

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAPP2018/0043 and 0050

BETWEEN:

**[1] KOSHIGI LIMITED
[2] SVOBODA CORPORATION**

Appellants

and

DONNA UNION FOUNDATION

Respondent

Before:

The Hon. Mde. Dame Janice Pereira, DBE

Chief Justice

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Godfrey Smith, SC

Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Midwinter, QC and Mr. Robert Nader for the Appellants

Mr. Andrew Willins for the Respondent

2018: October 30;

2019: January 17.

Civil appeal – Jurisdiction of the BVI Commercial Court to grant interim relief in support of foreign arbitration proceedings – Section 43 of the Arbitration Act, 2003 – Section 184(5) of the BVI Business Companies Act, 2004 – Black Swan principle – Whether the learned judge erred in exercising discretion to grant a worldwide freezing order, disclosure order and receivership order

The appellants, Koshigi Limited (“Koshigi”) and Svoboda Corporation (“Svoboda”), are the majority shareholders in a Maltese company Ulmart Holding Ltd. (“UHL”). Koshigi is incorporated in the British Virgin Islands (“the Virgin Islands”). Svoboda, though originally incorporated in the Virgin Islands, redomiciled itself to Anguilla during the currency of the proceedings below. The respondent, Donna Union Foundation (“Donna Union”), is a foundation established in Liechtenstein which holds minority shareholding in UHL. Donna Union instituted proceedings before the London Court of International Arbitration (“LCIA” or “the Tribunal”) in which it alleged that it had been subject to unfair prejudice by the majority shareholders in UHL. Donna Union was successful before the Tribunal, and both Koshigi

and Svoboda were ordered to buy out Donna Union's shares in UHL at a value of US\$67,159,546.

Before the Tribunal had delivered its award, Donna Union obtained a worldwide freezing order and an ancillary disclosure order from the Virgin Islands Commercial Court ("the court"), against Koshigi and Svoboda, pursuant to section 43 of the Arbitration Act, 2013 ("the Act"). The orders were subject to retrospective permission being obtained by Donna Union, from the Tribunal, in accordance with the LCIA Arbitration Rules. Donna Union unsuccessfully sought retrospective permission from the Tribunal and later sought, and obtained, the Tribunal's permission to apply for a fresh freezing order. Donna Union proceeded to have the first freezing order discharged. It thereafter filed a fresh application for a worldwide freezing order together with a disclosure order against both Koshigi and Svoboda. Prior to the hearing of this application, Svoboda redomiciled itself in Anguilla. By the time the application was heard, the court was aware of the Tribunal's findings that Svoboda and Koshigi had acted in concert to divert corporate opportunities away from UHL in a manner which was unfairly prejudicial to Donna Union. The court was also aware that Koshigi and Svoboda had participated in sham transactions, for the purpose of disadvantaging Donna Union. The court was also provided with evidence that both Svoboda and Koshigi had begun to dissipate their assets on the date the liability trial before the Tribunal concluded. On 9th May 2018, the court granted Donna Union's application for a worldwide freezing order and asset disclosure order against Koshigi and Svoboda, on an interim urgent basis. Donna Union also sought the appointment of a receiver for the businesses and assets of Koshigi and Svoboda, and this was granted. Having heard the arguments on both sides, on 19th July 2018, the learned judge continued the May 9th orders.

Svoboda and Koshigi appealed against the July 19th orders. The issues for determination by this Court are: (i) whether the judge erred in granting a worldwide freezing order, asset disclosure order and receivership order in relation to Svoboda's assets; and (ii) whether the judge erred in making the receivership and disclosure orders in relation to Koshigi.

In a related appeal, No. 43 of 2018, Svoboda and Koshigi have appealed the orders that were made by the learned judge on 9th May 2018. They also sought and obtained a stay of the disclosure order provided in the May 9th order, pending the hearing of their appeal against that order. However, by the time the present appeal came on for hearing, the May 9th orders and the stay of the disclosure order had become moot as they were overtaken by the learned judge's orders of the 19th July 2018.

Held: dismissing the appeal; awarding costs in both civil appeals 0043 and 0050 of 2018 to Donna Union Foundation to be assessed by a Master or the Registrar, if not agreed, within 21 days, that:

1. Section 184(5)(b) and (c) of the BVI Business Companies Act, 2004 states that a claim or proceedings shall not be abated, discontinued or impaired by the fact that a company who is party to the claim or proceedings has continued outside of the jurisdiction of the Virgin Islands. The fact that Svoboda had redomiciled itself in Anguilla, therefore, would not deprive the court of jurisdiction and is of no moment.

Section 43(2), (3), (4) and (5) of the **Arbitration Act, 2013** No. 13 of 2013 considered; Section 184(5) of the **BVI Business Companies Act, 2004** No. 16 of 2004 applied.

2. By virtue of section 43 of the Act, it is open to the court to grant interim measures in aid of foreign arbitration proceedings. These interim measures include orders made in support of the enforcement of a potential arbitral award. There is therefore no basis upon which this Court can properly read into the express wording of the Act, the need for assets to be in the Virgin Islands in order for the court to be able to grant interim measures in aid of foreign arbitration. The Act comprehensively clothes the court with the jurisdiction to grant interim measures and, as such, there is no need or basis for reading the Black Swan principle into the clear words of section 43 of the Act.

Section 43 of the **Arbitration Act, 2013** No. 13 of 2013 considered; Section 184(5)(b) and (c) of the **BVI Business Companies Act, 2004** No. 16 of 2004 applied; **Black Swan Investment I.S.A. v Harvest View Limited and another** BVIHCV2009/399 (delivered 23rd March 2010, unreported) considered; **Yukos CIS Investments Limited and another v Yukos Hydrocarbons Investments Limited and others** BVICAP2010/028 (delivered 26th September 2011, unreported) considered; **PT Ventures SGPS SA v Vidatel Ltd** BVIHC(COM)2015/0117 (delivered 8th February 2016, unreported) approved.

3. There is no basis upon which Svoboda could properly say that unless Donna Union is able to prove that it had assets in the Virgin Islands, it was inappropriate for the court to have granted the orders. There is cogent, undisputed evidence that the court was seized of *personam* jurisdiction. The freezing order was granted to preserve and protect assets which may then be used to enforce the arbitral award. In view of the totality of circumstances, it is clear that the learned judge, in granting the orders that he did, was at all times aware of the fact that he was being asked to make orders in aid of the potential enforcement by Donna Union of the Tribunal's awards against Koshigi and Svoboda. There is therefore no doubt that it was open to the learned judge, in the exercise of his discretion, to make the orders that he did. Accordingly, Svoboda's challenge to the learned judge's orders on the basis that it was inappropriate to do so fails.

Section 43 of the **Arbitration Act, 2013** No. 13 of 2013 considered; Section 184(5)(b) and (c) of the **BVI Business Companies Act, 2004** No. 16 of 2004 considered.

4. The complaint that the order for disclosure is intrusive or inappropriate is not a basis upon which the appeal court can properly interfere with the exercise of the court's discretion to make the order. The disclosure order in this case was a necessary part of the freezing order, as Svoboda and Koshigi seemed to have taken steps to conceal their assets and Donna Union had no way of knowing where their assets were without the benefit of a disclosure order. In so far as Donna Union's application was not made pursuant to the Black Swan principle but

rather pursuant to the provisions of the Act, the disclosure order was part and parcel of the judge's exercise of discretion pursuant to section 43 of the Act. It is unfair therefore to criticize the learned judge for granting the disclosure which he was empowered by statute to make and which was clearly within the exercise of his discretion. Accordingly, and there is no basis upon which this Court can conclude that the learned judge acted outside of the generous ambit of disagreement in exercising his discretion by making the disclosure order.

Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR 188 considered; **Motorola Credit Corporation v Uzan** [2012] EWCA C.O. 989 approved; **Ras Al Khaimah Investment Authority & Ors v Bestfort Development LLP & Ors** [2017] EWCA Civ 1014 approved.

5. It is settled law that when the court is asked to appoint a receiver, it has to be satisfied that there is cogent evidence that makes the appointment of the receiver appropriate in the circumstances. This Court is satisfied that the learned judge was in possession of evidence that Koshigi and Svoboda had begun to dispose of assets on the day the liability trial concluded before the Tribunal. In addition, there was evidence that they both had failed to comply with an earlier freezing order that was made by the court. In the absence of any explanation by Koshigi or Svoboda, the learned judge was entitled to draw adverse inferences from their conduct. The ineluctable conclusion that is reached is that the way in which both Koshigi and Svoboda have conducted themselves since the hearing before the Tribunal justified the learned judge granting a receivership order. Applying the well-established principles on the appellate court's interference with the lower court's exercise of discretion, it cannot therefore be said that the learned judge was clearly wrong in exercising his discretion to appoint a receiver over the businesses and assets of Koshigi and Svoboda.

Ninema Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND. CO. K.G. [1983] 1 WLR 1412 followed; **Dufour and Others v Helenair Corporation Ltd. and Others** (1996) 52 WIR 188 applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an appeal by Koshigi Limited ("Koshigi") and Svoboda Corporation ("Svoboda") against the judgment of the learned Adderley J [Ag.] by which the judge granted an application by Donna Union Foundation ("Donna Union") for the continuation of a worldwide freezing order, coupled with a disclosure order, and appointed a receiver over their businesses and assets, in support of foreign arbitral proceedings. Both Koshigi and Svoboda are displeased

with the judge's decision and have appealed against various aspects of the decision, which will shortly be addressed in detail. Suffice it to say, they both complain that the judge ought not to have made the orders that he did.

[2] I will now address the relevant background.

Background

[3] Koshigi is a company incorporated in the British Virgin Islands ("the Virgin Islands"). Svoboda is a company which was incorporated in the Virgin Islands but which redomiciled and in continued its business in Anguilla during the currency of the proceedings below. Both Koshigi and Svoboda are the registered majority shareholders in a Maltese company Ulmart Holding Ltd. ("UHL"), the latter of which indirectly owns various businesses in Russia and is one of the largest retailers in Russia.

[4] Donna Union is a foundation that is established in Liechtenstein and which holds minority shareholding in UHL. There was a dispute between the shareholders which resulted in Donna Union bringing proceedings before the London Court of International Arbitration ("LCIA" or "the Tribunal"), in which it alleged that it had been subject to unfair prejudice by the majority shareholders in UHL. The particulars of the allegations were serious. Donna Union alleged, among other things, that Koshigi and Svoboda had acted in concert to divert the assets and business opportunities of UHL and contrived a scheme to take control of UHL.

[5] It is noteworthy that Koshigi and Svoboda are the majority shareholders in Ulyubka Holdings. Koshigi held interests in Ulyubka Investments Limited. Koshigi also had interests in Kohuhu Enterprises Limited. Svoboda had interests in LLC Big Box. Koshigi and Svoboda also had interests in a Virgin Islands company called Elshtere Limited. Elshtere was the principal holding company of a fashion business controlled by Donna Union. Donna Union alleges that both Koshigi and Svoboda have transferred their interests in the above companies.

- [6] Before the Tribunal, Donna Union obtained a partial final award on liability against Koshigi and Svoboda in the unfair prejudice action. The Tribunal also ordered Koshigi and Svoboda to buy out Donna Union's shares in UHL. Meanwhile, the Tribunal scheduled a second hearing to determine the buyout price for Donna Union's shares.
- [7] Subsequently, the Tribunal conducted the second hearing and delivered its award, in favour of Donna Union, in the sum of US\$67,159,546.
- [8] I turn now to the first application before the BVI Commercial Court ("the court").

First Application before the Commercial Court

- [9] Shortly before the Tribunal had delivered its partial final award, Donna Union made a without notice application to the court for, and obtained, a worldwide freezing order coupled with an ancillary disclosure order against Koshigi and Svoboda, by way of interim relief in support of the foreign arbitration proceedings. However, Donna Union did not first seek the Tribunal's permission to apply to the court for interim relief even though the LCIA Arbitration Rules specifically require a party to obtain that permission before such an application is made to the court.
- [10] On the first application for the worldwide freezing order, the learned Chivers J, on 7th February 2018, granted the orders sought but expressly made the orders subject to retrospective permission being obtained from the Tribunal.
- [11] Donna Union unsuccessfully sought retrospective permission from the Tribunal. However, it later sought and obtained the Tribunal's permission to apply for a fresh freezing order. Thereafter, Donna Union applied to the court for a discharge of the first freezing order. It filed a new application for a fresh freezing orders together with disclosure orders against both Koshigi and Svoboda. Having filed its application, administrative difficulties emerged which are not strictly relevant to this appeal. Suffice it to say, the difficulties resulted in the delay of the hearing of

Donna Union's application for the freezing order and disclosure order. During this period a number of events occurred, including Svoboda redomiciling itself to Anguilla, even though Donna Union's application against both itself and Koshigi was pending in the court. Svoboda had been served with Donna Union's application before it redomiciled itself to Anguilla.

[12] I come now to the second application.

Second Application in the Commercial Court

[13] In its second application, Donna Union sought interim relief, pursuant to section 43(2) of the **Arbitration Act, 2013**¹ ("the Act") in support of arbitral proceedings outside of the Virgin Islands, namely the proceedings before the Tribunal.

[14] The application was heard by the learned Adderley J. By the time of the hearing, the court was in possession of the Tribunal's findings that Svoboda and Koshigi had acted in concert to divert corporate opportunities away from UHL Group in a manner which was unfairly prejudicial to Donna Union. The court was also in possession of the Tribunal's findings that Svoboda and Koshigi had participated in sham transactions for the purpose of disadvantaging Donna Union. The court was also provided with evidence that both Svoboda and Koshigi had begun to dissipate their assets on the date of conclusion of the liability trial before the Tribunal. The court was also aware of the fact that they had both breached the ancillary disclosure orders that had been previously made by the court.

[15] Donna Union having applied to the court for a worldwide freezing order and asset disclosure orders against both Koshigi and Svoboda, on an interim urgent basis, was granted the orders on 9th May 2018. Donna Union also sought the appointment of a receiver for the businesses and assets of Koshigi and Svoboda and this was granted. This was after the court had heard full argument. The judge directed that the application be given further consideration and, on 19th July 2018,

¹ Act No. 13 of 2013.

after having given full consideration to the arguments on both sides, continued the orders that were granted on 9th May 2018.

[16] In a related appeal, No. 43 of 2018, Svoboda and Koshigi have also appealed the orders that were made by the learned judge on 9th May 2018. They later sought and obtained a stay of the disclosure order provided in the May 9th order, pending the hearing of their appeal against that order.

[17] However, by the time the present appeal came on for hearing, the May 9th orders and the stay of the disclosure order had become moot since they were overtaken by the learned judge's July 19th orders. Quite properly, learned Queen's Counsel Mr. Midwinter did not pursue Koshigi and Svoboda's appeal against the May 9th orders.

The Appeal

[18] Svoboda and Koshigi have appealed against the July 19th orders that were granted by the learned Adderley J. In particular, Svoboda has appealed against (a) the asset disclosure order; (b) the worldwide freezing order; and (c) the receivership order. Koshigi has appealed against the asset disclosure and the receivership orders.

[19] The main thrust of Svoboda's position is that the court, though having the jurisdiction to make orders against it, ought not to have made the orders that it did. Svoboda says that it is was not domiciled in the Virgin Islands at the time of the hearing of Donna Union's application and complains that it was inappropriate for the court to grant a worldwide freezing order. It says that its domicile at the time of the hearing was important, that by the time the matter was heard it had changed its domicile from the Virgin Islands to that of Anguilla, and that the court ought not to have made the worldwide freezing order, especially since Svoboda had no assets in the Virgin Islands.

- [20] Both Svoboda and Koshigi state that the learned judge erred in making the asset disclosure orders against them. They also say that the receivership orders should not have been made. Indeed, they say that the orders made were inappropriate, in any event, even though they accept that the learned judge had the jurisdiction to make them.

Issues on appeal

- [21] Koshigi and Svoboda have filed several grounds of appeal. They can be crystallised into the following two issues:
- (i) Whether the judge erred in granting a worldwide freezing order and asset disclosure order over Svoboda and appointing a receiver in relation to Svoboda's assets; and
 - (ii) Whether the judge erred by appointing a receiver and making a disclosure order in relation to Koshigi.

- [22] It should be noted that Koshigi has not appealed against the worldwide freezing order made against it. For convenience's sake, Svoboda's complaint in relation to the worldwide freezing order will be addressed as a stand alone point, and the common issues of the appointment of the receiver and the disclosure order will be treated together.

Appellants' Submissions

- [23] Learned Queen's Counsel Mr. Midwinter said that the judge wrongly granted the worldwide freezing order against Svoboda since, at the relevant time, it was domiciled outside of the Virgin Islands and there was no evidence that it had assets in the jurisdiction. He said that it was inappropriate for the learned judge to have granted the interim relief that he did. His short point was that even though the court had jurisdiction over Svoboda and could make the orders that it did, it was inappropriate for the court to do so. Mr. Midwinter said that the court should have refrained from exercising its discretion to do so since there was no nexus between Svoboda and the Virgin Islands, in the absence of it being domiciled

there at the date of hearing or having assets in the jurisdiction.

[24] In relation to the disclosure orders that were made against Koshigi and Svoboda, Mr. Midwinter accepted that section 43(2) of the Act enables the court to grant interim measures in support of arbitral proceedings whether they are commenced in the Virgin Islands or elsewhere. He further acknowledged that the power is subject to section 43(7) of the Act which states as follows:

“In exercising the power conferred under subsection (2) in relation to arbitral proceedings outside the Virgin Islands, the Court shall have regard to the fact that the power is

- (a) ancillary to the arbitral proceedings outside the Virgin Islands; and
- (b) for the purposes of facilitating the process of a court or arbitral tribunal outside the Virgin Islands that has primary jurisdiction over the arbitral proceedings”.

[25] Mr. Midwinter said that there is no authority which indicates how the court should approach matters when acting pursuant to section 43(1) of the Act in relation to arbitral proceedings taking place abroad. He therefore suggested that the correct approach to be adopted is that which the court utilizes when granting interim relief in support of court proceedings overseas as set out in **Black Swan Investment I.S.A. v Harvest View Limited and another**.² He also sought to rely on **Yukos CIS Investments Limited and another v Yukos Hydrocarbons Investments Limited and others**;³ **Natali Osetinskaya v Golante Management Ltd**⁴ and **Jorge Bascunan and others v Daniel Elsaca and others**⁵ in support of his argument. Mr. Midwinter said that, in his view, the **Black Swan** line of cases indicates that the court will only grant relief in relation to court proceedings that are taking place overseas if there are assets present within the Virgin Islands in relation to which foreign proceedings might, in due course, be enforced.

[26] Mr. Midwinter was adamant that any freezing order or receivership order must

² BVIHCV2009/399 (delivered 23rd March 2010, unreported).

³ BVIHCVAP 2010/028 (delivered 26th September 2011, unreported).

⁴ BVIHCV2013/0037 (delivered 25th July 2013, unreported).

⁵ BVIHCV2015/0128 (delivered 3rd February 2016, unreported).

refer to assets in the Virgin Islands. Mr. Midwinter sought to impress upon this Court that his instructions were that Svoboda does not have any assets in the Virgin Islands, as distinct from saying that it did not have assets in the Virgin Islands. Even though he admitted that when Donna Union filed its application against Svoboda, the latter was domiciled in the Virgin Islands. He said however that, in so far as it was no longer domiciled in the Virgin Islands at the time of the hearing of the application, the court should not have made any of the orders that it did against Svoboda. He therefore urged this Court to set aside the orders that were made and allow Svoboda's appeal.

- [27] Mr. Midwinter opined that, in relation to Svoboda, it was open to Donna Union to seek freezing orders in London or Anguilla where Svoboda had been redomiciled and continued its business. He posited, in addition, that Donna Union could have sought the freezing orders in the country where Svoboda's assets were situated and he asserted that, in light of that, it was inappropriate for the court to issue the worldwide freezing order over Svoboda's assets and business.
- [28] In relation to Koshigi, Mr. Midwinter was adamant that even though the court had the jurisdiction to make the asset disclosure order and to appoint the receiver over its businesses and assets, it was not appropriate to do so.
- [29] In relation to the disclosure orders that the learned judge granted against Koshigi and Svoboda, Mr. Midwinter said that nothing in **Black Swan** suggests that the ancillary relief jurisdiction extends to granting an order for the disclosure of assets. He referred this Court to the pronouncements of the learned Bannister J at paragraph 15 of **Osetinskaya**, that the **Black Swan** jurisdiction applies to prevent the dissipation of unidentified assets that might be available to satisfy a future judgment and does not entitle a claimant to obtain disclosure orders from the court to enable it to interrogate the other party about its assets, generally. Even though Mr. Midwinter admitted that both Koshigi and Svoboda are in breach of the disclosure orders, and indicated his view that orders of the court should be

obeyed, he maintained that the court ought not to have granted the disclosure orders. He emphasized that the pronouncements made by Bannister J ought to apply with equal force to applications that are made under section 43(7) of the Act. To underscore his point, Mr. Midwinter said that it is wholly inappropriate for a litigant to use the ancillary jurisdiction of the court to purportedly prevent dissipation of assets, in order to circumvent the procedures available in the forum where the substantive proceedings were ongoing. He maintained that it was inappropriate for the learned judge to have ordered disclosure in the circumstances and urged this Court to set aside the orders.

[30] Turning his attention to the appointment of the receiver, Mr. Midwinter complained that there was no need for the judge to have imposed a receivership over the assets and businesses of Koshigi and Svoboda, since a receivership involves a greater interference in the freedom of the person against whom it is made. He opined that the receivership can only be justifiable if there is some serious basis upon which the court can conclude that the respondent is likely to breach the freezing order unless the receivership is imposed. He said that there is no suggestion that either Koshigi or Svoboda have sought to dissipate any assets after becoming aware of the freezing order that was obtained on 9th May 2018. He also complained that Donna Union's position is consistent with that expected in a fraud case and that the case at bar is not a fraud case.

[31] Mr. Midwinter asserted that the receivership order that was imposed was on the basis that Koshigi and Svoboda have not provided disclosed their assets in compliance with the disclosure order, and that it was inappropriate for the judge to have done so on that basis. He accepted that the court had the jurisdiction to make the receivership order. However, he referred the court to a number of matters which, in his view, supported the position that it was not an appropriate case for the imposition of a receiver over Koshigi or Svoboda and, he urged this Court to set aside the receivership order.

- [32] Finally, Mr. Midwinter asked this Court to allow the appeal and set aside all the orders of the court, except the freezing order in respect of Koshigi, and award costs to both Koshigi and Svoboda both in the lower court and on the appeal.

Respondent's Submissions

- [33] Learned counsel Mr. Willins said that the judge quite properly exercised his discretion to grant the freezing orders, together with the ancillary disclosure orders. He said that, in the circumstances, the judge was correct to appoint a receiver over the businesses and assets of both Koshigi and Svoboda, and he highlighted the fact that during the period of the arbitral hearings, both Koshigi and Svoboda divested themselves of their interests in Ulyubka Holdings, while Koshigi divested itself of its interest in Elshtere, and Svoboda divested itself of its interests in LLC Big Box and Elshtere. He pointed out that those interests were further divested by other shareholders a mere few days after the first freezing order, granted by Chivers J, was said to have ceased.
- [34] Mr. Willins highlighted the fact that the learned Chivers J, who had granted the first freezing order together with the disclosure order, was of the view that there was a real risk that Koshigi and Svoboda would have dissipated their assets. Mr. Willins also pointed out that Svoboda, having been served with the application by Donna Union for the appointment of a receiver over its assets, completed the process of redomiciling itself to Anguilla. He also pointed out that other companies with which Koshigi and Svoboda have been associated, and/or have divested their interests in, have similarly redomiciled themselves.
- [35] In relation to the court's jurisdiction over Svoboda, Mr. Willins was clear that the court had jurisdiction over Svoboda and pointed out that:
- (i) Svoboda had already been served in the Virgin Islands with the application for the first freezing injunction in February 2018. That was before it sought to redomicile itself elsewhere. It is therefore subject to the *in personam* jurisdiction of the court.

- (ii) Svoboda's new registered office, the law firm Forbes Hare in Anguilla, has made it clear that it was authorised to accept service on Svoboda's behalf, and in fact have consistently done so. He said by this means, Svoboda had submitted to the jurisdiction of the court.
- (iii) Section 184(5)(d) of the **BVI Business Companies Act, 2004**⁶ provides in respect of any company that has continued out of Virgin Islands that "service of process may continue to be effected on the registered agent of the company in the Virgin Islands in respect of any claim, debt, liability or obligation of the company during its existence as a company under this Act".
- (iv) The court exercises a single jurisdiction as extending throughout the Member States and Territories (see rule 2.4 of the **Civil Procedure Rules 2000**). For the purpose of service out of the jurisdiction, **Practice Direction No. 4 of 2008** confirms the jurisdiction of the court to extend to the six independent Member States and three overseas Territories.

[36] Mr. Willins said that it was quite appropriate for the court to have granted the orders which it did. He was adamant that the jurisdiction that was engaged was not that of **Black Swan**. Mr. Willins said that section 43(7) of the Act provided the court with the jurisdiction to grant the orders it did in support of the foreign arbitration before the Tribunal. He took issue with Mr. Midwinter's contention that there is no authority on how section 43(7) should be approached and applied. He said that, to the contrary, in **PT Ventures SGPS SA v Vidatel Ltd**⁷ the learned Farara J [Ag.] provided guidance on the application of section 43 of the Act. He commended this Court to the pronouncements of Farara J [Ag.].

[37] Turning his attention next to the disclosure orders and the appointment of the receiver, Mr. Willins opined that it was the conduct of Koshigi and Svoboda, in not complying with the orders for disclosure, that contributed to the learned judge's apparent lack of confidence as to the risk of dissipation. He said the judge quite rightly concluded that there was a further risk of dissipation, and he argued that

⁶ Act No.16 of 2004.

⁷ BVIHC(COM)2015/0117 (delivered 8th February 2016, unreported).

the orders made were well within the exercise of the judge's discretion.

[38] Mr. Willins concluded by saying that in addition to the specific jurisdiction with which the court is clothed by section 43(7) of the Act, it was clearly open to the court to rely on the **Black Swan** principle in granting the orders that it did. He was of the clear view that the court had jurisdiction under the **Black Swan** principle to grant the disclosure orders and to appoint the receiver and said that there was no basis to restrict the **Black Swan** principle jurisdiction to circumstances where it is proven that there are assets within the jurisdiction.

[39] Mr. Willins highlighted the fact that Koshigi and Svoboda's obligation to disclose, in accordance with the court's order of 7th February 2018, fell due on 23rd February 2018 and that neither Koshigi nor Svoboda had complied with the order. He said that even more egregious is the fact that the court has appointed a receiver, over the assets of both Koshigi and Svoboda, yet neither of them have provided any information to the receiver. Mr. Willins said that they are both blatantly disobeying the court's order and are therefore in contempt of court. He pointed out that even after the appointment of the receiver, there has been conduct by both Koshigi and Svoboda which is not consistent with the appointment of a receiver.

[40] Mr. Willins was adamant that both Koshigi and Svoboda dissipated their assets on the eve of the arbitral hearing. He said that the obvious reason was to put the assets out of Donna Union's reach. As if not enough, he said that a mere few days after the court granted the first freezing order together with the ancillary disclosure order, the assets were further divested to third parties. He said that there was evidence before the court that both Koshigi and Svoboda were inclined to further dissipate their assets.

[41] Mr. Willins emphasised that the court was acting in support of the Tribunal's processes and he said that there was no need for the court to rely on the **Black Swan** principles since section 43 of the Act clearly enabled the court to make the

orders that it did. As an alternative position, he argued that the court could have properly relied upon the **Black Swan** principles to make the orders it did.

- [42] Finally, Mr. Willins said that the learned judge properly exercised his discretion when he granted the freezing orders, disclosure orders and appointed the receiver. He therefore argued that this Court has no basis upon which to interfere with the judge's exercise of discretion. He therefore asked this Court to dismiss the appeal and award costs to Donna Union.

Discussion

- [43] This appeal brings into sharp focus the circumstances in which an appellate court can properly interfere with the exercise of discretion of a lower court. Of greater significance are the circumstances in which the court can grant interim measures in support of foreign arbitration.

- [44] To answer the questions that have been posed in this appeal necessitates the settling out of the relevant statutory framework in some detail. I will now do so.

- [45] Section 43 of the Act provides as follows:

“43. (1) Article 17J of the UNCITRAL Model Law is substituted by this section.

(2) **On the application of a party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside the Virgin Islands, grant an interim measure.**

(3) The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 33 in relation to the same dispute.

(4) The Court may decline to grant an interim measure under subsection (2) on the ground that

(a) the interim measure being sought is currently the subject of arbitral proceedings; and

(b) **the Court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.**

(5) In relation to arbitral proceedings which have been or are to be commenced outside the Virgin Islands, the Court may grant an interim measure under subsection (2) only if

(a) the arbitral proceedings are capable of giving rise to an arbitral award, whether interim or final, that may be enforced in the Virgin Islands under this Act or any other enactment; and

(b) the interim measure sought belongs to a type or description of interim measure that may be granted in the Virgin Islands by the Court in relation to arbitral proceedings.

(6) Subsection (5) applies even if

(a) the subject matter of the arbitral proceedings would not, apart from that subsection, give rise to a cause of action over which the Court would have jurisdiction; or

(b) the order sought is not ancillary or incidental to any arbitral proceedings in the Virgin Islands.

(7) In exercising the power conferred under subsection (2) in relation to arbitral proceedings outside the Virgin Islands, the Court shall have regard to the fact that the power is

(a) ancillary to the arbitral proceedings outside the Virgin Islands; and

(b) for the purposes of facilitating the process of a court or arbitral tribunal outside the Virgin Islands that has primary jurisdiction over the arbitral proceedings.

(8) The Court has the same power to make any incidental order or direction for the purposes of ensuring the effectiveness of an interim measure granted in relation to arbitral proceedings outside the Virgin Islands as if the interim measure were granted in relation to arbitral proceedings in the Virgin Islands.

(9) An interim measure referred to in subsection (2) means an interim measure referred to in article 17 (2) of the UNCITRAL Model Law, as provided in section 33 (1), as if the reference

(a) to arbitral tribunal in that article were a reference to the Court, and

(b) to arbitral proceedings in that article were a reference to court proceedings,

and is to be construed as including an injunction but not including an order under section 58". (Emphasis mine)

[46] Section 184(5)(a)–(d) of the **BVI Business Companies Act, 2004** provides as follows:

"(5) Where a company is continued under the laws of a jurisdiction outside the Virgin Islands,

(a) the company continues to be liable for all of its claims, debts, liabilities and obligations that existed prior to its continuation as a company under the laws of the jurisdiction outside the Virgin Islands;

(b) **no conviction, judgment, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing, against the company or against any member, director, officer or agent thereof, is released or impaired by its continuation as a company under the laws of the jurisdiction outside the Virgin Islands;**

(c) **no proceedings, whether civil or criminal, pending by or against the company, or against any member, director, officer or agent thereof, are abated or discontinued by its continuation as a company under the laws of the jurisdiction outside the Virgin Islands, but the proceedings may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof, as the case may be; and**

(d) service of process may continue to be effected on the registered agent of the company in the Virgin Islands in respect of any claim, debt, liability or obligation of the company during its existence as a company under this Act". (Emphasis mine)

[47] Based on section 43(2) of the Act, the court has jurisdiction to grant interim measures in support of foreign arbitration. This much is not in issue. The conjoint effect of sections 43 of the Act and section 184(5) (a)–(d) of the **BVI Companies Act** effectively undermines Svoboda's argument that the court relied on the **Black Swan** principle in granting the orders. In **Black Swan**, at paragraph 11, Bannister J stated that the reasoning of Lord Nicholls in the case of **Mercedes Benz A.G. v**

Leiduck⁸ was “compelling” as he pointed out that:

“...freezing orders are unlike ‘ordinary’ interlocutory injunctions, because they bear no relation to the subject matter of the proceedings. Their only purpose is to prevent dissipation of assets available to satisfy a money judgment”.

Bannister J stated further that:

“Moreover, [t]here is no logical distinction between the grant of such relief in aid of a domestic money judgment and a grant in aid of a foreign one, unless the foreign judgment is such that the domestic court would decline to enforce it”.

In his conclusion, Bannister J stated at paragraph 12 of **Black Swan** that:

“There are assets within the jurisdiction in the shape of the shares in the two defendant companies which justify the grant of such an injunction and the Court of Appeal has held (without having had to decide the jurisdictional issue) that the injunction is otherwise a proper one to be granted. I shall not, therefore, discharge it on grounds of want of jurisdiction”.

[48] To the contrary, it is apparent that the legislature in its wisdom sought to address situations that are very similar to the appeal at bar by giving the court the jurisdiction to grant interim relief measures in aid of arbitration. The Act and **BVI Business Companies Act** are very progressive. They grant specific powers to the local court in support of both local and foreign arbitration. Section 43(2)–(5) of the Act are of relevance to the appeal at bar. The fact that Svoboda has redomiciled itself to Anguilla is of no moment. Section 184(5)(b) and (c) of the **BVI Business Companies Act** effectively puts to rest Mr. Midwinter’s observation. It stipulates that no claim or proceedings shall be abated, discontinued or impaired due to the fact that a company who is party to the claim or the proceedings has continued outside the jurisdiction. The fact that Svoboda has redomiciled itself to Anguilla did not deprive the court of jurisdiction.

[49] There is great force in Mr. Willins’ position that it is not open to Svoboda to say that there is no evidence that it has assets within the jurisdiction. Svoboda has

⁸ [1996] AC 284.

failed to comply with the court's disclosure order. There is no doubt that this Court should not allow Svoboda to benefit from its own breaches of the court's order. It is accepted that domestic courts play an important role in foreign arbitration especially in relation to the potential enforcement of awards, and that it is open to the domestic court to make interim orders in aid of the foreign arbitration, including the enforcement of a potential award. This is specifically provided for in section 43 of the Act. I fail to see upon what basis this Court can properly read into the express wording of the Act, the need for assets to be in the Virgin Islands in order for the court to be able to grant the interim measures in support of the foreign arbitration. The Act comprehensively clothes the court with the jurisdiction to grant the interim measures and there is no need to resort to the **Black Swan** line of cases in order to give efficacy to section 43 of the Act.

[50] The line of cases, including **Black Swan** and **Yukos CIS Investments Limited**, upon which Koshigi and Svoboda have relied, are not authority for their proposition that the court should not exercise its discretion to grant interim relief, especially in relation to foreign arbitral proceedings, in the absence of some nexus to the Virgin Islands. These cases are therefore of limited assistance. There is no doubt that the jurisdiction that was exercised by the judge was that provided by the Act, which must be read together with the relevant provisions of the **BVI Business Companies Act**, as indicated above.

[51] There is no doubt that section 43 of the Act is very wide in its scope and should not be given a restricted interpretation. If any assistance is needed as to the scope of section 43 of the Act, it can be found in the instructive pronouncements of the learned Farara J [Ag.], in **PT Ventures** who, in reviewing the scope of sections 43 and 44 of the Arbitration Act, stated:

“(a)The provisions of the BVI Arbitration Act are less restrictive than their English equivalent whereas in England, the court will act only after a request has been made to the tribunal for reliefs, or the tribunal is powerless to act. There are no such limitations on the court's jurisdiction in the Virgin Islands.

(b)The BVI Court may decline to act where it considers relief would be more appropriate being granted by the Arbitral Tribunal.

(c)The BVI **Courts are entitled** to grant relief even **if the existence** of BVI assets **cannot be established**".⁹ (Emphasis mine)

[52] I can do no more than adopt and apply the above helpful enunciations to the appeal at bar. It is apparent that the Act evinces a pro-arbitration attitude for the courts and seems to be wider than the English Arbitration Act. There is no need nor basis for reading the **Black Swan** principle into the clear words of section 43(7) of the Act.

[53] There is no basis upon which Svoboda could properly say that unless Donna Union is able to prove that it has assets in the Virgin Islands, it was inappropriate for the court to have granted the orders. Donna Union has indicated that it has reasonable grounds for believing that Svoboda has assets in the Virgin Islands suffices. In a word, the position that Svoboda has advanced in the lower court and before this Court is wholly incongruous with the specific jurisdiction granted to the court by section 184(5)(a)–(d) of the **BVI Business Companies Act**. The court has the jurisdiction to continue to hear matters that were properly instituted. The **BVI Business Companies Act** is a unique piece of legislation which specifically addresses the issue that was raised in the court below, namely, whether Donna Union's application can be stifled by the removal or redomiciling of a company, namely Svoboda. As alluded to earlier, the legislature has answered this question in the negative. Of note is the fact that Svoboda was served with the application before it had redomiciled itself. There is cogent evidence that the Virgin Islands court was seized of *personam* jurisdiction. This much is not disputed. The freezing order was granted to preserve and protect assets which may then be used to enforce the arbitral award.

⁹ Note that the Tribunal is powerless to appoint a receiver or to grant worldwide freezing orders. See Article 25.1 of LCIA.

- [54] In view of the totality of circumstances, it is clear that the learned judge, in granting the orders that he did, was at all times aware of the fact that he was being asked to make orders in aid of the potential enforcement by Donna Union of the Tribunal's awards against Koshigi and Svoboda. From all that has been stated, it is apparent that there is no doubt that it was open to the learned judge, in the exercise of his discretion, to make the orders that he did. Accordingly, Svoboda's challenge to the learned judge's orders on the basis that it was inappropriate to do so fails.
- [55] For emphasis and completeness, there is nothing before this Court upon which it could be properly concluded that the learned judge, in granting the orders that he did, was exercising the **Black Swan** jurisdiction. To the contrary, he was exercising his discretion pursuant to section 43 of the Act.
- [56] While that is true, the learned Bannister J held that the **Black Swan** jurisdiction applies to prevent the dissipation of identified assets that might be available to satisfy future judgment, and does not entitle a claimant to obtain disclosure orders from the Virgin Islands court to enable it to interrogate the respondent generally. The case at bar is vastly different from that of a simple interrogation of the respondent, generally. In the case at bar, and in contradistinction, the learned judge was in possession of the very adverse findings of the Tribunal. Therefore, in granting the orders, he was acutely aware of the wrongdoing and dissipation of assets both by Svoboda and Koshigi. It cannot therefore be said that he had no basis upon which he could have exercised his discretion in granting the freezing order over Svoboda, since Donna Union was not simply seeking to interrogate Svoboda generally, but had placed concrete evidence before the court that indicated that its apprehended risk of dissipation was real. Without relying on **Black Swan**, the judge could have granted the freezing order pursuant to section 43, once there were reasonable grounds for believing that the assets would be dissipated.

[57] The legislative policy of the Virgin Islands is very positive and progressive. It is focused on the court acting in support of the arbitral proceedings to ensure that the enforcement of an award or winding up processes of a company are not frustrated. To this end, the continuation of a company outside of the Virgin Islands cannot undermine the jurisdiction which the court had properly obtained. After the award has been rendered to the parties, the local court may also be engaged where the award debtor fails to perform it, so that the award creditor may obtain the court's assistance to enforce the award. It is for this reason that the court will act in a supportive manner in granting the necessary interim measures, which may include, for example, the making of disclosure orders. Section 43(5)(a) and (b) of the Act are of relevance.

[58] Koshigi has not appealed against the court's grant of the worldwide freezing order. Svoboda has not provided any basis upon which this Court can properly conclude that the learned judge erred in the exercise of his discretion by granting the worldwide freezing order.

[59] In so far as Svoboda appeals against the exercise of discretion in the lower court, it was required to satisfy this Court that the learned judge, in the exercise of his discretion, committed an error of principle or was plainly wrong.

Exercise of Discretion

[60] The circumstances in which an appellate court can interfere with the exercise of discretion are prescribed and are well known. In fact, there is a strong stream of jurisprudence from this Court which addresses the matter and which needs no recitation. It is sufficient to state that the pronouncements of Sir Vincent Floissac CJ in **Dufour and others v Helenair Corporation Ltd and others**¹⁰ remain good law. In that case, Floissac CJ pronounced as follows:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his

¹⁰(1996) 52 WIR 188.

or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.

- [61] For the sake of convenience, I will now treat with Koshigi and Svoboda’s appeal against the asset disclosure order and the judge’s appointment of the receiver.

Disclosure order

- [62] It is passing strange, to say the least, that Koshigi and Svoboda have not complied with the disclosure orders and that, as Mr. Midwinter quite properly admitted, they are in contempt of court. What is more egregious is the fact that learned Queen’s Counsel Mr. Midwinter, who appeared on their behalf, indicated that his own view was that the court’s order ought to be complied with, but did not even attempt to offer an explanation for Koshigi and Svoboda’s “contemptuous” conduct. Ordinarily, Koshigi and Svoboda should not have been heard until they had purged their contempt. However, in so far as this point was not argued by Donna Union, I will refrain from making any further comments on that matter. For what it is worth, however, there was cogent evidence before the judge and before this Court that both Koshigi and Svoboda have ignored the disclosure orders.

- [63] Turning back to the matter at hand, at the heart of Koshigi and Svoboda’s complaint is that the orders for disclosure are too intrusive and are inappropriate. This is not a basis upon which the appeal court can properly interfere with the court’s exercise of discretion. The bases upon which an appellate court can properly interfere with the exercise of a lower court’s discretion have been pointed out above and need no repetition.

[64] It is very usual for the court to grant an ancillary order of disclosure to buttress a world-wide freezing order. In **Motorola Credit Corporation v Uzan**,¹¹ it was held that an ancillary disclosure order “gives the teeth which are critical to the freezing order”. There is nothing remarkable about the disclosure order that the learned judge made. In fact, to the contrary, it was in standard form.¹² If there was ever a case which necessitated the court making a disclosure order, this was it. Svoboda and Koshigi seemed to have taken steps to conceal their assets. Donna Union has no way of knowing where their assets are without the benefit of a disclosure order. The disclosure order was a key part of the freezing order.

[65] It is settled law that, in its determination of whether to make a freezing order, the question for the court is whether there is cogent evidence that without a freezing order, the defendant would put assets beyond the reach of enforcement. If any authority for this proposition is required, it can be found in **Ras Al Khaimah Investment Authority & Ors v Bestfort Development LLP & Ors**¹³ which cited the dicta of Floyd J in **HMRC v Cozens**¹⁴ where he held as follows:

“Indeed... it is inherent in the requirement to show that there is a risk of dissipation of assets that the cases in which freezing injunctions are granted are cases in which there is evidence that the defendant has some assets to dissipate”.

[66] The gravamen of Koshigi and Svoboda’s complaint made against the disclosure order seems to be their view that the **Black Swan** jurisdiction was not amenable to the court granting a disclosure order in support of a freezing order. In so far as it has been concluded that Donna Union’s application was not made pursuant to **Black Swan** but rather pursuant to the provisions of the Act, it is apparent that this argument cannot be sustained. Mr. Willins’ submissions on this point are

¹¹ [2002] EWCA Civ 989, p. 37.

¹² **JSC MCC Eurochem et al v Livingston Properties Equities Inc** BVIHCV(COM)2015/0097 (delivered 23rd June 2016, unreported) – Eder J [Ag.] at para 13 cited Christopher Clarke J in **JSC BTA Bank v Ablyazov** when he stated: “it is plain...that it is open to the court to make an order for the production of information even during the pendency of a challenge to the jurisdiction. If that be so it must, as it seems to me, follow that it is open to the court to impose a sanction for non-compliance as a means of securing compliance”.

¹³ [2017] EWCA Civ. 1014 at [38].

¹⁴ [2011] EWHC 27882 (Ch).

attractive and persuasive and we accept them. The disclosure order was part and parcel of the judge's exercise of discretion pursuant to section 43 of the Act.

- [67] Donna Union sought relief in support of foreign arbitral proceedings and section 43 gives the court the clear jurisdiction to grant interim measures. It is unfair therefore to criticize the learned judge for granting the disclosure order which he was empowered by statute to grant and which was clearly within the exercise of his discretion. There is nothing before us upon which it can be concluded that the learned judge acted outside of the generous ambit of disagreement in exercising his discretion in making the disclosure order.

Receivership Order

- [68] Both Koshigi and Svoboda have criticised the judge for having exercised his discretion to appoint a receiver over their businesses and assets.
- [69] It is settled law that when the court is asked to appoint a receiver, it has to be satisfied that there is cogent evidence that makes the appointment of the receiver appropriate. We are satisfied that the learned judge had before him, evidence that Koshigi and Svoboda had begun to dispose of their assets on the day of the conclusion of the liability trial before the Tribunal. In addition, there was evidence that they both had failed to comply with an earlier freezing order that was made by the court. It is also striking that when faced with evidence of their acts of dissipation, neither Koshigi nor Svoboda sought to explain their behaviour. The court therefore was entitled to draw adverse inferences based on their conduct. In **Ninema Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. UND. CO. K.G.**,¹⁵ the Court of Appeal held that the less impressive the evidence in response, the less effective it would be to displace any adverse inferences.
- [70] A receiver is an officer of the court and is not the agent of any party. A receiver therefore is accountable to the court and the court exercises jurisdiction over the

¹⁵ [1983] 1 WLR 1412.

receiver. A close examination of the receivership order reveals that the judge was careful to attach conditions to it, which served to ensure that any possible interference caused by the parties, was limited. In this regard, the judge ordered that the receiver had no power to vote in respect of the shares of Koshigi and Svoboda without first obtaining the permission of the court. It is noteworthy, however, that, in breach of the receivership order, Koshigi and Svoboda have apparently taken steps to appoint directors to the Board of UHL subsidiaries.

[71] The judge had the discretion to appoint the receiver over the businesses and assets. The ineluctable conclusion that is reached is that the way in which both Koshigi and Svoboda have conducted themselves since the hearing before the Tribunal justified the learned judge granting the receivership order. Applying the well-established principles on the appellate court's interference with the lower court's exercise of discretion, it cannot be said that the learned judge was clearly wrong in exercising his discretion to appoint the receiver over the businesses and assets of Koshigi and Svoboda. Accordingly, their appeals are dismissed in their entirety.

[72] Civil Appeal No. 43 of 2018 was overtaken by Civil Appeal No. 50 of 2018 and the former has become moot.

Costs

[73] In so far as the appeal in Civil Appeal No. 43 of 2018 has fallen away, in the exercise of this Court's discretion, the appropriate costs order is that Donna Union should have its costs on that appeal. In relation to this appeal, Donna Union, having prevailed in defending the appeal, shall have its costs on the appeal. Both sets of costs are to be assessed, by a Master or the Registrar, if not agreed within 21 days of this order.

Conclusion

[74] For all of the above reasons, Koshigi and Svoboda's appeal against the judgment of the learned Adderley J, is dismissed, and it hereby ordered that:

- (i) Donna Union is entitled to its costs in Civil Appeal No. 50 of 2018 against Koshigi and Svoboda, to be assessed by a Master or the Registrar, if not agreed, within 21 days of this order.
- (ii) Donna Union is entitled to its costs in Civil Appeal No. 43 of 2018 against Koshigi and Svoboda, to be assessed by a Master or the Registrar, if not agreed, within 21 days of this order.

[75] I gratefully acknowledge the helpful assistance of learned counsel.

I concur.
Dame Janice M. Pereira
Chief Justice

I concur.
Godfrey Smith
Justice of Appeal [Ag]

By the Court

Chief Registrar