

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 2018/0067

BETWEEN:

VTB BANK (PUBLIC JOINT STOCK COMPANY)

Claimant

and

[1] MICCROS GROUP LTD

[2] TAURUS LTD

Defendants

Appearances:

Mr. Tim Penny QC and Mr. Brian Lacy of Ogier for the claimant

Mr. David Lord QC, Mr. Sebastian Kokelaar and Ms. Sara-Jane Knock of
WithersBVI for the second defendant

The first defendant did not appear

2019: December 17 and 18
2020: January 23.

JUDGMENT

[1] **JACK, J [Ag.]**: On 22nd April 2015 VTB issued proceedings¹ in this Court against Mr. Skurikhin to recover sums due under guarantees given by him of the debts of SAHO. On 30th May 2017, VTB obtained judgment² by default against Mr. Skurikhin for 1,388,387,737.29 roubles (about US\$22 million). The current

¹ BVIHC (COM) 0040 of 2015.

² In BVIHC (COM) 0196 of 2016.

proceedings for the appointment of an equitable receiver are in support of execution of this judgment debt, not as a form of execution in itself.

[2] It is convenient to list the various short forms I shall use in this matter.

Accreda: a group of companies controlled by Mr. Meier, which provides off-shore financial structures and advice; subsidiaries include Accreda Trustees Ltd, the trustee of Olympic and Eastbridge;

Berenger: the Berenger Foundation, a Liechtenstein Stiftung, incorporated on 12th January 2005 (it is said) for the benefit of Mr. Skurikhin;

The Bologna property: one of the Italian properties, purportedly held on a usufruct (life interest) in favour of Mr. Meier;

The Butcher judgment: the judgment³ of Mr. Christopher Butcher QC (now Butcher J) sitting as a deputy judge of the English High Court (Commercial Court) handed down on 21st July 2015 in the English proceedings;

The BVI judgment debt: the judgment against Mr. Skurikhin granted by this Court on 30th May 2017 for 1,388,3897,737.29 Russian roubles (about US\$22 million);

Crown: Crown Capital Holdings Ltd, a Hong Kong company which held the bulk of the member interests in Pikeville on trust for Berenger;

Eastbridge: the Eastbridge Settlement, a discretionary trust established under the law of Nevis on 2nd February 2005, purportedly for the benefit of five executives of SAHO and Unidos (Unidos was removed as a beneficiary on 14th May 2007); Accreda Trustees Ltd is the trustee;

The English proceedings: **JSC VTB Bank v Skurikhin**⁴ in the Business and Property Courts of England and Wales (Commercial Court);

Mr. Hanselmann: Mr. Urs Hanselmann, an associate of Dr. Schurti and a board member of Berenger;

The Italian properties: Viale Tiziano 14, Cervia, Milano Marittima (a luxury property used by Mr. Skurikhin and his family); Via Gabara 3, Bologna (the Bologna property, another luxury property used by

³ [2015] EWHC 2131 (Comm).

⁴ Case No CL-2012-000478.

Mr. Skurikhin and his family); and Via Lagune 9, Sasso Marconi (an empty plot of land);

Mr. Lerch: Mr. Beat Lerch, an associate of Mr. Meier; holder of a small interest in the membership of Pikeville;

Mr. Meier: Mr. Zeno Meier, said to be Mr. Skurikhin's right hand man and a key figure in the corporate and trust structures which feature in this case; holder of a small interest in the membership of Pikeville;

Miccros: the first defendant, Miccos Group Ltd, a BVI company, said to be a creditor of Pikeville; it has one issued share, originally a bearer share, but converted in 2009 into a registered share;

The Milano Marittimo property: one of the Italian properties, purportedly subject to a usufruct (life interest) in favour of Mr. Meier;

Olympic: the Olympic Settlement, a Nevis discretionary trust, established on 2nd February 2005, a beneficiary of Berenger;

Pikeville: Pikeville Investments LLP, an English limited liability partnership, the members of which are Mr. Meier, Mr. Lerch and Crown; it was incorporated on 10th December 2002 and holds the Italian properties; on 10th June 2005 the membership interests in it were declared to held on trust for Berenger absolutely;

The Robertson judgment: the judgment⁵ of Ms. Patricia Robertson QC sitting as a deputy judge of the English High Court (Commercial Court) handed down on 12th June 2019 in the English proceedings;

The Russian judgments: about twenty-five judgments obtained by VTB in the Russian courts against SAHO and Mr. Skurikhin, as guarantor of SAHO's obligations to VTB for a total of about 2.12 billion Russian roubles (some of which may have been satisfied);

SAHO: a group of Russian companies active largely in the Russian agricultural sector, founded by Mr. Skurikhin;

Dr Schurti: Dr Andreas Schurti, a Liechtenstein lawyer and member of the board of Berenger;

Mr. Skurikhin: Pavel Valerjevich Skurikhin, a Russian businessman who founded SAHO and served as its chairman and apparent chief executive officer; said to be a fraudster;

⁵ [2019] EWHC 1407 (Comm).

Taurus: the second defendant, Taurus Ltd, an Anguillan company, which holds the sole issued share in Miccos, a share (it is said) held as to 55 per cent for Berenger and as to 45 per cent for Eastbridge;

Unidos: Unidos del Puento SA, a company incorporated in Costa Rica and sometime beneficiary of Eastbridge and Olympic;

VTB: the claimant, VTB Bank (public joint stock company), the second largest bank in Russia, majority owned by Russian state.

Procedural overview

- [3] After VTB obtained the BVI judgment debt against Mr. Skurikhin, it issued on 10th May 2018 the current application for the appointment of an interim receiver over the single issued share in Miccos. Miccos is said to have lent Pikeville some €19 million for the purchase of the Italian properties. (Whether it did lend this money or not is not clear: Dr Schurti says that it did, but there is no documentary evidence of the loan.) By an order dated 21st July 2015 of Mr. Christopher Butcher QC, sitting as a deputy High Court judge in England, equitable receivers were appointed in England over the interest of members in Pikeville: see the Butcher judgment. These receivers in turn, by order of Mann J of 6th August 2015, have been appointed administrators of Pikeville. An application made to the English Commercial Court to discharge the appointment of the receivers was refused on 12th June 2019: see the Robertson judgment.
- [4] Steps have been taken by Pikeville's administrators to obtain possession of the Italian properties in the face of grave difficulties. For example, in relation to the Milano Maritimo property, the Italian court bailiff attended on 4th October 2018 to take possession. On that date lawyers for Mr. Skurikhin served a Court application actually on the doorstep of the house seeking deferment of the taking of possession. In consequence, the bailiff adjourned taking possession until 3rd December 2018. As Stephen Katz, one of the administrators of Pikeville, explained:

“[41] I again attended with Mr. Meier’s lawyers on 3rd December 2018. It became apparent on gaining access to the premises that Mr. Skurikhin had, in full knowledge of the attendance, allowed an acquaintance of his who is recovering from a stroke and his carer to move into the property on 29th November 2018. The acquaintance was claiming that he was not medically fit to move and that he could not return to his home as he was in the middle of divorce proceedings.”

- [5] Eventually a doctor confirmed that the acquaintance was medically fit to move. The acquaintance (despite his allegedly grave health problems) threatened the bailiff with violence, but was deterred by the attendance of the local police. Sales of the Italian properties are imminent.
- [6] In this jurisdiction, on 30th May 2018 Wallbank J appointed Mr. Mark McDonald of Grant Thornton BVI *ex parte* as interim receiver of the share in Miccos. On 20th June 2018 VTB issued an application for an extension of the interim receivership. On 22nd June 2018, Taurus issued a cross-application seeking to be joined as an additional defendant and for the discharge of the interim receivership. Taurus was added as an additional defendant by order of 25th June 2018, but the cross-application for extension and discharge of the interim receivership was adjourned. Due to counsel’s unavailability, these adjourned applications only came before me for a two day hearing in December 2019. It is these adjourned applications which I now determine.

The short answer

- [7] There is a short answer to the application to extend the equitable receivership. The type of equitable receivership sought by VTB is a mere protective measure, designed to preserve assets. It is usually sought as an enhanced form of freezing order. Such measures are intended to be temporary. Like freezing orders, they are often sought before judgment has been obtained.
- [8] In the current case, VTB have recovered a very substantial judgment against Mr. Skurikhin in this jurisdiction. The share in Miccos is, VTB say, an asset of Mr. Skurikhin against which execution can issue. Under the **Judgments Acts 1838**

and 1840 (UK), VTB can seek a charging order over the share: see the discussion below. That is a straightforward remedy, which is much cheaper than the appointment of a receiver: see below para [23]. VTB say that they are concerned that in the period between the making of an interim charging order and a final charging order there is a risk that Mr. Skurikhin and his proxies will attempt to interfere with the sale by Pikeville' administrators of the Italian properties. This appears to be a real risk. Ms. Tatiana Menshenina, an English solicitor and a partner in Withers LLP, who act for Berenger in the English proceedings, says⁶ that "Miccos could, if it so wished, use this control [as the largest creditor of Pikeville, owed some €21,748,943.14] to pass a resolution at a creditors' meeting requiring the administrators to apply to the English court for an order terminating their appointment." This risk can, however, be easily dealt with by a very limited form of freezing injunction, preventing any such interference. (For completeness, I should add that Mr. Lord QC, leading counsel for Taurus, disputed that it was proper to appoint a receiver for the purpose of preventing interference with Pikeville's administrators. In the light of my conclusions, I do not need to determine this issue.)

- [9] There seems to be developing a culture in this Territory of parties obtaining interim relief and then doing nothing to obtain final substantive relief. That is not the purpose of granting interim remedies. If parties do nothing once they have obtained interim relief, they can expect the Court to discharge the interim relief on that ground alone. In the current case, VTB have done nothing to enforce the BVI judgment debt: they have simply sat on their protective equitable receivership for eighteen months from its grant *ex parte* in May 2018. I did not get the impression from Mr. Penny QC, leading counsel for VTB, that, if I extended the receivership, VTB would treat enforcement of its BVI judgment debt with any urgency. (He was proposing a leisurely exchange of pleadings and disclosure leading to a five-day hearing, listed for counsel's convenience, to determine the making of the

⁶ First witness statement of 6th November 2019 para 25.

receivership order final.) That is not in my judgment a proper basis for making or extending an interim receivership order.

- [10] Accordingly, I shall discharge the equitable receivership, but delay ordering the discharge, so as to give VTB a short period in which (if so advised) to issue an application for an interim charging order and a limited freezing order preventing interference with Pikeville's attempts to sell the Italian properties by seeking to discharge the administration of Pikeville. Any application for an interim charging order should attach Points of Claim setting out VTB's particularized case for enforcement against the Miccos share. Since the current application has, however, been very fully argued and in case the matter goes further, I shall consider the other points raised in the rest of this judgment.

The background

- [11] Something of the background can be seen from reports in the Russian press to which Mr. Penny QC drew my attention. These date from 2014 and give (in somewhat poor translation) an account of events by Mr. Valeriy Lebedinskiy, who had been appointed as a director of SAHO after SAHO got into financial difficulties. In one article, he said:

“SAHO company has reports for 2007-2010 which was properly audited... [A]lready in 2007, ...the losses of SAHO were over 500 million roubles. This was a quiet year, the prices for wheat, flour, bread were close to the highest figures, and the company was still operating at a loss... Next year (2008) the losses amounted to 237.4 million roubles — it seemed that the financial crisis took its toll... [He then describes accounting oddities — or rather falsifications — whereby a net deficit of 112.5 million roubles in the accounts at the end of 2008 was turned into a surplus of 121.3 million at the start of 2009.] In 2010 the loss was 1.4 billion roubles, but then this indicator in the ‘audited’ form was 2.7 billion roubles for four year[s]. The ‘hole’ in the assets is 5.9 billion roubles.”⁷

- [12] In another press article⁸ he said:

⁷ B3/47/1555.

⁸ B3/47/1542-1543.

“SAHO Group was being developed by the Skurikhin team using a Ponzi scheme... Moneys received from government-owned banks ‘for the seeding’ [of fields for crops] were in fact sent to Skurikhin’s Cyprus and British companies by dozens [of] millions of Euros... And all transactions of this kind carried out during the period from 2007 through 2011 were not made from the funds owned by companies existing within the perimeter of SAHO agricultural holding, but rather were exclusively obtained from loans allegedly received to perform agricultural works which were never done.”

The money-laundering was effected through:

“a foreign scheme which may be split into two parts (European-Asian and Italian parts). These companies are well-camouflaged and are being controlled via a special ‘intermediate layer’ being Swiss attorneys Beat Lerch and Zeno Meier who, at the same time, are ‘mass registrars’. Each legal entity entered in European registers lead to three dozens of various companies... [and he gives a lot of further details].”

- [13] Mr. Penny QC did not rely on these articles in order to show a good arguable case in support of his application for the continued appointment of the receiver. Instead they appeared as part of a (fairly late) development in the course of argument, when the question arose of Mr. Skurikhin’s intention to defraud creditors in the light of the timing of the movement of monies by him. I shall come back to the articles’ significance and the new way in which Mr. Penny sought to justify the relief sought.

Mr. Skurikhin’s bankruptcy

- [14] The Arbitrazh Court of Novosibirsk Oblast in the south-west of Siberia in Russia made Mr. Skurikhin bankrupt on 16th March 2016. On 7th June 2017 the same court concluded the bankruptcy proceedings and discharged Mr. Skurikhin from his obligations to his creditors. VTB appealed this latter decision. On 18th December 2018 the appeal court upheld the decision to conclude the bankruptcy proceedings but it reversed the decision to discharge Mr. Skurikhin from his obligations to his creditors. Apparently Russian law is similar to English law in that claims in fraud survive the debtor’s discharge from bankruptcy. The Supreme Court of Russia upheld the appeal court’s decision on 20th April 2018.

- [15] Neither party suggested that the Russian bankruptcy proceedings had any relevance to the current application. In particular, it was not argued on Taurus' behalf that any interest which Mr. Skurikhin had in the Miccros share had been transferred to the Russian equivalent of Mr. Skurikhin's trustee in bankruptcy.

Equitable receivers

- [16] The Courts of Equity had their own means of enforcing judgments, including by the appointment of receivers in equity. They used these powers not just to enforce decrees in equity, but also in support of judgments of the common law courts. This was due to the deficiencies in the common law methods of execution.
- [17] Historically the common law courts had only three writs of execution generally available⁹: the writ of *fi.fa.* for enforcement against goods and chattels; the writ of *eligit* for enforcement against land; and the writ of *capias* for enforcement against the debtor's person. All had substantial limitations. The sheriff's officer executing a writ of *fi.fa.* could not seize a chose in action. Thus, in the days before Bank of England banknotes were legal tender, if the debtor had a roll of banknotes in open view when the officer was executing the writ, the officer could not seize the banknotes, for they were choses in action, not chattels.¹⁰ The writ of *eligit* only allowed the taking into possession of half the freehold land of which the debtor had seisin; it did not permit its sale. It was only in 1677 that the interest of a cestui que trust might be seized in this way: **Statute of Frauds 1677** (Eng) section 10. (The **Judgments Act 1838** (UK) section 11 allowed the taking of possession of the whole of the land. Only in 1864 was the court allowed to order an actual sale of the land: **Judgments Act 1864** (UK) section 4.)
- [18] As a result, resort was often had to arrest for debt. The liability for arrest on mesne process (i.e. before a judgment had been obtained) had been steadily

⁹ There were — and in England still are — special writs of execution against the ecclesiastical property of beneficed clergy.

¹⁰ The Judgments Act 1838 (UK) section 12 reversed this.

extended to all contractual claims.¹¹ It was held that where a writ of *capias ad respondendum* lay before judgment (i.e. the writ for arrest on mesne process), so too did a writ of *capias ad satisfaciendum* after judgment: **Herbert's Case**.¹² Reforms in the course of the nineteenth century, culminating in the **Debtors Act 1869** (UK), largely abolished imprisonment for debt.

[19] As imprisonment for debt was being abolished, new forms of execution were introduced, such as the procedure for garnishing debts: **Common Law Procedure Act 1854** (UK) sections 61-67. Of particular importance in the current case is the procedure introduced by the **Judgments Acts 1838 and 1840** (UK) for the making of charging orders over the debtors' assets. These last two Acts apply in this Territory: **Stichting Administratiekantoor Nems v Anna Radchenko**.¹³ The effect of sections 14 and 1 of the Acts respectively is to allow a charging order to be made over the interest of the judgment debtor in any stock or share, whether the interest be legal or beneficial, in possession or in reversion, and whether vested or contingent. The share in Miccos can thus be the subject of a charging order.

[20] The Courts of Equity appointed receivers in order to allow execution against interests, which were otherwise beyond the reach of the common law remedies. As common law remedies were extended by statute, the scope for the appointment of receivers shrank. As Lord Redesdale, sometime Lord Chancellor of Ireland, said extrajudicially¹⁴, in a passage of his textbook approved by the English Court of Appeal in **Harris v Beauchamp Bros**¹⁵:

¹¹ The Statute of Marlebridge (or Marlborough) (52 Hen. III), c. 23, and the Statute of Westminster II (13 Edw. I), c. 11 allowed arrest for a cause of action in account; 25 Edw. III, c. 17 allowed arrest for claims in debt and detinue; and finally 19 Hen. VII, c. 9 allowed arrest in all actions on the case, which critically included *assumpsit* and *indebitatus assumpsit*.

¹² 3 Co. 11b at 12a.

¹³ BVIHCMAP 2019/0003 (delivered 29th March 2019, *per* Pereira CJ).

¹⁴ A Treatise on Pleadings in Suits in the Court of Chancery by English Bill, better known as Mitford's Chancery Pleading (4th Ed, 1827) at p 126. (Mitford was Lord Redesdale's surname, prior to his elevation to the peerage.)

¹⁵ [1894] 1 QB 801 at p 807.

“In some cases, where Courts of Equity formerly lent their aid, the legislature has, by express statute, provided for the relief of creditors in the courts of common law and consequently rendered the exercise of this jurisdiction in such cases unnecessary.”

- [21] The remedy survived the fusion of law and equity. Section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act 1968** provides:

“A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just.” (Capitalisation as in the original.)

- [22] Just as the power to appoint a receiver shrank in the course of the nineteenth century, so too can it expand as conditions change with judgment debtors becoming ever more skilled at defeating judgment creditors’ attempts at enforcement. In particular, the remedy is not limited to those cases where the Courts of Equity before the **Judicature Acts 1873 and 1875** (UK) would have appointed a receiver. As the Privy Council (on appeal from Cayman) held in **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**¹⁶:

“56. ...[T]he court was not bound by pre-1873 practice to abstain from incremental development. The jurisdiction could be exercised to apply old principles to new situations. **Masri (No 2)**¹⁷ confirms or establishes the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under [the equivalent of section 24(1)]; (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations.”

¹⁶ [2011] UKPC 17, [2012] 1 WLR 1721.

¹⁷ *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450.

[23] However, as Males J (as he then was) explained in **Cruz City I Mauritius Holdings v Unitech Ltd**¹⁸

“The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by *dicta* which speak of the need for “special circumstances”: see... **Masri (No 2)** and also the decision of Arnold J in **UCB Home Loans Corporation Limited v Grace**¹⁹, holding that there were sufficient ‘special circumstances’ rendering it just and convenient to appoint a receiver by way of equitable execution when it would be ‘difficult for the claimant to enforce its judgment by other means’ and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.”

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

[25] By contrast, the Court is willing on an interim application to appoint a receiver over assets which fall within the much wider definition of assets in the standard English freezing order²⁰. This form of order applies to:

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

¹⁸ [2014] EWHC 3131 (Comm), [2015] 1 All ER (Comm) 336 at para [47(c)], permission to appeal refused [2015] EWCA Civ 33.

¹⁹ [2011] EWHC 851 (Ch).

²⁰ The Commercial Court Guide [for England and Wales] (10th Ed, 2017) at p 122.

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

[26] The Court of Appeal in **Vinogradova v Vinogradova**,²¹ on appeal from this Court, held that an applicant for the appointment of an interim receiver:

“needed to satisfy the three elements that apply in all applications for appointing receivers, namely

- i. That he has a good arguable case for the appointment of a receiver;
- ii. That there is a real risk of dissipation; and
- iii. It is just or convenient to appoint a receiver.”

[27] The Court of Appeal cited the definition of a “good arguable case” in **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**,²² before Mustill J and the English Court of Appeal and held:

“that the good arguable case test... has a higher threshold in applications for the appointment of receiver (as opposed to the grant of an injunction).”

This is because, as our Court of Appeal held in **Norguff Holdings Ltd v Michael Wilson and Partners Ltd**²³ at para [27]:

“the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction... [T]he appointment of a receiver is usually more draconian than issuing a freezing order because of the expenses and inconvenience which often arise with the appointment.”

[28] In some cases, it can be difficult to distinguish between interim and final orders. The wording of the substantive elements of the two types of order appointing a receiver is identical. It is true that the interim form of the order will often include a cross-undertaking in damages by the applicant for the order, but this is not invariable. The purpose of the order must sometimes be sought outside the wording of the order itself.

²¹ BVIHCMAP 2018/052 (delivered 30th July 2019) at para [18].

²² [1983] 1 WLR 1412 (CA only); [1984] 1 All ER 398, (Mustill J) at p 400, (CA) at p 415.

²³ BVIHC VAP 2007/0008 (delivered 29th October 2007).

[29] The nature of the order made in England by Mr. Butcher QC, sitting as a deputy High Court judge, is in my judgment a final order. It was a form of enforcement, not merely an order in order to hold the ring. He determined the question on balance of probabilities, not on the lower “good arguable case” test. I gratefully adopt as my own the reasoning in paras [71] to [80] and [91] of Ms. Patricia Robertson QC in the Robertson judgment.

[30] In this regard it should be noted that it is not clear whether in England a member’s interest in a limited liability partnership can be the subject of a charging order. The **Charging Orders Act 1979** (UK) allows a charging order to be granted over a “stock”, which is defined in section 6(1) as including “shares, debentures and any securities of the body concerned.” However, it is doubtful if a member’s interest in an LLP falls within this definition. There is nothing in the **Limited Liability Partnerships Act 2000** which corresponds to section 23 of the **Partnership Act 1890** (which permits a judgment debt against a partner to be enforced against that partner’s interest in the partnership). It may, therefore, be that the appointment of an equitable receiver, as was done by Mr. Butcher QC, was the only way of attaching an interest in an LLP.

The offshore structure

[31] The outline structure of legal entities relevant to the current application is this. Berenger is a Liechtenstein foundation (or Stiftung). It was founded (i.e. incorporated) on 12th January 2005 for the benefit of Mr. Skurikhin. I shall revert to the details. Eastbridge is a Nevis discretionary trust, ostensibly for the benefit of five executives of SAHO and (originally) for Unidos. Again, I shall revert to the details.

[32] Mr. Meier, Mr. Lerch and Crown at the material times were the holders of the members’ interests in Pikeville, the English limited partnership which held the Italian properties. They declared that they held the members’ interests on absolute trust for Berenger.

- [33] Miccros is said to have lent some €19 million to Pikeville so that Pikeville could purchase the Italian properties. (Dr. Shurti makes this assertion, but no documentary evidence has been produced by Miccros as to whether or how or on what terms this loan was made.) It is thus potentially the biggest creditor of Pikeville. Miccros was incorporated in this Territory in 2000 with one bearer share. It was not in dispute that the bearer share, and the registered share into which it was converted, was held beneficially for Mr. Skurikhin. On 30th April 2003, in order for UBS to open a bank account for Miccros, Mr. Skurikhin was declared the beneficial owner of Miccros. That declaration was repeated in 2006 and 2008 and on 7th August 2009.
- [34] The **BVI Companies Act 2003** abolished bearer shares with effect from 31st December 2009. On 29th October 2009 the directors of Miccros resolved that the bearer share in Miccros be converted into a registered share, to be registered in the name of Taurus, an Anguillan company. The same day Taurus made two declarations of trust in respect of the share. One declaration declared that the share was held 55 per cent for Berenger, the other that 45 per cent was held for Eastbridge.
- [35] VTB say that the date of 29th October 2009 is significant. From 2007 onwards, some nine companies in the SAHO group had taken loans from VTB. In late 2008, SAHO was negotiating with VTB to refinance these loans. Ultimately, VTB entered into forty loan agreements with SAHO companies. As part of the refinancing, however, Mr. Skurikhin was required to give personal guarantees. This he did on 25th March 2009. The declaration of trust of the Miccros share comes only some six months after Mr. Skurikhin gave his personal guarantees to VTB. It shows, VTB submits, an intention to put assets out of the reach of Mr. Skurikhin's creditors, including contingent creditors like VTB.

Modern principles of tracing

- [36] Mr. Penny QC did not, in support of the current application, seek to rely on tracing. However, it may become an issue when VTB seeks to obtain final execution on assets. Until the recent Privy Council decision in **Federal Republic of Brazil v Durant International Corp**²⁴, it was thought that tracing was a very technical exercise, where it was essential that the money which it was sought to trace retained its “identity”. Although **Durant** was a Jersey case, the company itself was incorporated in this Territory and there have been proceedings in this jurisdiction.
- [37] Following the Privy Council case, this Court appointed liquidators in respect of Durant and two other associated companies. As part of the winding up, I was asked to make a pooling order in respect of Durant and the two other companies, so that the liquidators could deal with the assets of the three companies as if they were one: **Re Durant International Corp; Re Kildare Finance Ltd; Re MacDoel Investments Ltd; ex parte Richardson**²⁵. I discussed the changes wrought by the Privy Council decision. The background to the cases was that Salim Maluf, the former mayor of São Paulo in Brazil, and his son had taken massive kick-backs and bribes at the expense of the municipality. These monies were laundered through to Durant, Kildare and MacDoel. São Paulo and the Brazilian state brought proceedings before the Royal Court of Jersey and recovered judgment against Durant and Kildare. (MacDoel’s involvement only came to light later.) An appeal went to the Privy Council, which dismissed Durant’s appeal and held that tracing was a more flexible remedy than previously thought and was available in respect of the monies misappropriated.
- [38] In the **Durant** case before me, I cited my earlier discussion of the new principles of tracing in **Otkritie International Investment Ltd v Urumov**²⁶. In **Otkritie** I was dealing with the beneficial ownership of £5 million held in Jyske Bank (Gibraltar)

²⁴ [2015] JCPC 35, [2016] AC 297.

²⁵ BVIHC (COM) 2017/0134, BVIHC (COM) 2017/0135, BVIHC (COM) 2019/0020 (Decision of 5th December 2019).

²⁶ Supreme Court of Gibraltar, unreported, 9th June 2016; appeal dismissed without discussing this point (Court of Appeal of Gibraltar), unreported, 16th December 2016

Ltd and considered whether victims of an earlier fraud might be able to trace their losses to this money. I said:

“79. ...It always used to be thought that in order to trace money it was necessary to show identifiable monies passing from A to B to C to D to E. If, for example, the money was paid by B into an overdrawn account of C, then the money lost its identity. Thus even if C were to pay exactly the same sum out to D the next day, tracing would no longer be possible.

80. The Privy Council in **[Durant]** held that this is not an invariable rule of law. It held that ‘backwards tracing’ was potentially legitimate and explained:

‘38. The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry.’

81. This would imply that the payment from C to D in the above example (assuming it was always intended to represent the monies originally coming from A) could be relied on as part of a tracing claim against E. Further in a money-laundering case it may be arguable that there is a presumption that monies paid in at one end are represented by the monies paid out at the other end. In other words, in the above example, suppose the claimant who was seeking to trace was unable to prove the way in which monies moved from B to C (say, because B converted the money into cash) or did not even know of the existence of C. So long as A could show that B and D had an intention to launder the money, it may be possible for the Court to presume that the money in E’s hands represented the money transferred by A to B, without any need to prove C’s rôle or even C’s existence.

82. If that is right, then the Russian victims of the earlier frauds might have a claim to the US\$5 million.”

[39] Applying that to the current case, one potentially has a situation (I emphasize that these facts have not yet been pleaded, still less proven) where Mr. Skurikhin steals the rouble-equivalent of several tens of millions of dollars from SAHO. A short time afterwards he is found with *de facto* control of several tens of millions of dollars in off-shore entities. It would not be a complete leap of faith to conclude that these latter sums represent the monies stolen earlier. However, even if it was not appropriate to reach a final conclusion about this, based solely on the temporal coincidence, the timings may be enough to raise a presumption that the stolen monies have been laundered through to the current holders. If my analysis in para [81] of **Otkritie** is correct, the judgment creditor would not have to show precisely how the monies came to move from SAHO to the various off-shore entities: it would be for Mr. Skurikhin to show that any presumption that the money was the same was factually incorrect.

[40] There would be no unfairness in raising a presumption that the monies were traceable. If the monies in the off-shore structure had been acquired legitimately, then it should not be difficult to demonstrate that fact. In particular, the administrators of off-shore entities are now subject to a raft of anti-money laundering and “know your client” requirements. The paper trail showing the legitimacy of the monies should be easily available, if the monies were legitimately acquired. These are, however, matters for another day.

Fraudulent conveyances

[41] Mr. Penny QC submitted that the two declarations of trust of 29th October 2009 in respect of the sole share in Maccros were void under two statutory provisions. Firstly, he relied on the **Fraudulent Conveyances Act 1571**²⁷, often referred to as the Statute of Elizabeth. (This is slightly confusing since the **Charitable Uses Act 1601**²⁸ is referred to in the same way.) Secondly, he relied on section 81 of this Territory’s **Conveyancing and Law of Property Act 1961**.

²⁷ 13 Eliz I c. 5.

²⁸ 43 Eliz I c. 4.

[42] Before considering the application of the law to the facts, I need to consider whether the 1571 Act is in force in this Territory. Mr. Lord QC did not argue on Taurus' behalf that the Act was not in force, but, since it goes to the Court's jurisdiction, I need to consider the matter. It was fully argued by Mr. Penny QC.

[43] The 1571 Act provides:

"For the avoiding of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants etc have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and signs of every of them, whose actions, suits, debts, etc; by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.

Provided that this act or anything therein contained shall not extend to any estate or interest in land, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and *bona fide*, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

[44] A statute of the Westminster Parliament can apply in this Territory in a number of different ways. Firstly, a Westminster statute can declare expressly or by necessary implication that it applies here. Secondly, it can be applied by an Order in Council made by the Privy Council or by an Act or other legislation of the local legislature. Thirdly, it can apply as part of English law on the settlement of these islands. Only this last category is relevant in the current case.

[45] The Privy Council in an anonymous decision, which we only know as a result of its citation by Sir Joseph Jekyll MR, again in an **Anonymous** case²⁹, held:

“That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator’s presence, in the case of a devise of land, does not bind Barbadoes.”

[46] This might suggest that the automatic importation of Westminster statute law ended on the date the colony was settled. However, “settlement” was subsequently treated as having fully occurred when a local legislature started to operate — in the Virgin Islands, thus, potentially in 1774.³⁰ Since the Statute of Elizabeth long predates the European settlement of these islands, the point does not arise: the Statute was imported on settlement of the Virgin Islands by Europeans.³¹

²⁹ (1722) 2 P Wms 75.

³⁰ When the Legislative Assembly for the Virgin Islands was first called into being: John Henry Howard, *The Laws of the British Colonies in the West Indies and other parts of America, concerning real and personal property and manumission of slaves: With a view of the constitution of each colony* (1827) at p xi. Whether the earlier date of establishment of the General Assembly of the Leeward Islands should be taken as the cut-off date was not argued before me. Following Sir William Stapleton’s appointment as governor of the Leeward Islands in 1674, members of the General Assembly were only sent from Antigua, Monserrat, St Christopher and Nevis (two each) with none from the Virgin Islands. However, some laws made by the General Assembly applied in these islands, including the Common Law (Declaration of Application) Act 1705, which is still in force in this Territory.

³¹ Hendry and Dickson, *British Overseas Territories Law* (1st Ed, 2011) at pp 137-138.

[47] The main argument against the continuing validity of the 1571 Act is that it has been superseded by section 81 of the 1961 Act, which provides:

“(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Ordinance, with intent to defraud creditors, shall be voidable at the instance of any person hereby prejudiced.

(2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of conveyance, notice of the intent to defraud creditors.”

[48] This covers much the same ground as the earlier statute. The 1961 provision is taken word-for-word from section 172 of the **Law of Property Act 1925** (UK) (a section which has in turn since been replaced by section 423 of the **Insolvency Act 1986** (UK)). The 1925 Act expressly repealed the 1571 Act: see the Seventh Schedule to the 1925 Act. The 1961 Act does not. In my judgment that is significant. In the modern era it is very rare that the doctrine of implied repeal can apply, because no professional parliamentary draftsman or woman would leave such an important question at large. This is particularly the case with a Statute of such importance as the 1571 Act. If the legislator had meant to repeal the 1571 Act, it would have said so. It did not, so the Act in my judgment is still in force.

[49] I do not need to examine the potential differences between the two Acts. In both cases, there is a problem on the facts as adduced to me on this application. Mr. Penny QC submitted that the timings were sufficient to prove his case. Mr. Skurikhin gives the guarantees to VTB on 25th March 2009 and — lo! — on 29th October 2009, just over seven months later, he is disposing of his beneficial ownership of the share in Miccros to Berenger and Eastbridge. It is obvious, he submitted, that this transfer was to make him judgment-proof against his liabilities under the March guarantees.

[50] I do not agree. Mr. Penny did not read any authorities to me on the 1571 Act or its subsequent reenactments³², but his skeleton refers to **Godfrey v Poole**³³, a Privy Council case from New South Wales on the Act, where the Board approved this holding of Kindersley V-C in **Thompson v Webster**³⁴:

“It is now clear that it is not sufficient that a deed is merely *voluntary*; on the other hand, it is not necessary, in order to set aside a voluntary deed, that the settlor should be actually in a state of *insolvency*. The principle now established is this. The language of the Act being that any conveyance of property is void against creditors, if it is made with *intent* to defeat, hinder or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor, in making the settlement, was to defeat, hinder or delay his creditors.” (Sir Richard’s emphasis.)

The same is likely to apply to the 1961 Act.

[51] In my judgment, no such inference can be drawn from the mere fact that seven months after giving a guarantee a man is putting some of his assets into protective structures. Now, if the press reports from which I have quoted are true, Mr. Skurikhin’s whole purpose in October 2009 was to put his assets beyond the reach of his creditors, so that when (as was inevitable when his massive fraud came to light) enforcement proceedings were brought against him, his assets would be hidden behind opaque off-shore structures. That would be a clear case of a transfer intended to defraud creditors. However, Mr. Penny QC expressly (and in my judgment rightly) accepted that the press reports did not constitute evidence sufficient to show a good arguable case.

³² The Statute of Elizabeth continues to generate authority: see most recently the Privy Council decision on appeal from Gibraltar in *Trustee of the Property of Pehrsson v von Greyerz* 1999-00 Gib LR 231, *sub. nom.* *Re Pehrsson’s Trustee* (1999-2000) 2 ITELR 230.

³³ (1888) 13 App Cas 497.

³⁴ (1859) 4 Drew 628 at p 632, appeal to the Lords Justices dismissed (1859) 4 De G & J 600. It is not clear to me that *Godfrey v Poole* is necessarily a complete statement of the law. In *MacKay v Douglas* (1872) LR 14 Eq 166 a solvent man settled property on his wife and children before entering a risky partnership venture: held, setting aside the settlement, it sufficed that he was aware of the *risk* of bankruptcy if he became a partner; but cf *Holloway v Millard* (1816) 1 Madd 414.

[52] Without that evidence, the signing of the guarantee and the subsequent voluntary transfer of the share in Miccross in my judgment prove nothing. For ought one could gather from the evidence adduced by VTB, SAHO was in 2009 a successful and solvent company; the chances of the guarantees being called in was negligible; and Mr. Skurikhin (like any sensible businessman) wanted to protect his assets against unexpected (and at the time unforeseeable) disaster. Now it may be that VTB can prove the contrary — indeed it may be easy for it to do so — but on this application it has not attempted to show this. Instead, when I pointed out to Mr. Penny the difficulties which were in his way in showing *intention* to defraud from the bald facts on which he relied (essentially he was relying on just the dates), he had to have recourse to the press reports which I have cited.

[53] In my judgment, VTB on this application have failed to show a good arguable case that the two declarations of trust of 29th October 2009 were made with the intention of defrauding Mr. Skurikhin's creditors. Accordingly, I would not continue the appointment of receivers on this basis. This does not prevent VTB presenting better evidence of an intention to defraud creditors on an application for final relief. That would be a separate application with different evidence, including documentation produced on disclosure.

Public policy

[54] There is a principle of public policy that judgment debts should be paid. Indeed, this is part of a wider principle that people should honour their obligations. However, neither principle is absolute. Laws in many jurisdictions, including the United Kingdom and this Territory and the Principality of Liechtenstein, recognize that, subject to various limits, men and women can, whilst solvent, legitimately take steps to protect their assets against possible future financial disaster.

[55] Section 33 of the **Trustee Act 1925** (UK) gives a form of words for the creation of a protective trust, which preserves the assets of the principal beneficiary in the event of enforcement proceedings being brought against him or of his being made

bankrupt. Such a trust can be created by the principal beneficiary himself³⁵, however this is rare, because the effect of section 33(3) of the Act is that in the event of bankruptcy the income from the trust goes to the trustee in bankruptcy.³⁶ It is easy to have a third party settle the trust, thus avoiding this technical difficulty. A well-drafted English or BVI discretionary trust can protect a beneficiary from enforcement proceedings and the loss of assets on bankruptcy.

- [56] By statute³⁷, most forms of pension provision in the United Kingdom do not vest in the beneficiary's trustee in bankruptcy: **Horton v Henry**.³⁸ Until the special privilege was abolished by the **Attachments of Earnings Act 1971** (UK)³⁹, the salaries and pensions of civil servants and members of the armed forces were exempt from execution.
- [57] Nevis has passed "firewall" legislation to prevent the enforcement of foreign judgments against certain Nevis trusts: **Nevis International Exempt Trust Ordinance**⁴⁰ sections 27 and 28.
- [58] As we shall see, Liechtenstein law also gives protection (or at least attempts to give protection) against execution against a beneficiary's interest in a Stiftung (foundation).⁴¹ There are remedies if monies are transferred to a Stiftung to defraud creditors,⁴² but none are relied on before me in this case.
- [59] At some points during argument, Mr. Penny QC seemed to come close to saying that the Court should lean against permitting asset protection structures to

³⁵ Lewin on Trusts (19th Ed, 2015) at para 5-181.

³⁶ Underhill and Hayton on Trusts and Trustees (19th Ed, 2018) at para 11.70.

³⁷ Pension Schemes Act 1993 (UK) section 159(5), Pensions Act 1995 (UK) section 91, Welfare Reform and Pensions Act 1995 (UK) section 11.

³⁸ [2016] EWCA Civ 989, [2017] 1 WLR 391.

³⁹ Section 23(5).

⁴⁰ Chapter 7.03 (N).

⁴¹ The use of Liechtenstein foundations to stymie creditors is not new: see *Wyler v Lyons* [1963] P 274, where a husband created such a foundation to defeat his wife's claim to alimony pending suit. Simon P set aside service outside the jurisdiction on Dr Wyler, the foundation's sole council member, for want of a gateway.

⁴² Articles 64ff of the Rechtssicherungs-Ordnung 1923: see the memorandum of Dr. Bernard Lorenz of 12th October 2012.

succeed. It does not seem to me that that can be right. Each mechanism must in my judgment be considered on its own terms. Naturally, if an off-shore structure is used for fraud, then that is a very material matter when considering what the effect in law of the off-shore mechanism might be. However, public policy does not require a blanket ban on asset protection.

The Butcher and Robertson Judgments: ownership of Pikeville

- [60] VTB seek to rely on the effect of the Butcher and Robertson judgments under the doctrine of *res judicata* for the proposition that the Miccross share is held beneficially for Mr. Skurikhin and is thus available for execution of the BVI judgment debt. I shall examine the precise issues raised by this argument shortly, but first I shall give an overview of what the two English judgments determined. Both, it will be recalled, concerned an application to appoint equitable receivers over the membership interests in Pikeville. In practice this meant showing that Berenger, for whom the interests in Pikeville were held on trust, was held beneficially for Mr. Skurikhin.
- [61] It was common ground before me (and was not disputed in the English proceedings) that as a matter of law Berenger is governed by its “Statutes” (“Statuten” in German) and “Regulations” (“Reglement” in Liechtenstein legal parlance, presumably brought over from the French). Actual decisions are taken by the “Stiftungsrat” (translated as the Board of Directors, although “the Foundation’s Council” might be more accurate), which originally consisted of Mr. Meier, Mr. Lerch, Dr. Schurti and Mr. Hanselmann. Mr. Meier and Mr. Lerch retired from the Board in 2012. The original beneficiaries of the Foundation were Mr. Skurikhin and his issue as well as “trusts, foundations and the like the beneficiaries of which shall include one or more classes of Beneficiaries of this Foundation.”
- [62] It was common ground between the experts on Liechtenstein law that the effect of the Statutes and the Regulations was very similar in result to the working of a discretionary trust governed by English law, in that Mr. Skurikhin might well have

some expectation that he would benefit from the foundation, but that he had no legal or other right to any share of the assets. This was, however, subject to the potential existence of a “mandate”. A beneficiary, such as Mr. Skurikhin could make a contract with an individual board member, such as Mr. Meier, such that Mr. Meier was obliged to follow Mr. Skurikhin’s instructions as to how he should exercise his powers as a member of the Board. If the Board were obliged to follow the “mandate” of a beneficiary, then that beneficiary was treated as a matter of Liechtenstein law as the beneficial owner of the assets of the Foundation; otherwise not.

- [63] That seeming bright line may, however, in practice be much blurrier. Just as a discretionary trustee may well blindly follow the wishes of the main beneficiary, so that the “true” ownership of the trust assets is a greyer shade than the strict black and white letter of English law would provide, so too the existence of a mandate may be shadowy. A mandate in Liechtenstein law need not be in writing. It can thus readily be denied. (If a mandate exists, it has disadvantageous tax consequences in Liechtenstein, hence the need for deniability.) But even if there was no express oral agreement, a mandate may be inferred from conduct. As the faithful retainer, Adam, said to Orlando:⁴³

“Master, go on and I will follow thee,
To the last gasp with truth and loyalty.”

- [64] The trustee of an English-law discretionary trust and a Liechtenstein member of a Stiftungsrat, may adopt an Adamesque persona without any express agreement at all with the principal beneficiary as to how he should exercise his powers, but nonetheless doggedly, but voluntarily, follow his master’s wishes to the letter. Liechtenstein law appears to treat this as simply a question of fact: is a mandate to be inferred from the situation? As Dr. Frommelt, VTB’s expert, says:

“If the mandate agreement is concluded orally it is sometimes difficult to prove any influence of the real economic founder, therefore it is essential

⁴³ As you like it, Act 2 Scene 3.

to look out for pointers such as economic actions, e.g. guarantees given a foundation in the course of a business action by the real founder which, for the foundation itself, makes no direct sense.”

[65] Mr. Butcher QC’s conclusion was:

“49. On the material before me, I am satisfied that it is more likely than not that Mr Skurikhin does either have a right to call for the assets of the Berenger Foundation to be transferred to him, or has *de facto* control of those assets.

50. The following matters have led me to reach that conclusion:

(1) That there is evidence indicating that assets including those in the Berenger Foundation structure are the product of Mr. Skurikhin's transfer of his assets out of Russia in an attempt to make them difficult to trace and/or judgment proof. [The learned deputy judge cites a press article.]

(2) There is no doubt that Mr. Skurikhin is closely associated with assets which are and have been held subject to the structure involving Berenger Foundation and Pikeville. Important assets of Pikeville are used for the sole benefit of Mr. Skurikhin and his wife. This includes the Italian properties which are apparently leased rent free to Mr. and Mrs. Skurikhin; and the money loaned to Paradis de Beauté Srl [the company owning a beauty salon run by Mrs. Skurikhin].

(3) The extreme coyness of the members of Pikeville in revealing the ultimate controlling party of the LLP, coupled with Pikeville's involvement with companies associated with Mr Skurikhin, namely Sibinvestproject JSC, AL.PA Srl and SAHO Group ZAO, supports an inference that it is Mr. Skurikhin who exercises ultimate control.

(4) The directors of the Berenger Foundation have produced no evidence to show that the foundation's directly or indirectly held assets are not under Mr, Skurikhin's control.

(5) Mr. Skurikhin has signally failed to provide proper disclosure of his assets, or produce the documents which he has been ordered to produce. He has failed to produce any documentation which would indicate that he is not in control of the assets of the Berenger Foundation, and has not appeared to be examined on his asset position. In circumstances in which Burton

J,⁴⁴ on the material before him, inferred that Mr. Skurikhin did indeed have control of the assets of the Berenger Foundation, it was clearly for him, if the inference was not to continue to be drawn, to produce evidence that he did not. No material has been adduced, however, which begins to contradict the inference drawn by Burton J.

(6) The evidence of Dr. Frommelt.... In my judgment it is significant that an experienced Liechtenstein lawyer draws the conclusions: (a) that Mr. Skurikhin or his agent is the mandatory to a mandate agreement with the board of directors / foundation council of the Berenger Foundation; (b) that Mr. Skurikhin is likely to be able to instruct the board to transfer at least significant parts of the Berenger Foundation's interests in Pikeville into his own name; (c) that the reason why Mr. Skurikhin and his family benefit from the Berenger Foundation is because he is in *de facto* control as a mandatory and its economic founder.

51. Given this conclusion, it follows that the membership interests in Pikeville, which the members themselves say are held as nominees for the Berenger Foundation, should be considered in equity to be Mr Skurikhin's assets, and thus that it is open to the court to appoint a receiver over them.”

[66] Ms. Robertson QC's conclusion was the same. She had the advantage of hearing oral evidence from Mr. Meier and Dr. Schurti. She held at para [141]:

“Far from demonstrating that Berenger acted independently of Mr. Skurikhin, the available evidence suggests that Mr. Meier controlled Berenger's actions and did so in the interests of, and it is to be inferred at the behest of, Mr. Skurikhin. Looking back over the history of this litigation, there is a pattern of behaviour on the part of Mr. Meier and Berenger that seems more consistent with seeking to further Mr. Skurikhin's interests and advancing his strategy in respect of his dispute with VTB, than with them acting independently of him, suggesting that he was and is calling the shots, through instructions to Mr. Meier and, through him, to Berenger. The best explanation that can account for each twist and turn in the narrative is that he is recognised as the only beneficiary whose interests they are obliged to protect, and whose wishes should command, because he is the mandatory and the true beneficial owner of the assets, with anyone else's interest being merely contingent and dependent on Mr. Skurikhin's wishes.”

⁴⁴ In a judgment of 4th December 2012, [2012] EWHC 3916 (Comm), granting Chabra relief against *inter alia* Pikeville (see *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231).

She then set out in thirty-four substantial sub-paragraphs her reasons.

[67] Now it is right to say that Mr. Butcher QC in para [49] of his judgment might appear to have misdirected himself when he said that “*de facto* control of [the] assets” suffices to show ownership. It was (rightly in my judgment⁴⁵) common ground before me that what had to be shown was actual beneficial ownership and that *de facto* control was merely an indicium of ownership. However, read in context what he is in my judgment referring to are the inferences which Dr. Frommelt draws. He is not making the mistake of equating *de facto* control with beneficial ownership. I am comforted in this conclusion by fact that Ms. Robertson QC interprets this part of the Butcher judgment in the same way: see the Robertson judgment at para [109].

[68] After the Butcher judgment was delivered, Mr. Skurikhin was excluded as a beneficiary of both Berenger and Olympic. (He was, at least ostensibly, never a beneficiary of Eastbridge. Some bank documents, however, describe him as the principal beneficiary.) The Robertson judgment dealt with this new development. Ms. Robertson QC’s conclusion was:

“181. Whilst effective under their respective governing laws, Mr Skurikhin’s exclusions as a beneficiary of Berenger and of Olympic have been brought about in circumstances which make reliance upon them in support of an application to discharge the Receivership Order an abuse of process. On that basis, I accept VTB’s submission that they are not a matter upon which Berenger can rely as a material change of circumstances.

182. In any event, they do not diminish Mr Skurikhin’s ability to direct that assets be distributed to nominees who are to hold on his behalf and apply those assets in accordance with his instructions and to his own benefit (including by making an onward transfer to him), even if the assets can no longer be distributed directly from Berenger or Olympic to himself. The exclusions therefore do not undermine the basis for the Receivership Order.”

⁴⁵ And I would in any event adopt the reasoning in paras [102] to [108] of the Robertson judgment.

Res judicata

[69] Am I bound by the findings in the Butcher and Robertson judgments? If not, are they even admissible in support of VTB's application? Mr. Penny QC submits that *res judicata* applies, so that VTB can rely on issue estoppel or the doctrine in **Henderson v Henderson**⁴⁶ to debar Miccos and Taurus from (re)contesting the matters decided in those two judgments. Even if they are not strictly binding, he submits that nonetheless they should be treated as being of persuasive weight. Mr. Lord QC by contrast submitted that issue estoppel did not apply because there was no privity of parties and that **Henderson v Henderson** abuse of process did not arise where the proceedings were in another jurisdiction (England) and neither Taurus nor Eastbridge could realistically have appeared in those proceedings. In any event, he said, matters had moved on, because Mr. Skurikhin had been excluded as a beneficiary of Berenger.

[70] In **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd**⁴⁷ Lord Sumption identified six different types of *res judicata*. The first three concern types of cause of action estoppel and the doctrine of *transit in rem judicatam*, none of which are relevant to the current case. As to the last three types, he said:

“Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: **Duchess of Kingston's Case**.⁴⁸ ‘Issue estoppel’ was the expression devised to describe this principle by Higgins J in **Hoysted v Federal Commissioner of Taxation**⁴⁹ and adopted by Diplock LJ in **Thoday v Thoday**⁵⁰. Fifth, there is the principle first formulated by Wigram V-C in **Henderson v Henderson**, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

⁴⁶ (1843) 3 Hare 100.

⁴⁷ [2013] UKSC 13, [2014] 1 AC 160 at para [17].

⁴⁸ (1776) 20 St Tr 355.

⁴⁹ (1921) 29 CLR 537 at p 561.

⁵⁰ [1964] P 181 at pp 197-198.

[71] Lord Sumption proceeds to suggest these last two principles provide “some coherent scheme” for the different forms of *res judicata*, however, I do not read him as substituting the flexible **Henderson v Henderson** abuse of process approach for the detailed legal requirements necessary to establish an issue estoppel. It is still necessary to consider the two doctrines separately.

[72] As to issue estoppel, the parties were agreed that the House of Lords in **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)**⁵¹ had set out the requirements for an issue estoppel arising from the judgment of a foreign court as follows:⁵²

- (a) The judgment of the foreign court must be (i) of a court of competent jurisdiction in relation to the parties who is to be estopped, (ii) final and conclusive and (iii) on the merits;
- (b) The parties to the proceedings must be the same parties (or their privies) as in the foreign proceedings;
- (c) The issue raised must be identical, and a decision on the issue must have been necessary for the foreign court and not merely collateral.

[73] The English Commercial Court was of competent jurisdiction for the determination of the issue as to the availability of the member interests in Pikeville, an English limited liability partnership. Both the Butcher and Robertson judgments were given on the merits.

[74] So far as the requirement is concerned that those judgments be “final and conclusive”, the English Court of Appeal in **Desert Sun Loan Corp v Hill**⁵³ held (reading from the headnote):

“An issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, i.e. non-substantive, issue, thereby preventing a defendant from raising that issue in subsequent enforcement proceedings, where (i) there was express submission of the procedural or jurisdictional issue to the foreign court, (ii) the specific issue of fact had been raised

⁵¹ [1967] 1 AC 853.

⁵² Taken from para 73 of Mr. Lord QC’s skeleton argument.

⁵³ [1996] 2 All ER 847.

before and decided by that court and (iii) caution was exercised in relation to practical considerations, such as whether the issue was or should have been fully ventilated before the foreign court.”

- [75] The passages I have cited from the Butcher and the Robertson judgments are in my judgment final determinations. The two deputy judges reached determinations of fact to the usual balance of probability standard as to the availability for execution of the members’ interests in Pikeville. The issue as to the beneficial ownership of Berenger was before them for determination and they determined it. Under (a), therefore, (i) and (ii) are made out. (iii) does not arise: the matters were very fully ventilated in the two English hearings. Mr. Lord QC argued that Ms. Robertson QC’s holdings in respect of the existence of a mandate in favour of Mr. Skurikhin over Berenger was only collateral to her decision. I disagree: it was an alternative basis for showing Mr. Skurikhin’s control of Berenger. Where a judge decides matters on two bases both are potentially the subject of a *res judicata*.
- [76] As to (c), the interest of Mr. Skurikhin in the assets of Berenger is precisely the issue before me in the current proceedings concerning Berenger’s 55 per cent interest in the share in Miccross. However, Mr. Skurikhin’s interest in Eastbridge was not a matter before either of the deputy judges in England. That in my judgment is fatal to a reliance on issue estoppel as between VTB and Eastbridge.
- [77] As to (b), the relevant parties before Mr. Butcher QC were Mr. Meier, Mr. Lerch and Crown. They were, however, before him in their capacity as trustees of the membership interests in Pikeville. The relevant parties before Ms. Robertson QC were Mr. Meier, Mr. Lerch, Crown, Berenger and Accreda Trustees Ltd. The first three were there in the same capacity as before Mr. Butcher QC. Berenger was there in its own capacity. Accreda Trustees Ltd was there as trustee of Olympic, not as trustee of Eastbridge. None of parties before Mr. Butcher QC or Ms. Robertson QC were representing Eastbridge. Since Accreda Trustees Ltd were not there as trustee for Eastbridge, this again, in my judgment, is fatal to Eastbridge being privy to the decisions of the two deputy judges.

- [78] Mr. Penny QC sought to get around these difficulties by saying that Eastbridge was just another front for Mr. Skurikhin created by Mr. Meier to disguise his ownership and thus was privy to the determinations against Berenger. Whether that is right or not is a matter which I shall consider shortly, but he cannot rely on the point to establish an issue estoppel. It is effectively a bootstrap argument: assuming what it seeks to establish.
- [79] Accordingly, in my judgment, whilst there is an issue estoppel against Berenger, there is not against Eastbridge. It follows that VTB cannot rely on issue estoppel against Taurus. Taurus is a different corporate entity to Berenger. Berenger only has a majority interest in Taurus. That is not sufficient to make Berenger and Taurus privies: **Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd**.⁵⁴
- [80] As to **Henderson v Henderson** the question of abuse of process needs to be considered in relation (a) to abuse of the process of the English court and (b) to abuse of the process of this Court. As to (a), the BVI judgment debt was only obtained in 2017, long after the Butcher judgment. Eastbridge and Taurus could not reasonably have anticipated in 2015 that they needed to apply to be joined in the English proceedings on the off-chance that VTB would later seek to enforce its Russian judgments in the BVI against Miccos. Even if they had applied to join, it is doubtful whether permission would have been given. Indeed, it might be said that it would have been for VTB to join Eastbridge rather than *vice versa*.
- [81] By the time of the Robertson judgment, proceedings had already been commenced in this Court with interim receivers appointed in May 2018. No party applied to the English court to have the issues which are now before me determined in the English proceedings. Although the current proceedings were adjourned for longer than is usual, there was no application for a stay in order that the issue of Mr. Skurikhin's control of Eastbridge might be determined in England.

⁵⁴ [2015] EWHC 1640 (Comm), [2016] 1 All ER (Comm) 233 at para [145]; appeal dismissed [2016] EWCA Civ 411, [2016] 2 Lloyd's Rep 25, [2016] 2 All ER (Comm) 740.

That approach (to which VTB was as much a contributor as Eastbridge) was not an abuse of the process of the English court.

[82] Once (a) goes, there is in my judgment no realistic scope for **Henderson v Henderson** to apply to these BVI proceedings. If it was not abusive for Eastbridge and Taurus not to participate in the English proceedings, it is not abusive for Eastbridge via Taurus to seek to defend itself in the proceedings before me. Accordingly, (b) goes as well.

[83] Accordingly, in my judgment VTB cannot rely on the doctrines of issue estoppel or **Henderson v Henderson** as against Eastbridge.

[84] This leaves the question whether VTB can rely on the Butcher and Robertson judgments in order at the current interlocutory stage to show a good arguable case that Eastbridge is also a vehicle controlled by Mr. Skurikhin. The classical approach in **Hollington v F Hewthorn & Co Ltd**,⁵⁵ as confirmed in **Rogers v Hoyle**⁵⁶ and by the Privy Council in **Calyon v Michailaidis**⁵⁷, is that, in the absence of an estoppel *per rem judicatam*, the findings of a judge in one case are not admissible in another case. As Christopher Clarke LJ held in **Rogers**:

“39. ...The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.”

⁵⁵ [1943] KB 587.

⁵⁶ [2014] EWCA Civ 257, [2015] QB 265.

⁵⁷ [2009] UKPC 34, 2007-09 Gib LR 321.

[85] However, there appears to be an exception to this rule in the case of interlocutory applications. In **Sabbagh v Khoury**⁵⁸ there had been earlier litigation on related matters (the Masri litigation), but not between the same parties, so *res judicata* did not apply. Carr J (as she then was) held:

“[202] Sana’s reliance on the Masri litigation has generated much heated debate. There is first an issue as to admissibility. The defendants contend that, as a matter of principle, judicial findings in previous litigation are not admissible and that is the case even if, unlike in this case, they related to the same subject matter...

[203] Sana, on the other hand, contends that the rule in **Hollington v Hewthorn** does not prevent the use of findings in other litigation at an interlocutory stage. This is because the rationale of the rule in **Hollington v Hewthorn** is to exclude findings that are no more than the opinion of another person, based on unknown facts, so as to preserve the fairness of the trial. There is no risk to fairness of a trial if such material is introduced on the question of whether or not there is a serious issue to be tried. Such material can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage. Reliance is placed on **Joint Stock Co Aeroflot – Russian Airlines v Berezovsky**⁵⁹. There, when considering the question of whether or not there was a serious issue to be tried for the purpose of service out of the jurisdiction, Aikens LJ held that the claimant could rely on the findings of the Swiss criminal court...

[204] The defendants counter with reliance on the earlier Privy Council decision in **Calyon v Michailaidis**... [a]nd **Ferrexpo v Gilson Investments**⁶⁰...

[206] I am inclined to agree with Sana that the findings of another court may be relied on at an interlocutory stage for the limited purpose of demonstrating whether there is a serious issue to be tried, for example in considering what material at trial there might be. The Court of Appeal in **Joint Stock Co Aeroflot – Russian Airlines v Berezovsky**... clearly thought it appropriate to do so, and would have been well aware of the relevant principle in **Hollington v Hewthorn**. To deploy the findings of another court in this way does not endanger a fair trial for any of the parties. The situation in **Calyon v Michailaidis**... is distinguishable: there

⁵⁸ [2014] EWHC 3233 (Comm), applied by me in two cases: *Advalorem Value Asset Fund Ltd v Redford* at para [16] (Supreme Court of Gibraltar, decision of 4th September 2015, unreported) and *Re Wardour Trading Ltd; Cohen v Nekrich* 2016 Gib LR 46 at para [40].

⁵⁹ [2013] EWCA Civ 784, [2013] 2 Lloyd’s Rep 242.

⁶⁰ [2012] EWHC 721 (Comm), [2012] 1 Lloyd’s Rep 588 at para [51].

the findings of the Greek court were being relied on as conclusive, alternatively probative, evidence of a central plank of the Claimants' case, without more.

[207] Thus, to the extent that the Masri litigation is being used simply to inform the question of whether there is a properly arguable claim in prospect, that is, in my judgment a legitimate exercise in principle. To the extent that Sana seeks to use any findings in the Masri litigation as admissible evidence to prove a fact in issue or a fact relevant to the issue in these proceedings, I agree with the Defendants that she cannot do so (see para [28] of the judgment in **Calyon v Michailaidis**...)."

[86] In my judgment it is proper to take the Robertson judgment into account in considering whether there is a good arguable case that Eastbridge is, like Berenger, a vehicle under the effective control of Mr. Skurikhin.

[87] Mr. Penny QC wanted me to go further and take into particular account that Ms. Robertson QC had heard Mr. Meier and Dr. Schurti give live evidence and did not accept their evidence. This is not in my judgment appropriate. The fact that the witnesses may not have been telling the truth in relation to Berenger does not mean — automatically or at all — that evidence they (or more probably just Mr. Meier) may in due course give about Eastbridge is untruthful.

[88] In **AB v XY**⁶¹ a wife applied to the Family Court for a non-molestation injunction and ouster order against her husband. Williams J was hearing an appeal against a circuit judge's decision on a preliminary issue which the circuit judge had ordered as to whether the parties had entered a valid marriage in Jordan.

"[26] ...It is also conceded by the wife, and rightly so, that the observation in the judgment... to the effect that the husband's lies in relation to the marriage and the wife's truthfulness in relation to the marriage have the effect that any allegation the wife made would be accepted by the judge unless the husband's evidence on the issue was corroborated was wrong and contrary to **Lucas**⁶². This approach though mirrors the reasons given at paragraph 3 of the judgment for determining the marriage issue as a preliminary issue. The findings on this as to credibility were plainly to be determinative of the credit of the parties such

⁶¹ [2019] EWHC 1468 (Fam).

⁶² R v Lucas [1981] QB 720.

that (it is implied if not expressly stated) they would be disbelieved on anything else unless there was corroboration. I'm afraid I cannot agree that the issue of credibility can be dealt with in such a binary fashion. **Lucas** mandates a more nuanced approach.”

- [89] The evidence of Mr. Meier cannot be treated as irredeemably tainted. As and when he stands to give evidence, the Court will consider his evidence in the same fair way it considers all witnesses’ evidence.

Conclusions as to Berenger

- [90] I have held that Berenger is bound by *res judicata* by findings of Mr. Butcher QC and Ms. Robertson QC that it is mere vehicle for the benefit of Mr. Skurikhin and that the assets of Berenger are available for execution in respect of the judgment debts of Mr. Skurikhin.
- [91] Even if I am wrong about *res judicata*, I conclude that VTB have shown a good arguable case to the same effect. I have read the affidavits and witness statements. I have not read the three days of transcript of the hearing before Ms. Robertson QC. The experts were agreed that all members of the board of a Stiftung must be bound by a mandate, if the consequence was to give a beneficiary of the Stiftung a determined interest in the assets of the foundation. In the current case, there is in my judgment a good arguable case that instructions simply go Skurikhin to Meier to Schurti to Hanselmann. On this interpretation of the facts, the latter two are bound by the mandate held by Mr. Skurikhin.
- [92] There is also a good arguable case that the exclusion of Mr. Skurikhin as a beneficiary is mere window-dressing. (The backdating of documents, as found by Ms. Robertson QC, supports this.) He can use the mandate to benefit himself in numerous ways. There is also a good arguable case that excluding Mr. Skurikhin as a beneficiary was ineffective as a matter of Liechtenstein law, because it changed fundamentally the purpose of the foundation without sufficiently good reason. (The application of the 1571 Act and its descendants, or any Liechtenstein equivalent, so as to render void or voidable the use of the mandate

to defraud creditors was not argued before me.) With one exception, the evidence before me supports the conclusions of fact drawn by Ms. Robertson QC and shows the existence of a good arguable case.

[93] The exception is this. Article 5 of the Statutes of Berenger provides:

“Beneficiaries may not be deprived of their beneficial interest under the foundation by their creditors by means of proceedings for protective relief, execution or bankruptcy (Art 567 PGR)”

[94] Ms. Robertson QC in para [134] of her judgment found that “the existence of a mandate provides the obvious explanation for why the final sentence of Article 5 was included in the Regulations [*sic*: Statutes is intended].” The legal opinions subsequently obtained for use before me show that this is not as obvious as the learned deputy judge thought. Mr. Peter Kaiser, instructed on Taurus’ behalf, says that Article 567 of the **Personen- und Gesellschaftsrecht 1926** (a Liechtenstein statute governing persons and companies)⁶³

“contains the so-called privilege against execution (*Vollstreckungsprivileg*), which protects the assets of the foundation against claims by creditors of beneficiaries. It only applies if expressly incorporated into the statutes of the foundation by a provision such as Article 5 of Berenger’s statutes.”

[95] Dr. Frommelt says that the inclusion of Article 5 would not be necessary if there were only discretionary beneficiaries. However, he would not appear to demur from the proposition that, if the Board of the foundation made an appointment to one of the potential beneficiaries, Article 5 would be necessary to give that beneficiary protection against execution by judgment creditors. He prefers not to give an answer to the question as to whether Article 5 is simply a boiler-plate clause, but it is in my judgment a sensible inference that this is just a standard form. If Article 567 only applies if it is incorporated in the Statutes, there is good reason to include it in all cases, simply as a belt and braces exercise. This is particularly so, if (as is likely to be common) the existence or not of a mandate

⁶³ Now replaced by other statutory provisions but only in relation to newer foundations.

may be the subject of hot dispute, not least with the Liechtenstein tax authorities. Mr. Kaiser, Berenger's expert, confirms that Article 567 is incorporated in the Statutes of foundations where there is not any mandate.

- [96] Even if Ms. Robertson QC went wrong in her conclusions as to Article 5, she gives other reasons for reaching her conclusion as to Mr. Skurikhin's beneficial control of Berenger. Certainly, I am satisfied that the good arguable threshold is reached, even without her reasoning on Article 5.

Eastbridge

- [97] In order to show that Taurus' share in Miccos is available for execution on the part of VTB, VTB have to show that both Berenger and Eastbridge hold beneficially for Mr. Skurikhin. I have discussed Berenger in the preceding section. I now turn to Eastbridge. Mr. Penny QC put forward two arguments: firstly that the Eastbridge Settlement was void as a matter of Nevis law for uncertainty of objects and secondly that Eastbridge was a sham. This second argument has two parts. Mr. Penny QC submits that the trust was a sham from the outset and that the way it operated showed that Mr. Skurikhin was really the sole beneficiary. In my judgment these two parts need to be analysed separately.
- [98] Mr. Lord QC complained that the sham argument had been raised for the first time only days before the hearing and that I should refuse to entertain it. In the light of my conclusion as to whether the trust was a sham, I do not need to decide this. The question whether Eastbridge was just another front for concealing Mr. Skurikhin's assets (the second part of the second argument) has been part of VTB's case from the outset, so the objection does not lie in respect of this part of the argument.

Is Eastbridge void?

[99] The argument as regards uncertainty of objects is that “the definition of beneficiaries is so hopelessly wide as not to form anything like a class.”⁶⁴ The parts of the trust deed relied on are these:

Clause 1(1)(a): ‘Beneficiary’ means such person or persons named or described in the First Schedule hereto...

Clause 1(1)(h): “the Members of the Specified Class” means the person or Trusts named or described in the First Schedule hereto [subject to a proviso excluding *inter alia* residents of Nevis]

Clause 2: Nominations of persons to be included as Members of the Specified Class shall be made in writing from time to time by the Trustee...

Clause 6: The Trustee shall hold the Trust Property and the income thereof upon trust for all or such one or more exclusively of the other or others of the Members of the Specified Class if more than one in such shares and with such trusts for their respective benefit at the discretion of the trustee as the Trustee shall from time to time by any deed or deed revocable or irrevocable appoint.

Clause 10: Subject as hereinbefore declared the Trustee shall stand possessed of the Trust Property and the income thereof for those Members of the Specified Class at the date hereof or who shall be nominated as Members of the Specified Class during the Trust Period and who shall be alive at the expiration of the Trust Period whom failing [*sic*] the International Committee of the Red Cross...

Schedule 1 (in its original form): 1. Unidos... 2. Such person or persons as may be nominated from time to time within the Trust Period by the Trustee...”

[100] Although not relied on as part of this argument, it is convenient to quote from clause 7(1), which provides:

“Subject as herein provided the Trustee shall have the power... (c) to pay or transfer the whole or any part or parts of the capital or income of the Trust Property to the trustees for the time being of any other trust or settlement whatsoever established or existing... [and] (d) to settle capital on all or any one or more of the Beneficiaries and any settlement made by

⁶⁴ McPhail v Doulton [1971] AC 424 at 457 cited in Lewin on Trusts (19th Ed, 2015) at para 4-41.

the Trustee under this present power upon or for the benefit of anyone or more of the Beneficiaries as aforesaid may be created in and under the law of any part of the world (being a part of the world where the local law thereof recognizes settlements of the kind proposed to be made) and may contain such trusts powers and provisions whatsoever (including trusts powers and provisions to be exercised at the discretion of any person or person) as the Trustee shall think proper from the benefit of such Beneficiaries.”

It should be noted that there is no requirement for these powers to be exercised by deed.

[101] Mr. Penny QC submits in his skeleton in paras [154] to [156]:

“The critical distinction is between a discretionary trust, which a trustee is bound to execute, and a mere power, which a trustee is not bound to execute... [U]nder clause 6... the trustee holds on discretionary trust for those persons named or described in Schedule 1... By Schedule 1, the beneficiaries are not only certain named persons (under para 1), but include such person or persons as may be nominated from time to time (under para 2). The power to nominate is accordingly included in the definition of the beneficiaries of the trust, such that it is on a proper construction a trust rather than a mere power. The class of discretionary beneficiaries is therefore extremely wide. It includes anyone in the world who could be nominated by the trustee. In these circumstances the trust is void for administrative unworkability.”

[102] In support of this proposition, VTB rely on the expert report of Damian E S Kelsick dated 6th December 2019. He is an experienced attorney at the bar of St Kitts and Nevis. He concludes that “it is strongly arguable that clause 2” — I think he means para 2 — “in the Schedule to the Trust is void as being administratively unworkable.” Taurus relies on the expert report of William Hare. He was called to the English bar in 1994 and to various bars within the Eastern Caribbean Supreme Court in 1999, including St Kitts and Nevis. He concludes that the power to appoint further beneficiaries is a mere power, so no question of administrative workability arises and the trust is valid.

[103] There is an evidential question as to what approach I should take in determining this issue. Although the Eastern Caribbean Supreme Court is the Court for all nine

member states and territories, it has been held that the High Court sitting in one jurisdiction cannot determine the law of another jurisdiction. In **Attorney-General of St Kitts and Nevis v Denzil Douglas**⁶⁵ Ward J, sitting in St Kitts and Nevis, determined that he could not take judicial notice of the law of the Commonwealth of Dominica in deciding whether Dr. Douglas, the defendant, was a citizen of Dominica. The question of Dominican law had to be treated as an issue of fact, to be determined by expert evidence.

[104] After a full treatment of the authorities, he concluded that the High Court only had jurisdiction in the state or territory in which it was sitting. By contrast, he held, the Eastern Caribbean Court of Appeal had a jurisdiction over all nine states and territories and could take judicial notice of the law of each of them. He pointed out similarities to the position of the House of Lords when it was still the final judicial instance in the United Kingdom. The House of Lords (and the same must apply to the United Kingdom Supreme Court), unlike the English and Northern Irish Courts of Appeal and the Scottish Inner House, can take notice of the laws of all three jurisdictions in the United Kingdom. Similarly the Privy Council can take judicial notice of all jurisdictions from which an appeal lies to the Judicial Committee, even though the first and second instance courts from which the appeal lay could not.⁶⁶

[105] If applied unthinkingly, that would mean that I had to determine the question of the validity of the Nevis trust on the basis solely of the expert reports which had been adduced. However, it is possible to distinguish the **Douglas** case. All of the British Overseas Territories apply English law.⁶⁷ English law is not treated as foreign law in the BVI. The judges take judicial notice of it. This is only sensible. All the judges are trained in English law and indeed some, like myself and other judges in the Commercial Division, have judicial experience in England. It would

⁶⁵ SKBHCV 2018/0008 (delivered 2nd July 2018).

⁶⁶ *Cooper v Cooper* (1887) 13 App Cas 88 as to the House of Lords; *Canadian Pacific Railway Co Ltd v Parent* [1917] AC 195 as to the Privy Council.

⁶⁷ Indeed, of the six member states of the Eastern Caribbean Supreme Court, only St Lucia retains a French influence, via the Civil Code introduced in 1879 based on the Quebec Civil Code, but even in St Lucia French contract law principles have been largely superseded by English law: see most recently *Johnny v Attorney-General of St Lucia* SLUHCVP 2017/0036 (delivered 13th December 2019) at para [15]. All the others are purely English law based.

be pointless for the parties to have to obtain expert reports on matters of English law. Now it is apparent from the experts' reports, that the relevant Nevis law is just English law. Since I can take judicial knowledge of English law, I can in my judgment make my own determination of what the identical Nevis law is. (It would be different if it was suggested that there were any relevant differences between Nevis law and English law, or if the common law of Nevis had developed differently to the common law of England.)

[106] The key issue is whether there is an uncertainty on the objects of the trust arising from the ability of the trustee to add beneficiaries to the Schedule to the trust deed. Now it is well established that the class of beneficiaries of a discretionary trust must not be so wide that the trust is unworkable. The classic example was given by Lord Wilberforce of a discretionary trust for the benefit of "all the residents of Greater London": **McPhail v Doulton**.⁶⁸ Such a trust would be void *ab initio*, since the trustee would never be able to consider the merits and demerits of all the individual beneficiaries when deciding whether to exercise a discretion to make an appointment of income or capital.

[107] However, it is necessary to distinguish between a trust and a power. Different rules apply to different types of power. In **Re Manisty's Settlement; Manisty v Manisty**⁶⁹ the trust contained a power for the trustees to add beneficiaries, which Templeman J described as follows⁷⁰:

"The power to add beneficiaries and to benefit the persons so added is exercisable in favour of anyone in the world except the settlor, his wife, the other members of the excepted class for the time being and the trustees... This is not a general power exercisable in favour of anyone, nor a special power exercisable in favour of a class, but an intermediate power exercisable in favour of anyone, with certain exceptions."

[108] This is almost identical to the power given to the trustee of Eastbridge. Considering a discretionary trust in favour of a class, Templeman J went on to

⁶⁸ [1971] AC 424 at 457.

⁶⁹ [1974] 1 Ch 17.

⁷⁰ At p 21.

hold⁷¹, applying **Re Gulbenkian's Settlements**⁷² and **Re Baden's Deed Trusts (No 1)**⁷³, that:

“such a power or trust is valid if it can be said with certainty that any given individual is or is not a member of the class. The principle of the rule thus established does not strike down an intermediate power provided that, having regard to the definition of excepted persons, it can be said with certainty that any given individual is or is not an object of the power.”

[109] He discussed the ability of the courts to control the exercise of the power by the trustee and held that the court did have sufficient control to prevent abuse by the trustee. He upheld the validity of the trust and the power.

[110] Sir Robert Megarry V-C summarized the law in **Re Hay's Settlement Trusts**⁷⁴ (reading from the headnote):

“that a power for trustees to appoint anyone in the world except a handful of specified persons created an intermediate power; that although an intermediate power could validly be given to a person who was not in a fiduciary position, when such a power was given to trustees their fiduciary duties in relation to raised questions as to the validity of the power; that normally, however, those duties were merely to consider periodically whether to exercise the power, to consider the range of objects, and to consider the appropriateness of individual appointments, and that there was nothing in those duties which conflicted with the power in such a way as to invalidate it; and that accordingly, since the power given by clause 4 was neither void for linguistic or semantic uncertainty nor administratively unworkable, it was valid.”

[111] Accordingly, in my judgment Eastbridge is not void as a matter of law based on the true construction of the trust deed.

[112] I should add that, even if I was wrong to reach my own conclusion as to the English (and therefore Nevis) law, I would nonetheless have arrived at the same conclusion as a matter of my assessment of the expert evidence of Nevis law.

⁷¹ At p 22.

⁷² [1970] AC 508.

⁷³ [1971] AC 424.

⁷⁴ [1982] 1 WLR 202.

The highest Mr. Kelsick puts his view is that it is “strongly arguable” that Eastbridge is void. That, however, is not a sound basis for me to find that, as a matter of Nevis law, the trust is void. An expert on foreign law needs to give his opinion. Either Eastbridge is void or it is not. Mr. Kelsick does not say. Mr. Hare does give an opinion: his view is that Eastbridge is not void. In the absence of a contrary opinion from Mr. Kelsick, the weight of the evidence is in favour of Mr. Hare.

Is Eastbridge a sham?

- [113] The Eastbridge trust deed is in a standard form. It is well established “that in order for acts or documents to be a ‘sham’, with whatever legal consequences flow from this, all the parties thereto must have a common intension that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.”⁷⁵ Thus in order to be a sham from the outset in 2005, VTB need to show that Mr. Meier (representing Accreda Trustee Ltd) and Mr. Skurikhin, as the provider of the US\$23,000 which was used to establish the trust, did not at that time intend Eastbridge to hold the money on the terms of the trust.
- [114] In my judgment, there is no sufficient evidence to establish this. Mr. Penny QC argues for “a very strong inference that the SAHO directors who became ‘beneficiaries’ under the Eastbridge Settlement, were all nominees, or stooges, for Mr. Skurikhin... SAHO was Mr. Skurikhin’s company and entirely under his control. It made no commercial sense for Mr. Skurikhin to make a gift to them of 45% of Miccos...” However, Unidos was one of the initial beneficiaries of Eastbridge. There is no evidence who the beneficial owner of this Costa Rican company was, but it is likely that it was just another of Mr. Skurikhin’s vehicles. (Unidos was removed as a beneficiary of Eastbridge in 2007, but this does not affect the point as regards the position in 2005.)
- [115] Mr. Penny QC’s argument on the naming of SAHO directors as beneficiaries loses much of its force as a result of the fact that new beneficiaries can be appointed.

⁷⁵ Snook v London and West Riding Investments Ltd [1967] 2 QB 786 at p 802 *per* Diplock LJ.

Moreover, even if the director beneficiaries were stooges for Mr. Skurikhin that would not mean that Eastbridge was a sham. The directors could still be beneficiaries of Eastbridge, even if they had to hold any distributions to them for Mr. Skurikhin.

[116] Mr. Penny QC points to the closeness of Mr. Meier and Mr. Skurikhin and how this shows a high level of control by Mr. Skurikhin. However, that does not mean the trust was a sham. The deed gives the trustee extensive powers of appointment of beneficiaries, which could be used (and perfectly properly used) to benefit Mr. Skurikhin.

[117] This leaves the second part of the analysis: is the way in which the trust has been administered such that it is now a sham? As a matter of strict law, this question cannot arise in the form posed. If the trust, when it was initially settled, was not a sham, then it cannot subsequently become a sham. If the trustee chooses to ignore the terms of the trust, then the trustee is acting in breach of trust. There can be no transmogrification of a valid trust into a sham trust by reason of a trustee's defalcations.

[118] However, the reality may be quite different. I have cited the relevant parts of clause 7(1) of the trust deed. This gives the trustee wide powers to resettlement the trust property. Moreover, there is no requirement that any such resettlement be by deed: an oral resettlement would appear to be possible. Indeed, there may be scope for an implied resettlement, the implication being drawn from the factual way the trustee administers the trust assets.

[119] Mr. Skurikhin himself has accepted that he is a discretionary beneficiary of Eastbridge. As part of his disclosure obligations in the English proceedings, following the grant of a freezing order against him, he made an affidavit of 5th September 2012 to that effect. This was repeated by him in his witness statement of 2nd November 2012. Mr. Meier agreed. He was giving instructions to Mr. Robin Pickworth of Charles Russell, who was acting for Pikeville and another limited

liability partnership controlled by Mr. Meier. Mr. Pickworth in his fourth affidavit of 26th October 2012 confirmed that Mr. Skurikhin was a beneficiary.

[120] When I stand back and use the evidence of the Robertson judgment, as permitted by **Sabbagh v Khoury**, together with all the other evidence, VTB in my judgment establish a good arguable case that Mr. Meier, when acting through Accreda as trustee of Eastbridge, is a mere cypher for Mr. Skurikhin. There is a good arguable case both that Mr. Skurikhin has *de facto* control of Eastbridge and that he has *de jure* beneficial ownership as well.

Conclusion

[121] Accordingly, I conclude:

- (a) VTB have established a good arguable case that Berenger, Eastbridge and Taurus are beneficially owned by Mr. Skurikhin, so that the assets of these three entities, including the single share in Miccos are available for execution in respect of the BVI judgment debt; but
- (b) there is no need for the appointment of an equitable receiver: an application for a charging order over the share provides an adequate remedy, coupled, if necessary, with a limited freezing order to prevent Miccos interfering with the efforts of the administrators of Pikeville to realise the value of the Italian properties.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar