI proceedings on T Plus outside the jurisdiction. Service was effected, T Plus did not appear to the claim and on 21st February 2019 Adderley J made an *ex parte* order that T Plus was properly served and was deemed to admit the claim against it. T Plus applied on 8th October 2019 to set aside the *ex parte* order.

[71] Mr. Marshall QC submitted that the statement by Ms. Monoyiou is an example of a challenge to the orders of the BVI court by the Renova parties. I do not agree. Viewed in context the statement is typical of a litigant, T Plus was exercising its rights under the Civil Procedure Rules to question and challenge an *ex parte* order. The Cyprus claimants did not, and have not as far as I am aware, invited the District Court in Limassol to set aside Adderley J's order. That is a matter that is being pursued in the BVI courts. What they told the District Court in July 2020, after challenging the *ex parte* order in the BVI, was that T Plus was not properly served and was improperly included in the BVI proceedings and that T Plus is challenging its status in proceedings. A litigant can do this. Where the Cyprus claimants fell short was in not disclosing to the District Court that the *ex parte* order had been made. If T Plus' application is dismissed and the Cyprus claimants continue to pursue a position before the District Court that T plus has not been properly served and was improperly joined in the BVI proceedings, that could amount to a collateral attack on the order of the BVI court.³³ As far as I am aware this has not happened and this is probably why the judge said that it was premature to deal with this issue.

[72] A court considering an application for a worldwide freezing injunction by the BVI court would in all likelihood treat these two matters as material non-disclosures which may or may not have been sufficient to refuse the injunction or set aside one already granted. The judge's overall approach to the issue is set out in paragraphs 79 and 80 of his judgment -

³³ Ground of appeal number 10.

“[79] In particular, from this Court’s perspective, a failure to make full and frank disclosure of the fact that T Plus had announced negotiations with Gazprom had not terminated is likely to be treated as so serious that the WFO should be discharged in very short order. Similarly, a failure to disclose that T Plus’ status in relation to these proceedings had already been pronounced upon by this Court in a manner contrary to what was being asserted in support of the WFO application would probably also have that result. These points would, at least in principle, so seriously undermine the apparent merits of the case as to weaken the Cyprus Claimants’ position gravely and, on their face, fundamentally.

[80] Such thoughts might be tempting, but the Court must resist that temptation. This Court does not know the fullness of what the Cyprus court was told, nor how. Nor does this Court necessarily have all the papers before it that were before the Cyprus court. Nor are the legal and procedural requirements and civil procedure rules necessarily the same in Cyprus as here. Moreover, whilst I note that there have been a number of hearings before the Cyprus court or courts, with the Cyprus Defendants recorded as present (albeit under protest), this Court does not know to what extent, if at all, the Cyprus Defendants are themselves responsible for the length of time it might take to bring on their own application(s) in opposition to the Cyprus WFO for hearing, whether on account of the number of issues they might wish the Cyprus court to adjudicate upon, Counsel’s convenience, or otherwise.”

[73] Mr. Marshall QC placed heavy reliance on paragraph 79 and submitted in ground 2 that it was irrational and wrong in principle for the judge to not go on and find that the anti-suit injunction would be oppressive and vexatious. However, the judge was not making a finding in the case before him about the relief being sought by the appellants. He went on in paragraphs 80 – 84 (paragraphs 79-80 are reproduced above) to explain his position. He pointed out that the issue of non-disclosure and other issues related to the Cyprus claim and the WFO are matters for the Cyprus court. The Abyzov parties have applied in Cyprus to set aside the claim and the WFO and the Cyprus court is best placed to deal with these issues. The judge also pointed out (in paragraph 84) that the pleadings have not been particularised but that this is not in breach of the procedural rules in Cyprus.³⁴ As stated above, he left the determination of these issues to the Cyprus court.

³⁴ Ground of appeal number 11.

[74] Finally on these grounds, I find that the judge did consider the non-disclosures and in his discretion he left the final determination of their effect to the Cyprus court. He did not think that in an application for an anti-suit injunction where the Cyprus claim is entirely different from the BVI claim, the parties are different, and BVI is not the natural forum for the trial of the Cyprus claim, that the non-disclosures made the Cyprus claim vexatious or oppressive and therefore the injunction sought should be granted. The judge did not commit an error of principle in adopting this approach and there is no basis to interfere with the exercise of his discretion to refuse the relief sought.

Ground 13 – The Assurance

[75] At a hearing before Wallbank J on 26th of May 2020 in connection with the appellants' separate application for an anti-suit injunction in respect of the Russian proceedings leading counsel for Mr. Vekselberg gave the court following undertaking on behalf of Mr. Vekselberg –

“I can confirm, on instructions, that apart from the two sets of Russian proceedings identified in the application, that Mr. Vekselberg has not commenced any proceedings in any jurisdiction against Mr. Abyzov or Emmerson which relate to the issues to be determined in the BVI proceedings and that he has no intention to commence any such proceedings.”

Ground 13 asserts that Mr. Vekselberg breached this undertaking to the court by causing companies that he controls to commence and continue the Cyprus proceedings. The judge found at paragraph 122 of his judgment that –

“The point is, in my view, not determinative, but one amongst several discretionary factors. Nonetheless, strictly speaking the Respondents are correct. Mr Vekselberg did not act in breach of that assurance, and the Cyprus proceedings had by then already been commenced. The Applicants would regard such a statement as myopic and blinkered, with the big picture being that all distinctions between Mr Vekselberg and corporate entities he indirectly controls should in reality be ignored. I cannot so lightly ignore or pierce the corporate veil, which is what the Applicants' approach amounts to.”

[76] The appellants criticised the judge's approach and submitted that he erred in applying such a strict approach to the assurance and he should have used a more liberal approach and find that the assurance applied not only to actions commenced or continued by Mr. Vekselberg himself, but also to any action commenced by an entity that he undisputedly owns or controls such as Gothelia, IES Cyprus and Brookweed.

[77] Mr. Marshall QC also submitted that if Mr. Vekselberg had not given the assurance Wallbank J would have granted the anti-suit injunction. This is speculative and cannot be a basis for interfering with the judge's finding.

[78] Looked at in context Mr. Vekselberg was the only of the Renova parties before the court when the assurance was given as none of the companies that he controls were parties to the litigation. He is the only person referred to in the undertaking and I do not think that the judge, to whom the undertaking was given and who has had conduct of the majority of the proceedings in the BVI litigation, can be faulted for finding that the assurance was not breached by the continuation of the Cyprus proceedings which, as Wallbank J and this Court have found, were not commenced and are not being conducted by entities that are controlled by Mr. Vekselberg and the issues in the Cyprus proceedings are completely different from the issues in the BVI proceedings. As such, I do not think that the judge erred in his interpretation and treatment of the assurance.

Grounds 6, 7 and 8 – The Receivership

[79] The appellants complained in grounds 6 and 7 that the judge was wrong to find that the WFO did not interfere with the functions of the receiver and did not cause prejudice to the appellants.

[80] The brief background to these grounds of appeal is that on 23rd September 2019 the BVI court in claim No. BVIHCOM 2019/0127 appointed receivers and managers over the assets of Emmerson on the application of a third party, JSC

Alfa Bank, a Russian company. The functions of the receivers included collecting the assets of Emmerson worldwide (which would include its assets in Cyprus). The WFO obtained by the Cyprus claimants in July 2020 restrains the Cyprus defendants from alienating any of their assets up to the value of the Cyprus claim. The extent of this restraint is shown by a letter dated 10th September 2020 from Elias Neocleous & Co LLC, the lawyers in Cyprus for the Cyprus claimants, to the receivers informing them in detail of the terms of the receivership and advising them not to take any steps concerning Emmerson's assets. Mr. Marshall QC submitted that the WFO interfered with the receivers in the performance of their duties and that any such interference is a contempt of court as well as an impermissible interference with the order of the BVI court appointing the receivers.

[81] The potential for conflict between the two orders is obvious and the judge found at paragraph 107 of his judgment that *'[t]he Applicants have shown that the Cyprus WFO at the very least risks interfering with the Receiver appointed by this Court'*. However, the judge found that there was no evidence of actual interference or damage to the appellants and having regard to the findings of no overlap between the claims, no jurisdiction over two of the Cyprus claimants, and that the BVI is not the natural forum for the trial of the Cyprus claim, he did not find that this was a sufficient ground for granting the anti-suit injunction. This was an exercise of discretion by the judge taking a holistic view of the application and I would not interfere with his decision.

[82] The appellants complained in ground 8 that the judge failed to consider that he could have granted an injunction ordering the Cyprus claimants to withdraw the WFO in isolation, leaving the Cyprus claim in place. It is correct that the judge treated the potential injunction as applying to the claim and the WFO.³⁵ This is not surprising. The application and the entire presentation of the case by the appellants was on the basis of injuncting the entire proceedings in Cyprus and

³⁵ See paragraph 111 of Wallbank J's judgment.

this Court was told by Mr. Birt QC that the appellants did not at any stage ask the judge to make such a split order.

- [83] I do not doubt that the judge could have made an order in respect of the WFO only and now that this Court is being asked to make such an order there is a new development that must be considered. On 25th April 2021, after the hearing of the appeal, the receiver filed a Notice of Completion of the Receivership (“the Notice”) confirming that the receivership of Emmerson had been completed and was at an end. The Notice was filed in this appeal with written comments from both sides. This means that the potential for interference with the order of the BVI court appointing the receiver is no longer a live issue in this appeal and it is not necessary to make an order regarding the receivership.

Ground 9 – The Width of the WFO

- [84] Ground 9 asserts that the judge was wrong not to take account of the complete absence of any provision in the WFO dealing with the extraterritorial effect of the order. As a matter of BVI law such a provision is necessary in the form of a Babanaft proviso. The proviso is usually inserted in worldwide freezing orders to warn third parties in foreign countries that the terms of the order do not affect or concern them unless the order is declared to be enforceable in their country. The proviso has become standard practice in the BVI and a worldwide freezing order issued without one can be considered to be defective.
- [85] Mr. Marshall QC submitted that the unqualified WFO issued by the District Court was an exorbitant assertion of jurisdiction and that of itself was sufficient to render the WFO vexatious and oppressive and an attack on the BVI court. The judge referred to the appellants’ attack on the WFO in reciting the appellants’ submissions on the point but he did not address the point and make a finding in his analysis. The judge should have made a finding but his failure to do so is not fatal to the exercise of his discretion in the circumstances of this case.

[86] In reviewing this matter, I noted that there was unchallenged expert evidence before the judge by the respondents' expert, Mr. Neofytos Pirilides, that as a matter of Cypriot law the WFO does not have extraterritorial effect. This is not a complete answer to the concerns about the absence of a Babanaft proviso because a person receiving the order outside of Cyprus would not know that it does not have extraterritorial effect unless and until he is so advised by an expert in Cypriot law. The unqualified WFO is a matter that should be considered. I also note that there is no evidence that third parties, other than the receiver, have been served with or notified of the WFO. In all the circumstances of this case I would not consider that the failure to include a Babanaft proviso in the WFO was sufficiently serious to warrant the grant of an anti-suit injunction restraining the further prosecution of the Cyprus claim or withdrawing the WFO. Issues like the width of the WFO, like so many other issues in this case, can be resolved by the court having jurisdiction in this matter, the District Court of Limassol.

Conclusion

- [87] For all of the reasons set out above I find that the appellants have not made out any of the grounds of appeal and I would dismiss the appeal and order them to pay the respondents' costs of the appeal to be assessed at no more than two-thirds of the amount awarded in the court below unless such costs are agreed within 21 days of the date of this judgment.
- [88] The Court acknowledges the very detailed and helpful submissions of leading counsel and those assisting them.

I concur
Louise Esther Blenman
Justice of Appeal

I concur
Mario Michel
Justice of Appeal

By the Court

Chief Registrar