TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/028

BETWEEN:

[1] YUKOS CIS INVESTMENTS LIMITED
[2] WINCANTON HOLDINGS BV

Appellants/Claimants

and

[1] YUKOS HYDROCARBONS INVESTMENTS LIMITED
[2] FAIR OAKS TRADE INVEST LIMITED
[3] GLENDALE GROUP LIMITED

Respondents/ Defendants

[4] BRITTANY MANAGEMENT LIMITED

Defendant

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]
The Hon. Mr. Albert J. Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Ian Kawaley	Justice of Appeal [Ag.]

Appearances:

Lord Grabiner, QC, with him, Mr. Mann and Mr. Patton, for the Appellants
Mr. Berry, QC, with him, Mr. Forte, Mr. William and Ms. Wood, for the Respondents

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2010: December 16;
2011: September 26.

Civil appeal – Use of a Stichting to hold property in the Netherlands – Interim relief – Freezing (Mareva) order – Appointment of a receiver – Whether a party can seek interim relief in the local jurisdiction if the substantive proceedings are pending in a foreign jurisdiction – Whether the learned judge erred in refusing to grant the interim relief sought by the appellants in the court below – Risk of dissipation of assets – Whether the trial judge erred in finding no evidence of a risk of dissipation of assets

The appellants, Yukos CIS Investments Limited ("Yukos CIS") and Wincanton Holdings BV ("Wincanton"), are bodies incorporated in the Republic of Armenia and the Netherlands respectively. The instant proceedings arose out of the breakup of OAO-Yukos Oil Company ("Yukos Oil"), of which Yukos CIS is a subsidiary. The first respondent, Yukos Hydrocarbons Investments Limited ("YHIL"), and Wincanton are both wholly owned subsidiaries of Yukos CIS. In 1996, Yukos Oil was privatized and acquired by Mikhail

Khodorkovsky. In May 2005 however, Mr. Khodorkovsky was convicted of tax fraud and sentenced to eight years imprisonment. In response to these events, the management of Yukos Oil arranged for Yukos CIS to transfer YHIL to Wincanton. Fair Oaks Trade and Invest Limited ("Fair Oaks") and Glendale Group Limited ("Glendale"), the second and third respondents respectively, are both subsidiaries of YHIL. All three respondents are BVI incorporated companies. Wincanton then transferred YHIL along with its subsidiaries Fair Oaks and Glendale, to Wincanton's Netherlands-incorporated subsidiary, Financial Performance Holdings BV ("FPH"). The effect of these manoeuvres was to create a structure in which two Netherlands incorporated companies, that is, Wincanton and FPH, stood back to back in the chain of ownership. This in turn allowed Yukos Oil to take advantage of an entity known to the law of the Netherlands as a Stichting, which is essentially a foundation broadly similar to a trust. The Stichting would issue what are called depository receipts, which entitle the holders to all the income passed up from the entities owned by the Stichting, but only at a time of the Stichting's choosing.

Wincanton's shares in FPH were transferred for no consideration to Stichting Administratiekantoor Financial Performance Holdings ("Stichting FPH") in exchange for all of the depository receipts issued by Stichting FPH. At this point, Yukos CIS ceased to have any control of its BVI subsidiaries, although it retained the ultimate right to be paid their profits. What is significant however, is that these profits would only be paid when the directors of Stichting FPH found it fit to do so; the directors are presently refusing to distribute income until the resolution of the present dispute over control of the BVI subsidiaries. Yukos Oil was subsequently declared bankrupt, and the company's assets were acquired by a company called OJSC Rosneft ("Rosneft"), a Russian state-controlled oil company. As a result of the events which had taken place prior to the acquisition of Yukos Oil by Rosneft, Rosneft could have no control over YHIL or its subsidiaries unless it could set aside the transfer of the FPH shares to Stichting FPH. In May 2010, a decision of the Dutch Court in favour of Rosneft allowed the state controlled oil company to appoint its own board to Wincanton. Therefore, Rosneft had managed to "drill down" as far as Wincanton in the chain of ownership, but needed to set aside the transfer of the FPH shares if it was to gain control of YHIL and its BVI subsidiaries.

Rosneft turned to the Dutch courts in an effort to regain control of the three respondent companies. While the matter was pending in the Dutch courts and without seeking equivalent relief from those courts, the appellants turned to the BVI courts seeking an order to (a) have the three respondents, which are all BVI incorporated companies, give detailed disclosure of their current financial condition together with details of their financial transactions to date, (b) have the assets of the three respondents frozen, and (c) have an interim receiver appointed to each of the respondent companies to effect compliance with (a) and (b) and "to ensure that the business of the respondents is not conducted in a manner injurious to the interests of Yukos CIS or Wincanton." The learned trial judge dismissed the claim in the court below, and the appellants appealed his decision.

Held: dismissing the appeal (Kawaley J.A. [Ag.] and Gordon J.A. [Ag.] a majority, with Redhead J.A. [Ag.] dissenting) and awarding the respondents two-thirds of the costs below in respect of the costs of the appeal pursuant to CPR 65.13, that:

1. The learned judge did not err in law or in principle in exercising his discretion to refuse to grant the interim relief sought by the appellants in the court below. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in the aid of either relief the applicant is likely to obtain from the local court, or from a competent foreign court. The relief that the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets, nor establish a proprietary claim in respect of any such assets.

2. There was an insufficient factual nexus between the appellants' asserted rights of ownership over the FPH shares and the asserted right to freeze and or appoint a receiver over the respondents' assets. The appellants claimed merely a right to indirectly control the respondents; the foreign cause of action did not give rise to potential BVI proceedings to enforce (through whatever means) the foreign judgments against the respondents' assets. The proper question is not whether a freezing injunction is sought 'in support of' either a local cause of action or a foreign cause of action which has a local equivalent in any strict sense. Rather, the relevant enquiry is whether or not the appellant may obtain a foreign judgment which may be enforceable by whatever means against local assets owned or controlled by the respondent.

   Meespierson (Bahamas) Limited et al v Grupo Torras SA et al (1999) I.T.E.L.R. 29 cited.

3. The learned judge was correct in holding that the failure of the appellants to seek equivalent interim injunctive relief in the Dutch proceedings against the persons who presently control the BVI respondents was a further discretionary factor which mitigated against granting the relief sought. One would ordinarily expect a freezing order to be obtained initially in the main litigation court, with a duplicative application subsequently being made in satellite proceedings. The 'satellite' court would effectively be assisting the principal court by making an order designed to ensure that any judgment entered by that court would not be rendered nugatory. The supporting freezing order would, in a very general way implicitly entail both recognition and enforcement of the foreign interim freezing order.

4. The respondents are resident companies in the BVI and the BVI jurisdiction is responsible for the being and life of the respondents. The BVI Court has jurisdiction, in the strict sense, over the respondents. The substantive action is before the Dutch court. If the appellants are successful in that jurisdiction, any claims which they may have against the respondents would be meaningless if the BVI court fails to grant any relief, in light of the fact that the Dutch court is unable to grant any relief to the appellants (per Redhead J.A. [Ag.).

   Mercedes Benz A.G. v Leiduck (P.C.) [1996] A.C. 284 cited; Siskina (Owners of Cargo Lately Laden on Board) and Others v Distos Compania Naviera S.A. [1979] A.C. 210 distinguished; Elena Rybolovleva v Dmitri Rybolovlev BVIHCV 2008/0403 distinguished.

5. It is a fundamental principle of British-based company law that a company's management is not only entitled but also legally obliged to operate on the assumption that the duly registered shareholders are the owners of the shares. The present application for interim relief is not in real terms based on a desire to preserve assets from a risk of dissipation pending trial. It is in substance an attempt to prevent the registered shareholders of the respondent companies from exercising control of the companies until the dispute over their own ultimate and/or intermediate ownership is resolved. The appellants' desire to achieve this goal is commercially logical and may ultimately (through success in the Dutch proceedings) be legally vindicated. At this juncture however, the appellants' goal is legally inadmissible in all the circumstances of the present case.

6. According to established principles, for dissipation to justify the grant of an interim freezing injunction or the appointment of a receiver, there must be a real risk that either (1) the respondents will not retain sufficient funds to meet a money judgment which the appellants hope to obtain, or (2) the respondents will dispose of property which belongs to the appellants. In the present case, neither of these crucial preconditions were met; the dissipation complaints were highly artificial in all the circumstances and were rightly rejected by the learned judge.

7. There is evidence, at least for the appellants to believe that the respondents will, if the Dutch Court finds in the appellants' favour, take action to ensure that the orders of the Dutch Court are less effective than would otherwise be the case. The Court is not concerned with the probabilities of what will happen but rather, with whether there is evidence establishing a real risk that assets may be dissipated (per Redhead J.A. [Ag.]).

   Derby & Co. Ltd and Others v Weldon and Others (Nos. 3 and 4) [1990] Ch. 65 applied.

8. The appellant's application for disclosure was rightly rejected by the learned judge; the grant of such an application can only legally be justified if disclosure is being used as an ancillary tool for policing an interim freezing or receivership order.

9. The learned judge did not exercise his discretion whether to grant or decline to grant the relief sought by the appellants in the court below, because, on his own analysis, he never had any discretion to exercise as he had already concluded that he had no jurisdiction to grant the interim relief which they sought. The learned trial judge was simply expressing a hypothetical or gratuitous view as to how he would or might have exercised his discretion if, contrary to his conclusion, he had a discretion to exercise (per Redhead J.A. [Ag.]).

JUDGMENT

[1] REDHEAD, J.A. [AG.]: This is an appeal from a decision of Bannister J, the Commercial Court Judge in the British Virgin Islands ("BVI"). This decision was given on 6th August 2010. The appeal came before the Court of Appeal on 13th December 2010 and was heard on 16th December 2010, just before the Christmas break.

[2] The application before the trial judge by the appellants[1] was for the following orders:-

(a) that the respondents[2] give detailed disclosure of their current financial condition together with details of their financial transactions for 30th September 2005 to date;

(b) that the respondents' assets be frozen; and

(c) that an interim receiver be appointed to each of the respondent companies in compliance with (a) and (b) above and to ensure that the business of the respondents is not conducted in a manner injurious to the interests of Yukos CIS or Wincanton, i.e., the appellants.

[3] The three respondents are BVI incorporated companies.

[4] The learned trial judge refused to grant the orders as prayed for by the appellants. The appellants are dissatisfied with the decision of the learned judge. They have appealed to this court.

[5] The appellants have filed 7 grounds of appeal with sub-grounds which are many. The grounds are as follows:

(i) The judge was wrong to find that he had no jurisdiction to appoint a receiver or to make a freezing order against the respondents in support of

[1] Who were the claimants in the court below.
[2] Who were the defendants in the court below.

foreign proceedings.[3] If, contrary to the appellants' case, the trial judge was right to strike out the rectification claim, he nevertheless had the jurisdiction to make the order sought by the appellants in support of the proceedings in the Amsterdam court.

(ii) The judge was wrong to find that the appellants could and should have obtained the ruling they sought from the Court in Amsterdam.

(iii) The judge was wrong to find that there was no peril to the property (or risk of dissipation of the property) sufficient to justify the appointment of a receiver or making a freezing injunction.

(iv) The judge was wrong to dismiss the application for the appointment of a receiver on the grounds that there is no "deadlock or difficulty in conducting the management" of the respondents.

(v) The judge was wrong to dismiss the application for the appointment of a receiver on the grounds that he could not envisage how a receivership would work if the current directors of the respondents refused to co-operate.

(vi) The judge was wrong to find that the disclosure sought by the appellants went beyond the proper scope of an order ancillary to a freezing injunction and could be used to damage the respondents commercially.

(vii) The judge was wrong to order that the appellants should pay the Respondents' costs. In light of the foregoing, the judge should have held that the application either for the appointment of a receiver or the making of a freezing injunction with ancillary disclosure order was successful and ordered the respondents to pay the appellants' costs.

Background Facts

[6] Yukos CIS Investments Limited ("Yukos CIS"), the first named appellant, is an Armenian company. Wincanton Holdings BV ("Wincanton"), the second named

[3] Paragraphs 16-18 of the learned trial judge's judgment.

appellant, is a Dutch company. The three respondents are all British Virgin Islands registered companies.

[7] The proceedings in the court below, as observed by the trial judge arose out of the breakup of OAO-Yukos Oil Company ("Yukos Oil").

[8] In 1996, Yukos Oil was privatised. In that same year it was acquired by Mikhail Khodorkovsky. In 2003 and 2004, the Russian courts, on the complaint of the Russian Tax Authorities, found Yukos Oil guilty of tax fraud and because of the mountain "lump" sum tax liabilities and penalties, Yukos Oil was made bankrupt. Following the bankruptcy, there was an auction sale. Yukos Oil's assets were acquired by OJSC Rosneft ("Rosneft"), an oil company with the Russian State being its majority shareholder. The conduct of the Russian government in this matter has been condemned by the Parliamentary Assembly of the European Council and by the courts in England, Cyprus, Denmark, Lithuania and Spain.

[9] The management of Yukos Oil in September 2005 arranged that one of its subsidiaries, Yukos CIS, should transfer its only wholly owned subsidiary, YHIL, to Wincanton, another wholly owned subsidiary of Yukos CIS which was created for that purpose. Wincanton then transferred YHIL and with it YHIL's subsidiaries, Fair Oaks and Glendale to Netherlands-incorporated subsidiary, Financial Performance Holdings BV ("FPH").

[10] In my view, this is a very complicated structure. According to the learned trial judge, these manoeuvres were to create a structure in which the two Netherlands incorporated companies[4] stood back to back in the chain of ownership. This structure enabled Yukos Oil to take advantage of an entity known to the law of the Netherlands as a Stichting. A Stichting, as was explained, is capable of holding property while itself being ownerless. It is like a human trustee. I would describe it as a faceless, ownerless entity. The Stichting issues depository receipts which

[4] Financial Performance Holdings BV and Wincanton Holdings BV.

entitle the holders to all the income passed up from the entities owned by the Stichting. The time of issue of these receipts was solely at the Stichting's choosing. As Lord Grabiner QC explained in his opening, if you are the holder of depository receipts, you are entitled to any income which the Board of the Stichting in its wisdom distributes from the profits of the underlying companies. And it is a matter for the Board of the Stichting to decide whether or not to distribute any monies. Lord Grabiner QC described this set up as analogous to a shareholder without the right to vote.

[11] Wincanton transferred its shares of FPH for no consideration to Stichting Administratiekantoor Financial Performance Holdings ("Stichting FPH") in exchange for all the depository receipts issued by Stichting FPH. The result was that Yukos CIS ceased to have any control over its BVI subsidiaries, while retaining the ultimate right to be paid profits but, of course, only when the directors of Stichting FPH saw fit. At present, the directors are refusing to distribute income until the resolution of the present dispute for the control of the BVI subsidiaries. Stichting FPH's Original Articles forbade the use of any of its property in satisfaction of any claims based on tax assessments which gave rise to the difficulties in which Yukos Oil found itself in 2004.

[12] Article 2 of the Foundation says in part:

> "The Foundation shall utilize the rights of the shares in a manner which shall best safeguard the interest of the company and any other subsidiaries of the Yukos Oil Company which are together the group of companies to which the Company pertains, the group's directors, officers and employees, the group's legitimate creditors and all other recognized stakeholders of the group including by means of legal procedures the foundation's objects shall not include the utilization of any right attaching to the shares in furtherance of or as a result of any illegitimate claim, judgment or transaction including but not limited to those resulting from or connected with the tax assessments made against Yukos Oil Company and members of the group in the Russian Federation".

[13] Lord Grabiner QC in his opening said that this was designed to prohibit the Stichting from using the moneys derived from the FPH shares, for example, to

discharge those liabilities. It is also effective to bar the entitlement of Yukos CIS or Wincanton to a dividend, for example, on the basis that Rosneft obtained the ownership of those companies as a result of the auction and that the action had arisen only after the insolvency and that the insolvency had been driven by the unpaid tax liabilities.

[14] Learned counsel for the appellant made the point that the whole thing was structured in such a way that those who were interested were to be excluded from getting any benefits from the Stichting because they had derived their interest in these assets through the auction process and ultimately because of the insolvency of the original Yukos company. I make the observation that this was a very clever and complicated scheme which was designed to prevent any benefits going to Yukos CIS or Wincanton.

[15] As observed by the learned trial judge:

> "…Rosneft must have known when it purchased Yukos CIS of the structure… and that it could have no control over YHIL or its subsidiaries unless it could undo the interpolation in September 2005 of Stichting FPH. Further refinements designed to make the chain of ownership even more complicated and to prevent the assets of the BVI companies from being used to pay off debts in the bankruptcy of Yukos oil were introduced by the ex-Yukos Oil management of Yukos CIS in 2008 and 2009. They involve the interposition of a Delaware corporation, later converted into a Delaware limited partnership, to which the depositary receipts previously held by Wincanton were assigned.....[it] is obvious, that when they were carried out Rosneft had yet to appoint its own board to Wincanton, which it managed to do only after a decision of the Dutch Court in its favour on 10 May 2010.
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> The current position, therefore, is that Rosneft has drilled down as far as Wincanton in the chain, but needs to set aside the transfer of the FPH shares to Stichting FPH in 2005 if it is to establish control of YHIL and its BVI subsidiaries. In July of this year [2010] it commenced proceedings in Holland designed to achieve this object. On 7 July 2010 it obtained pre-trial attachment of the FPH shares. On 19 July it brought a claim seeking … an order declaring that the transfer of the FPH shares by Wincanton to Stichting FPH in September 2005 was void."[5]

[5] Paragraph 7-8 of Bannister J's judgment.

[16] Lord Grabiner QC, learned counsel for the appellants, agreed with the above and regarded it as a good, concise analysis. It is these proceedings in the Dutch Court, the appellants, if successful, sought the orders from the BVI Court to enforce the outcome of the Dutch proceedings, if in appellants' favour. They contend that if not granted, they fear that they may end up with Pyrrhic victory if successful in the Dutch Court.

Dissipation

[17] I deal first of all with the issue of dissipation. As learned counsel for the respondents submitted in their supplemental skeleton arguments:

> "The Respondents start their supplementary skeleton argument with the issue of jurisdiction. Whilst logically a prior question, unless the Appellants can impugn the learned Judge's finding that there was no risk of dissipation, then this Court need not trouble itself with these important – and difficult – issues. The Respondents therefore suggest that the Court considers [first the] risk of the dissipation...."

[18] At paragraph 26 of his judgment the learned trial judge says:

> "I am … unpersuaded on the evidence that the claimants have demonstrated any risk of dissipation such as would justify the imposition of a freezing order even if I thought that this was a proper case for the grant of one. The same reasoning applies to the grant of some weaker restraining order, such as an order restraining dispositions other than in the ordinary course of business."

[19] I am firmly of the view that from the above passages, the learned trial judge was saying that there was risk of dissipation, but it was not sufficient, or grave enough to justify the imposition of a freezing order. I am fortified in this regard in light of what the learned trial judge said before, at paragraph 20 of his judgment:

> "Then it is said that it is possible that the current management are not prosecuting claims against Yukos Oil parties… the current management's friends and associates. I suppose that this is a form of dissipation, although it is not commonly encountered but it is difficult to see what a freezing order would do to put it right."

[20] Having considered Black Swan Investments ISA v Harves View & Others,[6] which the respondents say was wrongly decided, the learned trial judge went on to distinguish his own judgment from the one at bar. The learned judge said that:

"Black Swan rests upon the willingness of the court, in a case when the defendant to foreign proceedings has assets within its jurisdiction, to act in aid of a claimant's prospective entitlement to a money judgment if successful in the foreign proceedings. It depends upon the assumption that the foreign money judgment will be enforceable, by registration or otherwise, in the court within whose jurisdiction the assets are situated. It is this last feature which founds the jurisdiction."[7]

[21] The learned trial judge, Bannister J then went on to analyse the distinguishing features in the case at bar when he said:

> "In this case Wincanton's primary claim in Holland is to be entitled to be registered as the holder of FPH's shares, although it is true to say that Wincanton and Yukos CIS have a damages claim in the alternative. It was not suggested to me at any stage during the hearing that Yukos CIS/Wincanton are seriously interested in the damages claim. What they want is control...[They] did not draw my attention to or rely upon the damages element of the Dutch claim. This, therefore, is not a claim whose intended outcome, if it succeeds, will be a money judgment and I think that it would be wrong for me to base any part of my decision in this case upon the alternative claim for damages. If Yukos CIS/Wincanton succeed in the Dutch proceedings, they will not be coming to this jurisdiction to register their judgment, because there will be nothing to register. Wincanton will (sic) have become indirectly entitled to the shares in the defendants by virtue of its entitlement to the shares in FPH and there will be neither need nor reason for it to trouble this Court to assist it to obtain redress. For that reason alone, it seems to me that Black Swan principle has no application to the present case."[8]

[22] It seems clear to me that the learned trial judge, in analysing the distinguishing features, was saying as with Black Swan that there must be a prospective entitlement to a money judgment if successful in foreign proceedings, which will be enforceable by registration in the court within whose jurisdiction the assets are situated.

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[6] BVIHCV 2009/339, 23rd March2010.
[7] Paragraph 16 of Bannister J's judgment.
[8] Paragraph 17 of Bannister J's judgment.

[23] Whereas in the case at bar, Wincanton's claim is to be registered as the holder of FPH's shares, if Yukos CIS/Wincanton are successful in the Dutch proceedings, they will not be coming to the BVI to register anything. Wincanton although would have become indirectly entitled to the shares in the defendants by virtue of its entitlement to the shares in FPH. There will be no need nor reason for Wincanton to trouble the BVI Court to assist to obtain redress. The learned judge concluded that the same reasoning seems to him to rule out the grant of a freezing order. He said: "I know of no basis upon which freezing … orders are granted except to prevent the frustration of a money judgment."

[24] I shall examine the appellants' case and the authorities in order to make a determination on this issue.

[25] First of all, Lord Grabiner QC in his submission suggested that the test for dissipation is whether the other side is acting in a way that will or may render the judgment of the Dutch Court valueless. He said in his opinion there is no doubt about that. Lord Grabiner QC then referred to a passage in the judgment of the learned trial judge where he said:

> "Further refinements designed to make the chain of ownership even more complicated and to prevent the assets of the BVI companies from being used to pay off debts in the bankruptcy in Yukos oil were introduced by the ex-Yukos Oil management of Yukos CIS in 2008 and 2009. …Rosneft had yet to appoint its own board to Wincanton, which it managed to do only after a decision of the Dutch Court in its favour on 10 May 2010."[9]

[26] Learned counsel argued that as a result of this, Rosneft was not in a position to control events. Lord Grabiner QC submitted that the learned judge failed to carry forward the analysis (referred to above) in the latter part of his judgment when he dealt with the question of dissipation. He overlooked what he, Lord Grabiner QC, referred to as the elephant in the room, the fact that the whole Stichting structure was an exercise in dissipation.

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[9] Paragraph 7 of Bannister J's judgment.

[27] Learned counsel for the appellants went on to refer to specific instances of dissipation. It concerned a sum of $400 million US Dollars which he said the BVI companies were to get from Yukos Capital, which in turn it had recovered from Rosneft as a result of proceedings in London. Lord Grabiner QC explained this was as a result of an application in London before Mr. Justice Steel. He said that Mr. Feldman (a director of one of the respondents) gave evidence that the respondents would not transfer wealth or diminish the initial value of their assets pending final determination on the question of ownership. His statements were relied on and repeated before the judge.

[28] Learned counsel contended that Yukos Capital was believed to have received the $400 million US Dollars in mid-August, not long after Mr. Justice Steele's judgment. The appellants saw correspondence in confirmation that the money was paid over from Yukos Capital to the respondents and would not be dissipated or transferred away.

[29] On 23rd August 2010 and 22nd September 2010, letters were written by solicitors for the appellants in connection with this payment. Learned counsel for the appellants said at first that the respondents ignored the letter. The appellants then raised the matter in a letter to the Registrar of the Supreme Court in connection with the certificate of urgency. Only then did the respondents deign to have sent a response to them and via the Registrar. This was unsatisfactory, according to the appellants as it referred to the issue of the $400 million in the vaguest and most general terms.

[30] The letter from the solicitor for the appellants on 22nd September 2010 invited the respondents to give an undertaking not to transfer away the approximately $400 million received from Yukos Capital. The respondents have failed to give such an undertaking.

[31] The respondents in evidence have said that they would not transfer wealth or diminish the initial value of their assets pending the final determination of the question of ownership. But yet they refused to give the undertaking. On the one hand they said that there is no intention on the part of the respondents to dissipate so there is no need to give an undertaking. On the other hand, learned counsel for the appellants contended that in light of what the respondents say, if true, it is difficult to understand why they would refuse to give the undertaking. I agree with the contention of learned counsel for the appellants.

[32] In my considered opinion, the appellants put forward the above in order to bolster what they say they fear, because of the way the respondents are acting. They fear that if they are successful in the Dutch Court "the cupboard may be bare"

[33] Learned counsel for the appellants argued that the Stichting structure and the removal of the companies from its original structure, may not be what is usually thought of as dissipation. The court should not be hung up about the dictionary meaning of dissipation. Rather, the court is asked to exercise a flexible, equitable jurisdiction designed with justice in mind. He contended that there are many cases in which the court has explained that the concept of dissipation goes beyond the dissipation of a particular sum of money.

[34] In support of this contention, learned QC referred to Cherney v Neuman.[10] His Honour Waksman QC said:[11]

> "It is trite law that the applicant for such a relief must show that there is a real risk that any judgment in his favour which he may obtain at trial will remain unsatisfied if injunctive relief is refused."

[10] [2009] EWHC 1743 (Ch.)
[11] At paragraph 69.

[35] At paragraph 70 of Cherney the learned judge said:

> "In order to consider that risk, the applicant is often said to have to show a risk of "dissipation" of the Defendant's assets. But a risk that the assets will be hidden or otherwise dealt with so as to make any judgment nugatory will suffice as well ...There needs to be "solid evidence" of this risk".

[36] Is there solid evidence of that risk in the case before us?

[37] Lord Grabiner QC in his submission before us pointed out the following facts which he referred to as dissipation-the sum spent on litigation. Lord Grabiner QC told us that he did not have the figures because the other side had declined to provide them for the years 2008 and 2009. I make the comment, why would the respondents refuse to provide the figures to the appellants unless the respondents have something to hide. However, the figure for 2008 as per Managing Directors Report is as follows:

> "Report Result
> During the period under review the company (Financial Performance Holdings BV Amsterdam) recorded a loss of USD$33,875,350 as set out in detail in the Profit and Loss account. The year's loss is mainly caused by the funding of indemnity trust in the amount of USD$20,000,000 and the consolidation of net asset value of the subsidiary. The reduction in the value of the subsidiary was mainly caused by legal expenses and other professional fees incurred in group companies in connection with efforts to recover and protect the group's assets. "The 2007 loss was mainly caused by legal expenses and other professional fees incurred in group companies in connection with efforts to recover and protect the group's assets"[12].

[38] Learned counsel for the appellants made the comment that in Wincanton's 2008 account there is a sum of $33.875 million US Dollars; of that sum there is a $20,000,000 trust fund which gives the directors an indemnity in connection with litigation. He, Lord Grabiner QC, inferred that the remaining $13 million is litigation expenses. Learned QC also pointed to page 129 of Bundle 3 where he said that the reservoir then was $160 million which does not take into account $400 million (the sum recovered from litigation).

[12] See pages 123 and 129, Bundle 3.

[39] The appellants argued that the setting up of the Stichting is in and of itself a vehicle for dissipation. In their skeleton argument, reference is made to Mr. Hamm's report, the appellants' Dutch law expert[13] .

> "The structures put in place are such that the Appellants' practical ability to control its interest in YHIL and its subsidiaries has been eroded to the point that the assets were not truly at Yukos CIS' and Wincanton's disposal". Hamm describes it as a mechanism for "shielding off control and assets."

[40] Learned counsel contended that the real question is whether there is reason to believe that the respondents will take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case.[14]

[41] Learned counsel for the appellants argued that quite apart from the manoeuvres of the respondents in setting up the Stichting, it is apparent that the respondents have dissipated specific assets. It is common ground that the respondents are expending millions of dollars in pursuing claims against former Yukos Oil subsidiaries, Rosneft and the Russian Federation, not for the benefit of the respondents but for that of third parties, the original Yukos shareholders and legitimate creditors. The respondents argued that this is a gross misrepresentation. Whereas, the appellants argued that the respondents have failed to pursue claims against Yukos Oil entities which the learned trial judge accepted amounted to "a form of dissipation"[15]

[42] As I understand the appellants' case, they are saying that these actions and non-actions are rubbing salt in their wounds because the vast amount of funds used are not the respondents', but rightly belong to the appellants.

[43] If there is evidence to support the above that will certainly amount to dissipation, and I entertain no doubt that there is, at least for the appellants to believe that the

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[13] Vol. 2B Tab 1 paragraphs 19-20.
[14] Derby & Co. Ltd and Others v Weldon and Others (Nos. 3 and 4) [1990] Ch. 65 at 76 per Lord Donaldson.
[15] See paragraph 20 of the learned trial judge's judgment.

respondents will, if the Dutch Court finds in favour of them, take action to ensure that the orders of the Dutch Court are less effective than would otherwise be the case.[16]

[44] This court is not concerned with the probabilities of what will happen but whether there is evidence establishing a real risk that assets may be dissipated.[17]

[45] The appellants in their skeleton arguments argued that the mere fact that the respondents put in place a protective structure, as the appellants "pejoratively" called it, shows that the respondents will fight tooth and nail to prevent the appellants from recovering anything of value if they, the appellants, succeed in being declared the rightful owners of FPH.

[46] The respondents question why this should be the case. They assert that the respondents' management were responding to unique situations.

[47] The respondents in their skeleton arguments pointed to several abuses which prompted, they say, the respondents' management to act in the way that it had.

[48] In 2005, the report prepared by the Special Repporteur, the Parliamentary Assembly of the Council of Europe issued Resolution 1418 concluded, inter alia, that:

> "Intimidating action by different law enforcement agencies against Yukos and its business partners and other institutions linked to Mr. Khodorkovsky and his associates and the careful preparation of this action...the arrest and prosecution of leading Yukos executives suggest that the interest of states action goes beyond the mere pursuit of criminal justice, and includes elements of weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets."

[16] Derby v Weldon (supra note 14).
[17] See Stephen Gee, Commercial Injunctions (5th Edition) paragraph 12.040.

[49] The report concludes that Yukos had been forced to sell off its principal assets by trumped up tax reassessments leading to a total tax burden far exceeding that of Yukos' competitors, and for 2002 even exceeding Yukos' total revenue for that year.

[50] In 2009 the Committee on Economic Affairs and Development reported that:

> "For several years now there have been reports of cases of economically motivated abuses of the justice system, notably in the Russian Federation...The Yukos affair epitomises abuse of the system..."

[51] The respondents in their skeleton submission argued that in the face of what is referred to above, those individuals (Yukos Oil Management), establishing the protective structure, was not only understandable and justifiable, but it was laudable.

[52] Reference was made to Mr. Theede's evidence, the former President and CEO of Yukos Oil which said in part:

> "...it became unequivocally clear to the Yukos management team that it was the Russian Federation's intention to take control of Yukos' assets.... We also had a fiduciary duty to our stakeholders to take such protective measures"

[53] The respondents contended that the managers acted at great personal risk to place the assets into a structure where the rival claims could be assessed under independent legal systems. They had no personal interest in the assets, yet they risked intimidation, politically motivated criminal proceedings and inhumane treatment to preserve the assets.

[54] The respondents asserted that there was ample evidence of the corrupt legal procedures and prosecution before the judge relating to Yukos. But in respect of this, the management did not take the assets for themselves or hide them away but placed them in a structure which ensured that the economic benefit of the assets remain (ultimately) with Yukos CIS by issuing depository receipts. How? I have difficulty in appreciating how this could be the case when it was argued that

the Stichting was set up (Clause 2) to ensure that no financial benefits accrue to the appellants.

[55] The appellants in their skeleton arguments argued that the Stichting articles direct the Stichting Board to pay any moneys derived from FPH and below to the former creditors and to Yukos Oil, that is, Mr. Khodorkovsky and his associates. They try to make it appear to be palatable, the appellants argue, by making it subject to the consent of the depository owner. The holder of the depository receipt is Consolidated Nile whose partnership agreement prevents anyone deriving title from the Russian Tax Assessment from joining the partnership.

[56] Lord Grabiner QC argued that the Stichting Articles and the Partnership Agreement of Consolitated Nile are designed to make it impossible for any of the appellants to recover the assets of these companies for the following reasons:

(1) are based in a reputable jurisdiction (Holland) where claims to the assets can be and are being litigated in front of the independent Dutch Courts.

(2) they have placed the assets under the supervision of auditors and the Stichting Board, the members of which include independent individuals of pre-eminent reputation in commercial and legal fields.

[57] Lord Grabiner QC argued that the position (power) of those eminent people who in effect run the Stichting is an extremely limited one. They have no functional responsibility of what ultimately happens to the monies; that is not a matter for them. It is not the function of the Stichting to have any say whatsoever in how the people who are beneficially entitled to that money may spend it or use it. They, of course, do not sit on any of the Boards. They do not sit on the Boards of the BVI companies for example. They are only officers or members of the Board of the Stichting itself. They have no other function in the companies. They have not only preserved the assets, but allowed hundreds of millions of dollars worth of assets to be collected in from both Rosneft and Yukos related companies.

[58] The respondents in their skeleton arguments argued that the fact that the management took those careful steps to preserve the assets in the face of what was seen by independent observers as a co-ordinated attack by the state involving economically motivated abuse of the system, meant that the respondents would not take illegitimate steps to remove or conceal assets in the face of a judgment from an independent court. The respondents say plainly not. They say in fact, all of the evidence is to the contrary.

[59] Lord Grabiner QC, argued that the appellants' only point on this issue is the failure to give an undertaking which is to be found in Bundle 10[18] where learned counsel for the claimant said:

> "if respondents own evidence[19] was to be believed there should have been no difficulty in giving the undertaking."

[60] At paragraph 108 of the appellants' skeleton arguments, the appellants contended:

> "The respondents seek to rebut the inference of a risk of dissipation by saying that they have taken no steps to dissipate assets in the period that elapsed since the hearing before the judge. This is not persuasive. These respondents are far too shrewd to have engaged in a misstep of that kind pending the hearing of the appeal. But there is no reason to think that once this appeal is determined, the respondents will voluntarily keep their assets within the appellants' reach."

[61] Mr. Berry QC for the respondents said for 5 months they have not dissipated. Why now? The respondents have given an assurance.

[62] Finally, the respondents, in addressing the question of failure to give an undertaking, say in their skeleton arguments that a person who fails to give an undertaking if he does not intend to dissipate his assets is not required to give an undertaking. No authority was cited for this proposition and having regard to my

[18] Claimants Bundle Vol 10 paragraphs 107 and 108.
[19] Feldman's evidence that the respondents would not.

observation above, I am of the view that is a very weak point in the respondents' arsenal.

Discretion

[63] I now consider the question of discretion.

[64] Learned counsel for the respondents, Mr. Berry QC, argued that the judge held that even if he were wrong both on jurisdiction and the risk of dissipation, he would nevertheless have exercised his discretion to decline to grant the relief.[20] This was for three reasons:

(1) that it would be inappropriate to grant the relief against the respondents given that no equivalent had been granted by the Dutch Court. I make the observation that this is a jurisdiction point in that it would only be inappropriate if the learned trial judge did not have the jurisdiction to grant the relief. I will return to this when I consider jurisdiction. There is no evidence that any application for equivalent relief was asked for in the Dutch Court. In fact the evidence is to the contrary;

(2) that the proposed receivership was unworkable; and

(3) it would be wrong in principle to displace validly appointed directors where there is nothing more than a dispute about the ultimate ownership of companies.

[65] The respondents in their skeleton argument referred to the legal principles that should guide a higher court in interfering with a judge's discretion. For that proposition they cite the case of Hadmor Productions v Hamilton.[21] At page 220, Lord Diplock reminds us:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court,

[20] Paragraph 27 of the learned judge's judgment.
[21] [1983] 1 A.C. 191.

> whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only."

[66] The appellants' position, as I see it, as adumbrated in their skeleton arguments, is that the learned trial judge did not exercise any discretion in any event for the simple reason that on the judge's own analysis, he never had any discretion to exercise because he had already concluded that there was no jurisdiction. And, so far as he was concerned, that was really the end of the case. He was simply expressing a hypothetical view as to how he would have or might have exercised his discretion if, contrary to his conclusion, he had a discretion to exercise. No discretion has, in fact, been exercised.

[67] Logic, reason and common sense propel me to accept this submission and I so do.

[68] The appellants, on this point, submit that the learned trial judge having exercised no discretion, this Court is untrammelled in its freedom to exercise its own discretion. I agree unreservedly.

[69] I would add that in my view, the learned trial judge expressed a hypothetical and gratuitous view, gratuitous in the sense that he was not asked or called upon to exercise his discretion in the context of his earlier finding.

[70] The appellants raised another question regarding the exercise of discretion. In their skeleton arguments, they referred to the third witness statement of Mr. Tolstikov[22], in which he said inter alia:

> "Yukos failed, not because of some fanciful alleged conspiracy by the Russian Federation, but because it was a corrupt organisation that evaded and then obstructed government's efforts to enforce the laws."

[22] Vol 30 Exh. NTI.

[71] The appellants, in their skeleton arguments, submitted that the respondents' pretext for introducing what they presumably regard as prejudicial material is to involve the clean hands doctrine as a reason for denying relief.

[72] They argued that there is nothing in the evidence to impugn the conduct of Yukos or Wincanton. They are simply reasserting their ownership of companies and assets which were taken away from them for nil consideration.

[73] Finally, the appellants contended that in order for their conduct to be relevant, there would have to be an immediate and necessary relationship between the improper conduct and the relief sought.[23] I agree.

Jurisdiction

[74] I now deal with the issue of jurisdiction.

[75] The respondents in their skeleton arguments contended that the appellants do not have a legal or equitable right which can be enforced in the BVI Court or enforced by a final judgment against these respondents.

[76] There is no cause of action at all against the respondents, and no basis on which the defendants to the substantive Dutch proceedings could be served with proceedings in the BVI.

[77] The respondents, for that proposition, place very great reliance on Siskina (Owners of Cargo Lately Laden on Board) and Others v Distos Compania Naviera S.A.[24]

[23] Supra note 14 at paragraph 2.037).
[24] [1979] A.C. 210.

[78] In The Siskina[25] Lord Diplock explained-

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or not include a final injunction.
>
> "Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton L.J. in North London Railway Co. v Great Northern Railway Co. (1883) 11 Q.B.D. 30, 39-40, which has been consistently followed ever since."

[79] Learned counsel, Mr. Berry QC, in his argument said that is plainly a decision about the scope of the English High Court's powers to grant interim relief which powers derive from an English legislative provision which is materially identical to section 24(1) of the West Indies Associated Supreme Court (Virgin Islands) Ordinance.[26] The Siskina has been applied in many decisions including Koch v Chew,[27] Sibir Energy Plc v Gregory Trading SA et al.[28]

[80] The respondents in their skeleton arguments argued that there can be no question that The Siskina[29] places limits on the jurisdiction of the High Court to grant interim relief. It is the leading authority on the ambit of the jurisdiction to grant interim relief, including freezing orders. And it is binding authority for the proposition that section 24(1) of the West Indies Associated Supreme Court

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[25] At page 256 letter C.
[26] Cap. 80 Revised Laws of the Virgin Islands 1991.
[27] (1997-8) OFLR 537.
[28] BVIHCV 2005/0174.
[29] Supra note 24.

(Virgin Islands) Ordinance[30] can only be invoked in support of a "legal or equitable right which [the court] has jurisdiction to enforce by final judgment". The Siskina[31] simply cannot be side stepped in the way the appellants wish.

[81]` I begin my analysis of The Siskina[32] bearing in mind that this is a case which dealt with the question of "serving out of the jurisdiction" under order 11 of the old Rules of Court.[33] The case at bar is not such a case.

[82] The appellants in their written submission contended that Black Swan [34] establishes that the Courts of the BVI have jurisdiction to grant interim preservative relief over defendants located in the BVI where the substantive cause of action is being litigated in a foreign court. It follows, they argued, that there is jurisdiction in this case to make a freezing order, or to appoint a receiver, in aid of the Dutch proceedings.

[83] As I have said above, the respondents contended that Black Swan was wrongly decided. As a result the courts of the BVI have no jurisdiction to grant interim relief where the substantive cause of action has to be litigated abroad. The appellants argued if this were so it would leave a gaping lacuna in the remedial armoury of the BVI courts.

[84] In Black Swan, Bannister J[35] found the reasoning of Lord Nicholls in Mercedes Benz A.G. v Leiduck (P.C.)[36] to be "compelling" and is described by the learned authors Dicey, Morris and Collins as "powerful". With reference to Lord Nicholls judgment, 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

[30] Supra note 24.
[31] Supra note 24.
[32] Supra note 24.
[33] Rules of the Supreme Court.
[34] Supra note 5.
[35] At paragraph 11.
[36] [1996] A.C. 284.

judgment which does not depend upon a pre-existing cause of action. Bannister J. could find no logical distinction between the grant of such a relief in aid of a domestic money judgment and the grant in aid of a foreign one, unless the domestic court would decline to enforce it.

[85] Bannister J boldly concluded in Black Swan:

> "In my opinion", given the lacuna in the authorities to which I have referred, I propose to fill it in this jurisdiction by respectfully adopting the reasoning of Lord Nicholls in Mercedes Benz. I hold accordingly that I have jurisdiction not only in the strict but also in the broad sense to continue the injunction originally granted ..."

[86] In my opinion, the learned judge seemed to take a step back in the case at bar by following his own decision in Elena Rybolovleva v Dmitri Rybolovlev[37] which, in my opinion, can be distinguished. In Rybolovlev, I agree with the judge's ruling that a wife whose husband's shares, in his name, registered in a BVI company, had no claim against that company for rectification of its register of members; therefore there was nothing to be registered on behalf of the wife in the BVI. Whereas in the instant case, the BVI court will be able to enforce the proceedings of the Dutch court.

[87] In my considered opinion, the learned trial judge when he confined his analysis to a "money judgment" fell into error. At paragraphs 17-18 he states:

> "In this case, Wincanton's primary claim in Holland is to be entitled to be registered as the holder of FPH's shares, although it is true to say that Wincanton and Yukos have a claim in damages in the alternative. It was not suggested to me at any stage during the hearing that Yukos CIS/ Wincanton are seriously interested in the damages claim. … This, therefore, is not a claim whose intended outcome, if it succeeds, will be a money judgment …".

[88] The appellants argued, realistically, that there will be cases even without a money judgment, in which it will be necessary to preserve assets within the jurisdiction

[37] BCIHCV 2008/0403.

pending the outcome of overseas proceedings. They contended that the respondents do not agree with the learned trial judge's analysis on this point.

[89] The respondents, in their skeleton arguments contended:

> "The judge may be forgiven for referring to the most common type of foreign judgment instead of using a term broad enough to encompass all types of judgment which might come out of a foreign court and be enforced by the BVI".

[90] In Mercedes Benz[38], Lord Nicholls of Birkenhead, asserted:

> "I regret that I find myself constrained humbly to advise Her Majesty that this appeal should be allowed. The first defendant's argument comes to this: His assets are in Hong Kong, so the Morocco court can't reach them; he is in Monaco, so the Hong Kong court cannot reach him. That can't be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.
>
> "In order to explain why that is not the law, it is necessary to separate clearly the two questions which arise on this appeal. Both are questions of law. The first is whether the Hong Kong court ever has jurisdiction, in the sense of legal power, to grant a Mareva injunction in aid of a judgment being sought in a foreign court. If the Hong Kong court has such jurisdiction, the second question is whether a plaintiff in such a case may serve proceedings claiming a Mareva injunction on a defendant outside the jurisdiction, in the territorial sense, of the Hong Kong Court. Failure to distinguish between these two meanings of jurisdiction is a fruitful source of confusion."

[91] At page 306 Lord Nicholls opined:

> "Once it is borne in mind that a Mareva injunction is a protective measure in respect of a prospective enforcement process, then it can be seen there is a strong case for Mareva relief from the Hong Kong court being as much available in respect of an anticipated foreign judgment which would be recognised and enforceable in Hong Kong....Courts are not so insular that they enforce only judgments obtained in proceedings conducted by themselves."

[92] At page 308 Lord Nicholls informed us that when The Siskina was decided, Mareva injunctions were in their infancy. Since then the scope of Mareva relief

[38] Supra note 37 at page 305.

has broadened. These developments in a jurisdiction which even now is in a state of development make it easier than formerly to see the Mareva jurisdiction in this wider international context.

[93] Lord Nicholls is fortified in this approach by observations subsequently made in the House of Lords. Lord Diplock's categorisation of the circumstance in which alone an interlocutory injunction may be granted by English Courts has been queried by many distinguished Law Lords. Lord Nicholls then reasoned:[39]

> "These are highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875."

[94] The appellants, of course, adopt Lord Nicholls' approach that the Court has power to make a freezing injunction in aid of foreign proceedings.

[95] The respondents referred to this as "judicial heresy" to call in aid a dissenting speech to support their case.

[96] At first sight, this appears to be sound but on a careful analysis, there is, in my judgment, ample legal support for the adoption by the appellants of Lord Nicholls' approach.

[97] The difference between the majority and Lord Nicholls concerned the question of leave to serve out. The observations of Lord Nicholls referred to above were not decided on by the other judges of the Privy Council. However, Lord Mustill for the majority made this comment on the observation of Lord Nicholls' approach. He said:

> "The second question therefore does not arise for decision and their Lordships prefer to express no conclusion upon it. They do however, think it proper to make this observation. It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no

[39] At page 308 of Mercedes Benz A.G. v Leiduck (P.C.) [1996] A.C. 284

> substantive proceedings are brought against him in the court, be it in Hong Kong or in England, possessing such jurisdiction, an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service." (My emphasis)

[98] I make the observations that Lord Nicholls' analysis could never be regarded as contrary to The Siskina. We must be reminded that The Siskina dealt mainly with a serving out application under Order 11. It never dealt with service on a defendant who is resident within the jurisdiction, which Lord Nicholls' analysis was all about.

[99] The Siskina is a House of Lords authority and of course followed by many courts worldwide. It is therefore very persuasive authority. The Mercedes Benz case is a Privy Council decision which is binding on our court.

[100] Lord Grabiner QC contended that there is no post-Siskina decision in England about whether injunctive relief can be obtained at Common law against a resident defendant in aid of foreign proceedings. He then submitted:

> "Courts in jurisdictions where there is no equivalent Section 25[40] therefore must treat earlier decisions with great caution. See Fourie v La Roux[41]".

[101] In Solvalub Ltd v Match Investments Ltd,[42] Sir Godfrey Le Quesne QC delivering the judgment of the Court of Appeal in Jersey, after pointing to the critical differences in the course taken in the proceedings in Mercedes and Solvalub, in the former, said that Mareva injunction was issued in Hong Kong. The Hong Kong writ was served outside the Hong Kong jurisdiction with the leave of the Hong Kong Court. In the Solvalub case, the order of Justice was served not only on the bank but also upon the Respondents in the jurisdiction. He also

[40] Civil Jurisdictions and Judgments Act 1982.
[41] (2007) 1 WIR 320 at page 333 letter C-D per Lord Scott.
[42] [1998] I.L.Pr. 419.

said that no order for service out of the jurisdiction was ever made nor did the Appellants ever seek such an order.

[102] At paragraphs 30-31 of Solvalub Sir Godfrey said:

> "Jersey is an important financial centre. Geographically it is very close to the United Kingdom. For practical and especially for financial purposes it is very close to many more countries all over the world. There are dozens of funds which are constantly encouraging people who have money to place it here...The figure is enormous.
>
> "If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of duty of comity which courts in different jurisdictions owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success".

[103] I make the observation that the British Virgin Islands is a very important financial centre, just as Jersey is. I therefore regard Sir Godfrey's comments about the Royal Courts of Jersey lending its "aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries" as very much on point so far as the BVI Court is concerned. It is true that the respondents are not sued in any other country but that does not, in my view, negate the reasoning of Sir Godfrey.

[104] The respondents are resident companies in the BVI. The BVI jurisdiction is responsible for the being and the life of the respondents. Having regard to the abovementioned authorities, I have no doubt that the BVI Court has jurisdiction, in the strict sense, over the respondents. The substantive action is before the Dutch Court. I have no knowledge whether or not the Dutch Court has jurisdiction over the respondents. If the appellants are successful before the Dutch Court, any claims which they may have against the respondents would be meaningless if the

BVI Court fails to grant any relief, and if the Dutch Court is unable to grant any relief to the appellants. "That can't be right".

[105] "That is not acceptable today."[43] . As Lord Nicholls cautioned in Mercedes Benz:[44]

> "It is difficult to see any reason in principle why, in this type of case, where the defendant is within the territorial jurisdiction of the court [as the respondents in this case are], the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute. It would be odd if the court should adopt the attitude of drawing back and declining to give any relief, whatever the circumstances, unless the court were seized of the whole dispute [as in this case]. That would be a pointlessly negative attitude, lacking a sensible basis. That is not the law."

[106] The appellants contended that there was no pre-existing binding authority on the point. It follows that Bannister J. was right to hold in Black Swan that it was an open question whether the BVI Court had jurisdiction to grant interim relief against BVI resident companies.

[107] The respondents contended that the matter should be left to the legislature. Personally, I am sympathetic to this contention. I had expressed a similar view in my dissenting judgment in Newton Spence v The Queen.[45] However, having regard to powerful voices to the contrary and in particular to the issues in the case at bar, I am prepared to go along with the view.[46]

[108] The respondents in their skeleton submissions argued strenuously why interim relief should not be granted to the applicants in this case. They argued that the BVI Court can only grant interim relief if it would have jurisdiction to grant final relief, whether or not the proceedings are being held in the BVI or abroad.

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[43] Mercedes Benz A.G. v Leiduck (P.C.) [1996] A.C. 284 at page 305 per Lord Nicholls.
[44] Supra note 35 at page 311 C-D per Lord Nicholls.
[45] Criminal Appeal No. 20 of 1998 (Saint Lucia).
[46] See for instance Jeanette Walsh v Deloitte & Touche Inc. [2001] UKPC 58 at paragraph 22 per Lord Hoffman and section 24.

[109] The respondents contended that the touchstone for granting any relief therefore, is whether there is a legal or equitable right which the BVI Courts have jurisdiction to enforce.

[110] The respondents argued:

> "The Appellants are seeking to apply well established jurisprudence, (Sic) flowing from the decision of the Privy Council in the Siskina (Supra) which has been consistently applied in the Courts of the Eastern Caribbean for many years".

[111] I make the comment that The Siskina is not a decision of the Privy Council, but rather a decision of the House of Lords. It has been consistently applied by the Courts of the Eastern Caribbean and therefore it would be very difficult, if not impossible, not to follow The Siskina.

[112] The respondents argued that the appellants are inviting the Court to take an extraordinary and unprecedented step by granting interim relief where there is no cause of action against these respondents, no cause of action at all which could be litigated or lead to final relief in the BVI and no interim relief has been sought.

[113] They contend that the appellants' ownership of the companies is not in issue in the Dutch proceedings. It is only the ownership of FPH. The real question, according to the respondents, is whether the BVI Court has jurisdiction to appoint an interim receiver (or grant a freezing order) where the applicant has nothing more than a potential commercial interest in the respondents' affairs, but there is no cause of action against the respondents and no possibility of any relief being granted against anyone in the BVI.

[114] In support of this contention, the respondents referred to Koch and Chew[47]. Georges J opined:

> "Further, the plaintiffs, in my opinion have failed to show a cause of action which is justifiable [justiciable] in this jurisdiction to which a Mareva injunction can properly attach. A Mareva injunction can only be granted if

[47] 1997-8 OFLR 537.

> it is ancillary to a substantive claim and that substantive claim must satisfy the requirements of Order 11 Rule 1 RSC which permits service of a writ or notice of a writ out of the jurisdiction.[48].
> .....The Mareva itself, as the authorities clearly show, cannot stand by itself. It must be ancillary to a substantive claim. Where, as here the real defendants do not reside in the jurisdiction, leave is necessary to serve the writ or notice of it , out of the jurisdiction and it is incumbent on the plaintiffs to establish a cause of action which falls within the ambit of Order 11 Rule 1 in order that a Marerva may be granted in the first place".

[115] In Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd. and Others,[49] Lord Browne Wilkinson opined:

> "I can see nothing in the language employed by Lord Diplock (or later cases in this House commenting on the *Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English Court...the relevant question is whether the English court has power to grant the substantive relief not whether in fact it will do so. Indeed, in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court." (My emphasis)

[116] One of the orders sought by the appellants from this Court is to allow the appellants application for an interim receiver or freezing order with ancillary disclosure.

[117] Should this Court appoint a Receiver in light of the above?

[118] The learned trial judge in refusing the application to grant a Receiver said at paragraph 26 of his judgment:

> "I am therefore unpersuaded on the evidence that the claimants have demonstrated any risk of dissipation such as would justify the imposition of a freezing order even if I otherwise thought that this was the proper case for the grant of one. The same reasoning applies to the grant of some weaker restraining order, such as an order restraining dispositions other than in the ordinary course of business."

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[48] See Siskina (Owners of Cargo Lately Laden on Board) and Others v Distos Compania Naviera S.A. [1979] A.C. 210.
[49] [1993] A.C. 334 at page 342.

[119] This Court has decided that there is sufficient evidence in support of the dissipation of assets.

[120] It seems to me that the learned trial judge was persuaded to come to a different conclusion because he was influenced by the professionalism of the personnel who supervised the board of Stichting FPH. At paragraph 25, the learned judge said:

> "Finally, I bear in mind that all the assets of FPH and its subsidiaries are under the overall supervision of the board of Stichting FPH, one of whose members is Professor de Guillenchmidt, a former dean of the Faculty of Law of the University of Paris. Wherever his sympathies may lie (and I am not concerned with them), it seems to me in the highest degree improbable that he would permit the management of the group of companies owned by Stichting FPH to dissipate or peculate their assets. There is no more reason to believe that either of the two members of the board would stand by and allow that to happen".

[121] The appellants do not dispute the professionalism or integrity of the members of the Stichting board, but they contend that their hands are tied and can only act in accordance with the Articles of Stichting FPH.

[122] Lord Grabiner QC submitted that realistically there will be cases where even without a money judgment it will be necessary to preserve assets within the jurisdiction pending the outcome of overseas proceedings. He contended that if Wincanton wins in Holland, there is absolutely no reason to think that the current directors will go quietly.

[123] Learned counsel for the appellants argued that it can also be assumed that some individuals will, if they can, refuse to recognise or give effect to the Dutch judgment. So in order to be effective, it will be necessary to secure recognition of the Dutch judgment in the BVI.

[124] Mr. Berry QC explained that a large part of the business of Yukos Hydrocarbons (first named respondent) is bringing litigation to recover debts owed by Rosneft . For example, Yukos Hydrocarbons or one of its subsidiaries made a loan of $145 million to Yukos International BV. Yukos Hydrocarbons also made a loan of $400

million to Yukos Capital Luxembourg. Yukos Capital Luxembourg then "unlent" the same money ($400 million) to Yukos Negli Gas which sum was in turn lent to Rosneft.

[125] The respondents in their skeleton submissions alleged that Rosneft is responsible for the payment of these debts. It is not paying. Roseft is fighting these claims, in a cunning way and it is trying to cut off these claims by bringing applications for the appointment of a receiver, disclosure and freezing orders.

Receivership

[126] The learned trial judge in his judgment at paragraph 29 said:

> "Even if I had taken the view that I did have jurisdiction to grant interim relief upon this application and that the evidence otherwise justified it, I would not have appointed a receiver and certainly not a receiver with the powers sought to be granted to him in the claimants' application".

[127] The appellants in their skeleton arguments argued that the contentions of the respondents relying on the reasons given by the judge, that the appointment of a receiver would be unworkable is misconceived.

[128] The appellants contended that confusion seems to have arisen in relation to a reference to Kerr and Hunter on Receivers an Administrators[50] where a receiver is appointed, not just for receiving rents and such profits, or getting in outstanding property, "but also for carrying on or superintending a trade, business or undertaking".

[129] But the respondents do not carry on business in this sense. They exist for the sole purpose of paying liabilities and getting in assets, essentially in litigation involving other companies in the Yukos or Rosneft group. The role of the receiver would be to protect the interests of those ultimately found to have ownership of the

[50] (19th Edition) Chapter 9.

respondents. This is not like assuming the day to day running of a commercial business.

[130] Some of the issues raised in this appeal are complex and cannot be resolved on an interlocutory application. One such example is the allegation of loans which Rosneft is owing and its efforts to evade payments by bringing the present applications.

[131] These matters could only be resolved at a full trial with expert evidence, cross examination of witnesses etc.[51]

[132] For the foregoing reasons the appeal is allowed. The judgment and orders of the learned trial judge are hereby set aside. In the exercise of my discretion, it is hereby granted an order for disclosure of the current financial condition of the respondents together with details of their financial transactions from 30th September 2005 to present, and a freezing order in favour of the appellants.

[133] I would order costs to the appellants to be agreed or assessed.

[134] The respondents' application for payment on account of their costs is dismissed.

Albert J. Redhead
Justice of Appeal [Ag.]

[135] KAWALEY J.A. [AG.]: In my judgment the appeal in this matter must be dismissed on the grounds that the learned judge did not err in law or in principle in exercising his discretion to refuse to grant the interim relief sought by the appellants in the court below and in striking out their rectification claim. I would

[51] See American Cyanamid Co. v Ethicon Ltd. [1975] A.C. 396 at 407 per Lord Diplock.

award the respondents two-thirds of the costs below in respect of the costs of the appeal, pursuant to CPR 65.13.

[136] The question of whether the British Virgin Islands Commercial Court ("the BVI Court") had (personal and/or territorial) jurisdiction in the strict sense was fully argued by counsel on the appeal, although ultimately (for my part) it was not pivotal in light of my primary findings that the generally recognised factual pre-conditions for exercising such jurisdiction (subject-matter jurisdiction) were not on the evidence before the trial judge made out.

[137] There can be little doubt that whenever the BVI Court is capable of exercising in personam jurisdiction over a defendant, the statutory power to grant an interlocutory injunction or appoint a receiver "…in all cases in which it appears to the Court or Judge to be just or convenient…"[52] may potentially be exercised in support of a claim primarily pursued in foreign proceedings in a general sense. The learned judge's omission to explicitly record a finding to this effect does not to my mind suggest that he failed to consider this issue, far less that he resolved this issue against the appellants.

[138] For the reasons cogently articulated by Bannister J. himself in the Black Swan case,[53] by Lord Grabiner for the appellants in the present appeal and by Redhead J.A. [Ag.] in his judgment delivered in the present appeal, the BVI court clearly has personal or territorial jurisdiction in the strict sense to grant a freezing injunction or appoint a receiver in respect of the local assets of BVI resident companies in aid of foreign proceedings. Assuming a risk of dissipation can be established, the factors which will make it just or convenient to exercise the jurisdiction to grant such relief will depend upon the specific facts of each case. The judicial discretion to exercise this statutory power is not completely unfettered; the scope of the jurisdictional competence to exercise the statutory discretion is

[52] Section 24(1), West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80 Revised Laws of the Virgin Islands 1991.

[53] Black Swan Investment I.S.A. v Harvest View Limited and Another, BVIHCV 2009/399, dated March 23, 2010.

delineated by common law rules governing the circumstances in which such interim relief may be granted.[54]

[139] Establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration, recognition or otherwise) by the local court against the local defendant. Although ordinarily an interlocutory injunction is sought in support of a substantive claim before the court to which the relevant application is made, in the present context this requirement had to be met by reference to (a) the substantive claim before the foreign court, and (b) the prospect that the applicant will obtain a foreign judgment which will entitle him to execute a money judgment against, or control pursuant to a proprietary judgment, the local assets sought to be frozen. In the present case the reasons why the jurisdictional (in the broader sense) requirements were not met for exercising the discretion to grant injunctive relief may be summarised as follows. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in aid of either relief the claimant is likely to obtain from the local court or from a competent foreign court. The relief the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets nor establish a proprietary claim in respect of any of such assets. The relief sought will entitle them to control Stichting FPH and only indirectly the shares of the BVI respondents; this is presumably why a pre-trial attachment was granted by the Dutch court on 7th July 2010, in respect of the FPH shares.

[140] In some cross-border cases it may well be irrelevant that equivalent interim injunctive relief has not also been sought in the primary litigation court; for instance

[54] This proposition was recently affirmed by the Judicial Committee of the Privy Council in its advice delivered on 21st June 2011 in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited et al [2011] UKPC 17 at paragraph 57 (per Lord Collins). However this decision also supports the view that whether or not an injunction is granted ultimately depends on the demands of equity in light of the facts of each case rather than whether the facts fit into established categories for the grant of the relevant relief.

a local judgment may be in prospect in respect of a claim which cannot be asserted in the foreign proceedings. In the present case, having struck-out the rectification of the register claim, the judge was correct to hold that the failure of the appellants to seek equivalent interim injunctive relief in the Dutch proceedings against the persons who presently control the BVI respondents was a further discretionary factor which mitigated against granting the relief sought. This omission created the distinct impression that far from being asked to assist the Dutch Court, the BVI Commercial Court was being invited to grant relief which would in practical terms impact on legal actors who were before the Dutch and not the BVI Court. Moreover, the BVI Court was being asked to grant such relief, purportedly in aid of the Netherlands proceedings (or a judgment which might be obtained from the foreign court), in circumstances in which it was unclear that the Netherlands court itself would grant similar relief.

[141] For the reasons further elaborated upon below, I am regretfully unable to concur in the conclusion reached by Redhead J.A. [Ag.] in his judgment herein that the appeal should be allowed, despite concurring with much of his reasoning on the most important broader issues of law raised on the present appeal.

Jurisdiction (in the personal or territorial sense) to grant injunctive relief

[142] It was common ground that that the respondents are subject to the personal jurisdiction of the BVI courts and that jurisdiction in this strict sense exists to grant the injunctive relief sought. It is impossible to sensibly read the judgment which forms the subject of the present appeal as wrongly concluding that no such personal jurisdiction exists.

The need for the interim injunctive relief to be supportive of a substantive cause of action: the Black Swan principle (jurisdiction in the broader or subject-matter sense)

[143] For the reasons set out in the Judgment of Redhead J.A. [Ag.]; I agree that the judge erred in law to the extent that he may be regarded as having found that he had no jurisdictional competence to grant interim relief in support of a foreign cause of action which was not designed to obtain a money judgment. It does not automatically follow from the preliminary finding that jurisdictional competence potentially exists to grant interim relief in support of an anticipated foreign non-money judgment, however, that the factual grounds for exercising such jurisdiction have been made out. This is how Bannister J, having decided to strike out the rectification claim and so leaving no cause of action against the respondents within the jurisdiction for the interim relief claim to "support", dealt with the issue:

> "[16] In effect, that leaves the 'free standing' Black Swan jurisdiction as the only basis for the grant of any of the relief sought by the claimants. Black Swan was a pure freezing order case based upon the fact that the claimant was pursuing in South Africa a money claim against the owner of two companies incorporated in the BVI. The order made by the Court of Appeal and continued by myself froze the assets of the two BVI companies in support of any money judgment which the claimant might obtain in South Africa. Black Swan rests upon the willingness of the court, in a case where the defendant to foreign proceedings has assets within its jurisdiction, to act in aid of the claimant's prospective entitlement to a money judgment if successful in the foreign proceedings. It depends upon the assumption that the foreign money judgment will be enforceable, by registration or otherwise, in the court within whose jurisdiction the assets are situated. It is this last feature which founds the jurisdiction."

[144] The judge apparently made two key findings on this issue: (1) the court can only grant interim relief to freeze assets against which the applicant may (if he succeeds in the foreign proceedings) be able to enforce a foreign money judgment; and (2) the existence of assets within the jurisdiction against which the applicant will be able to enforce his foreign judgment is the foundation of jurisdictional competence to grant the interim relief. In my judgment (and this point was conceded), finding (1) was clearly wrong, if one is bound to conclude that

such finding was made at all. As is compellingly submitted in paragraph 44 of the Skeleton Argument of the claimants on appeal and leave to appeal:

> "…The reason for this is obvious: a court will be more, not less, willing to prevent the disposal or dissipation of assets which, depending upon the judgment in the foreign claim, might turn out to be owned by one party rather than the other, in comparison with assets that clearly belong to one party but which may potentially be used to satisfy a damages award…"

[145] However, in my judgment, finding (2) was the crucial finding and the only operative finding which the judge clearly made. He essentially found that interim relief could only be granted in support of a foreign cause of action in circumstances where there were assets within the jurisdiction against which such foreign judgment might be enforced. In the present case he correctly found there were no assets within the jurisdiction against which any judgment the appellants might obtain could potentially be enforced. To my mind, he focused on the money judgment issue alone simply because money judgments were in issue in the Black Swan case upon which reliance was placed. However, his substantive finding was that no judgment which the appellants were likely to obtain would ever be enforced in the BVI against the respondents' assets at all. Bannister J most pivotally stated as follows:[55]

> "[17]…If Yukos CIS/Wincanton succeed in the Dutch proceedings, they will not be coming to this jurisdiction to register their judgment, because there will be nothing to register. Wincanton will have become indirectly entitled to the shares in the defendants by virtue of its entitlement to the shares in FPH and there will be neither need nor reason to for it to trouble this Court to assist it to obtain redress. For that reason alone, it seems to me that the Black Swan principle has no application to the present case."

[146] It is accordingly an abstract and immaterial criticism of the judgment below to complain that the Black Swan principle was wrongly limited to applications for interim relief in support of proceedings in which a foreign money judgment was likely to be obtained. The crucial finding of the trial judge was that there was an insufficient factual nexus between the appellants' asserted rights of ownership

[55] At paragraph 17 of his judgment.

over the FPH shares (with an alternative claim in damages not asserted against the BVI respondents at all) and the asserted right to freeze and/or appoint a receiver over the respondents' assets. The appellants claimed merely a right to indirectly control the respondents; the foreign cause of action did not give rise to potential BVI proceedings to enforce (through whatever means) the foreign judgments against the respondents' assets. As the respondents submitted, a similar approach was taken by the Bahamian Court of Appeal in Meespierson (Bahamas) Limited and Others v Grupo Torras SA and Another.[56]

[147] I find that the substance of the judge's legal findings about the inapplicability of the Black Swan principle to the present case was sound. This in no way undermined the legal analysis in the Black Swan case itself, with which I concur, on the proper approach to the jurisdiction to grant interim relief in support of foreign proceedings. The proper question is not whether a freezing injunction is sought 'in support of' either a local cause of action or a foreign cause of action which has a local equivalent in any strict sense. Rather, the relevant enquiry is whether or not the claimant may obtain a foreign judgment which may be enforceable by whatever means against local assets owned or controlled by the defendant. It was fairly open to the judge to find evidentially that the nature of the appellants' claims in the Dutch proceedings were not likely to give rise to any entitlement under BVI law to enforce any judgments obtained against the assets of the BVI respondents. It was equally open to him to find in the alternative that there was no material risk of the respondents' assets being dissipated in the interim period before trial in the Dutch proceedings.

[148] The Black Swan case[57] was specifically concerned with the granting of a freezing injunction in support of a foreign cause of action which had no local equivalent, in circumstances where it was clear that the claimant might obtain a foreign money udgment which would be enforceable against BVI assets. Bannister J. held that

[56] (1999) I.T.E.L.R. 29.
[57] Supra note 53.

the jurisdiction to grant such relief existed in reliance on the dissenting opinion of Lord Nicholls in Mercedes Benz v Leiduck.[58] Lord Nicholls rejected the notion that that an interim freezing injunction could only be granted if it supported a local cause of action, holding that in truth Mareva injunctions were granted in aid of prospective judgments, not in aid of substantive causes of action. This is why in the present case the judge rejected the notion that Black Swan jurisdiction to grant a freezing injunction existed: his central factual finding was that no prospect of the appellants seeking to enforce a judgment against the respondents' assets had been demonstrated. Not only was this view of the evidence properly open to Bannister J., a contrary finding would have been perverse.

[149] This conclusion does not rule out altogether the possibility that, in appropriate cases, interim relief might be granted to an applicant in support of a foreign claim against third parties to the foreign proceedings who are resident in BVI. This would have to be based on the grounds that such relief is necessary to prevent the judgments which the applicant hopes to obtain being rendered nugatory. However, it is difficult to envisage circumstances in which such relief would be available in the absence of the ability of the claimant to either (a) enforce the relevant foreign judgment against the third parties' assets, or (b) assert a local cause of action likely to result in a local judgment enforceable against third parties to the foreign litigation who are within the territorial jurisdiction of the local court. A more flexible approach to freezing injunctions would potentially ride a coach and horses through fundamental notions of separate corporate legal personality. It would also potentially justify routine interference with the rights of companies, indirectly connected with shareholder disputes involving their affiliates, to freely control their assets. The appellants' submission that the broad terms of the statutory power to grant injunctions and appoint receivers gives the court an unfettered discretion to grant such relief on an interim basis, unconstrained by established common law jurisdictional parameters, must be rejected.

[58] [1996] 1 A.C. 284.

[150] Moreover, it is a fundamental principle of British-based company law that a company's management is not only entitled but also legally obliged to operate on the assumption that the duly registered shareholders are the owners of the shares. If a dispute about the ultimate or intermediate ownership of a company's shares was itself sufficient to justify freezing a company's assets pending the resolution of the dispute at the instance of a prospective alternative ultimate or intermediate owner, the vital business activities of operating subsidiaries would all too frequently grind to a halt. The present application for interim relief is not in real terms based on a desire to preserve assets from a risk of dissipation pending trial. It is in substance (as Bannister J effectively found) an attempt to prevent the registered shareholders of the respondents from exercising control of the respondents until the dispute over their own ultimate and/or intermediate ownership is resolved. The appellants' desire to achieve this goal is commercially logical and may ultimately (through success in the Dutch proceedings) be legally vindicated. But at this juncture the appellants' goal is legally inadmissible in all the circumstances of the present case.

[151] To the extent that the evidence did not support the existence of an important precondition for the grant of the interim relief sought (a cause of action within or without the jurisdiction likely to lead to a judgment which would be enforceable against the respondents' assets within the jurisdiction), the judge was right to conclude that he had no jurisdictional grounds for exercising his discretion in favour of granting the relief sought.

Was there sufficient evidence of a risk of dissipation of assets to justify granting the relief the appellants sought?

[152] The ultimate ownership dispute which gave birth to the present litigation (and related proceedings elsewhere) brings into play policy concerns which modern-day commercial courts in the western hemisphere are rarely required to grapple with.

The Russian state-controlled Rosneft seeks (through the appellants) to assert rights of ownership based on traditional 'western' company law rules. It acquired ownership of Yukos CIS (the 1st appellant) after its former owner was convicted of tax fraud, the company placed into bankruptcy and its assets auctioned off. Former employees of the jailed former ultimate private owner of the subsidiaries of Yukos Oil sought to ring-fence the Group's underlying assets (including the BVI-incorporated respondents 1-3). They seek to contend that the manner in which the current ultimate owners acquired their purported ultimate control is so incompatible with human rights-derived notions of private property rights that it invalidates the appellants' purported rights altogether.

[153] This underlying dispute falls to be resolved by the Netherlands courts, not the BVI courts, and the judge expressly disregarded this intriguing background for the purposes of his determination of the issues before him. Assuming all other jurisdictional grounds for granting the interim relief sought were made out, the factual matters requiring determination could fairly be distilled into one remaining evidential question: was there sufficient evidence of a risk of dissipation of assets to which the appellants might ultimately become entitled but which were currently owned or controlled by the respondents to justify the Court exercising its broad discretionary powers to grant interim conservatory injunctive relief in support of foreign proceedings in which the appellants had a good arguable case?

[154] Although the 'political' background to the case was explicitly disregarded by the judge, he clearly found that the character and purpose of the respondents' core operating functions were crucially relevant to the way the evidence of risk of dissipation relied upon in support of the application ought properly to be interpreted and understood. In this respect Bannister J's approach to the evidence was, in my judgment, fundamentally sound. At pages 3-5 of his judgment, he summarised this aspect of the evidence as follows:

i. "[3] The essential facts for present purposes are that pressure built up on Yukos Oil in early 2004. In response, its principal subsidiary was auctioned off in December of that year. In May 2005, Mr

Khodorkovsky, the principal behind Yukos Oil, was convicted of tax fraud and sentenced to eight years in prison. Seeing the net closing in, the management of Yukos Oil in September 2005 arranged that one of its subsidiaries, Yukos CIS, should transfer its own wholly owned subsidiary, YHIL, to Wincanton, another wholly owned subsidiary of Yukos CIS brought into existence for the purpose. Wincanton then transferred YHIL (and with it YHIL's subsidiaries Fair Oaks and Glendale) to Wincanton's Netherlands-incorporated subsidiary Financial Performance Holdings BV ('FPH'). The outcome may be represented thus:

1. Yukos CIS (Armenian)
    a. ↓
2. Wincanton (Dutch)
    a. ↓
3. FPH (Dutch)
    a. ↓
4. YHIL (BVI)
    a. ↓
5. D2 and D3 (BVI)...

ii. [7] As is obvious from this summary of events, Rosneft must have known when it purchased Yukos CIS of the structure which I have summarised above and that it could have no control over YHIL or its subsidiaries unless it could undo the interpolation in September 2005 of Stichting FPH. Further refinements designed to make the chain of ownership even more complicated and to prevent the assets of the BVI companies from being used to pay off debts in the bankruptcy of Yukos oil were introduced by the ex-Yukos Oil management of Yukos CIS in 2008 and 2009….

iii. [8] The current position, therefore, is that Rosneft has drilled down as far as Wincanton in the chain, but needs to set aside the transfer of the FPH shares to Stichting FPH in 2005 if it is to establish control of YHIL and its BVI subsidiaries. In July of this year it commenced proceedings in Holland designed to achieve this object. On 7 July 2010 it obtained pre-trial attachment of the FPH shares. On 19 July it brought a claim seeking, among other relief, an order declaring that the transfer of the FPH shares by Wincanton to Stichting FPH in September 2005 was void."

[155] Implicit in the judge's summary description of the uncontested background facts are the factual findings that (1) the appellants' ultimate owner acquired their shares knowing that it would face a legal battle to unwind the Stichting structure,

and (2) the avowed and overt business purpose of those who presently control the respondents is to prevent their assets being used to discharge the bankruptcy debts of Yukos Oil. This factual matrix is far removed from the usual commercial and legal context in which interim freezing injunctions are sought. Typically, such interim relief is sought to aid enforcement of anticipated money judgments, although conservatory injunctions are also (somewhat less often) sought to prevent the disposition of property in aid of a proprietary claim. The appellants in the present case neither (a) sought interim relief in support of an anticipated money judgment, nor (b) asserted a proprietary claim against the respondents' assets. The application was not based on any traditional grounds for seeking the relevant relief. This is why the judge was broadly right to only consider the issue of risk of dissipation as an alternative basis for his primary finding that no jurisdictional grounds justifying the exercise of the discretion to grant interim relief had been made out.

[156] For dissipation to justify the grant of an interim freezing injunction (or indeed the appointment of a receiver) according to established principles, there must be a real risk that either (1) the respondents will not retain sufficient funds to meet a money judgment which the appellants hope to obtain, or (2) the respondents will dispose of property which belongs to the appellants. With neither of these crucial preconditions being met, it is unsurprising that Bannister J. dealt somewhat summarily (and perhaps disdainfully) with the dissipation arguments. In my judgment the dissipation complaints were highly artificial in all the circumstances of the present case and were rightly rejected by the judge, despite the fact that one or more of the matters complained of might have evidenced dissipation in the traditional sense if the appellants had any prospect of obtaining a judgment which could be enforced against the respondents' assets.

[157] However, even if one looks at the position very broadly and shorn of the traditional constraints on granting such interim relief, the most compelling global reason for

concluding that there was insufficient evidence of a serious risk of dissipation of assets was neatly articulated in the judgment below as follows:[59]

> "[25] Finally, I bear in mind that all the assets of FPH and its subsidiaries are under the overall supervision of the board of Stichting FPH, one of whose members is Professor de Guillenchmidt a former Dean of the faculty of Law at the University of Paris V. Wherever his sympathies may lie (and I am not concerned with them), it seems to me in the highest degree improbable that he would permit the management of the group of companies owned by Stichting FPH to dissipate or peculate their assets. There is no more reason to believe that either of the other two members of the board would stand by and allow that to happen.
> [26] I am therefore unpersuaded on the evidence that the claimants have demonstrated any risk of dissipation such as would justify the imposition of a freezing order even if I otherwise thought that this was a proper case for the grant of one. The same reasoning applies to the grant of some weaker restraining order, such as an order restraining dispositions other than in the ordinary course of business."

[158] Bannister J did not find that there was no evidence of risk of dissipation; rather he found that there was no sufficient risk established to justify the grant of the relief sought. It was open to the judge to reach this factual finding; he did not err in law or principle in arriving at the conclusion which he reached. In my judgment his approach to the evidence on this issue, looked at in the round, was clearly sound and, as Mr. Berry QC rightly submitted, the judge's factual findings are accordingly not subject to review by this court.

[159] Lord Grabiner, in his oral submissions, contended that the judge had missed the wood for the trees and failed to spot the elephant in the room: the creation of the Stichting structure itself was a sophisticated exercise in dissipation. This is an argument which could, perhaps, fairly be deployed in support of the substantive cause of action advanced by the appellants in the Dutch proceedings. The argument properly speaks to the control exercised by FPH over the respondents, rather than the manner in which the respondents are dealing with their assets. It is an argument which rationally supports the pre-judgment relief obtained in the Netherlands against the FPH shares. But asserted in support of an application for

[59] At paragraphs 25 and 26.

an interim freezing order against the respondents in respect of whose assets the appellants assert no cognisable claim, it distorts the concept of risk of dissipation almost beyond recognition. I accordingly feel bound to reject this limb of the appeal.

Discretionary grounds for refusing relief: failure to seek equivalent interim relief from the Netherlands court

[160] The judge further held that an additional discretionary ground for refusing relief, even if the relevant jurisdictional grounds for doing so had been made out, was the failure to first apply in the substantive litigation court for similar relief. In the absence of a viable BVI claim asserted against the BVI respondents, the relief was essentially sought in aid of foreign proceedings. One would ordinarily expect a freezing order to be obtained initially in the main litigation court, with a duplicative application subsequently being made in satellite proceedings. The 'satellite' court would effectively be assisting the principal court by making an order designed to ensure that any judgment entered by that court would not be rendered nugatory. The supporting freezing order would, in a very general way, implicitly entail both recognition and enforcement of the foreign interim freezing order.

[161] In my judgment it is impossible to say that the judge erred in principle in the approach he adopted to this discretionary issue. On the contrary, I would fully endorse the following findings which he made:[60]

> "[27]… If for whatever reason the claimants do not wish to approach the Dutch court for such relief, then it seems to me illegitimate for them to attempt to obtain it by the back door by coming here and asking this Court to enjoin the BVI subsidiaries. For me to attempt to grant relief in respect of a matter which is pre-eminently within the province of the Dutch court would, in my judgment, give rise to the risk of inconsistent orders being made in different jurisdictions and, if only for that reason, would be inimical to the comity which I must and am anxious to show towards the courts of a friendly jurisdiction."

[60] At paragraph 27 of his judgment.

Receivership and disclosure

[162] It follows that I would for the above reasons affirm the judge's decision that interim relief in the form of the appointment of a receiver was not available. I see no reason for differing with his factual determinations as to why, in any event, it would make no practical sense to appoint a receiver.

[163] In the circumstances, the application for disclosure (which can only legally be justified as an ancillary tool for policing an interim freezing or receivership order) was rightly rejected by the judge as well.

Rectification claim

[164] The appellants are seeking in the Dutch proceedings to assert intermediate ownership over the BVI respondents; it is obviously untenable to assert any right to directly own these companies' shares. No serious or tenable challenge was made to the judge's decision to strike-out the rectification claim and I would affirm his decision in this regard as well.

Ian Kawaley
Justice of Appeal [Ag.]

[165] I have read the judgments of my brothers Redhead J.A. [Ag.] and Kawaley J.A. [Ag.] and I agree with the decision of Kawaley J.A. [Ag.] and the order as stated at paragraph 135 of his judgment.

Michael Gordon, QC
Justice of Appeal [Ag.]