

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0023

BETWEEN:

BEN OLDMAN SPECIAL SITUATIONS FUND L.P.

Claimant/Appellant

and

[1] KARVER INVESTMENTS LIMITED
[2] HAZELDENE FINANCE LIMITED
[3] BRIARFIELD INTERNATIONAL LIMITED
[4] DUNEDIN FINANCE LIMITED

Respondents

[5] CJSC "VMZ RED OCTOBER"
[6] Mr. IGOR ZAVYALOV
[7] Mr. NIKOLAI TIMOKHIN

Defendants

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mr. Rolston Nelson

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

Appearances:

Mr. Sharif Shivji with him Mr. Tim Wright for the Appellant
Mr. Alain Choo Choy, QC with him Ms. Tameka Davis for the Respondents

2018: July 10;
November 26.

Interlocutory appeal – Application for stay of proceedings – Forum non conveniens – Whether the learned judge erred in granting a stay on the basis that Russia was the more appropriate forum

The appellant is an assignee of rights in respect of obligations of the fifth respondent, CJSC "VMZ Red October" ("Red October"), previously owed to a syndicate of lenders under a loan agreement dated 26th November 2007 between Red October and VTB Bank Europe plc ("VTB Bank"). By the loan agreement, up to US\$80 million was made available to Red October, a Russian company. None of the lenders carried on business in the British Virgin Islands ("BVI").

On or about 31st July 2009, Red October defaulted in making loan repayments. Advances were made for specific purposes which were not fulfilled. It was alleged that Red October's management, headed by the sixth respondent, acquired with those loan advances shares for themselves in a Russian company, OJSC Stupino Metallurgical Company ("Stupino") via their nominee (a Russian company, SpetStal-Invest). The seventh respondent is the son-in-law of the sixth respondent and a director of Stupino. They are alleged to be the masterminds behind the alleged fraud. It is alleged that the first four respondents ("the BVI respondents") are nominees for the sixth and seventh respondents. The BVI respondents are incorporated in the BVI but have no other connection to the BVI.

On 27th September 2016, the appellant issued a claim form (which was subsequently amended) in the BVI alleging that the Stupino shares in the hands of the BVI respondents are traceable proceeds of money in breach of a Quistclose trust governed by English law in favour of the appellant's predecessors in title. As a result, the appellant contends that the Stupino shares are held by the BVI respondents on constructive trust (governed by English or BVI law) for the appellants.

The BVI respondents challenged the jurisdiction of the BVI court and was granted a stay of the action against them based on forum non conveniens. Being dissatisfied with the decision, the appellant appealed complaining that the learned judge committed a series of errors of principle in analysing the forum question. Additionally, the appellant contends that the learned judge speculated as to the positive case the BVI respondents might advance. The appellants also say that in any event there were special circumstances which pointed to the BVI as the more appropriate forum.

Held: dismissing the appeal with costs to the BVI respondents to be assessed if not agreed within 21 days, that:

1. The wrongful conduct underlying the three claims against the BVI respondents was conduct that took place in Russia, among Russian individuals and legal entities incorporated in Russia and resident there. The claim form makes clear, the ability to make the Stupino shares subject to a Quistclose trust depends on the ability to establish breaches of fiduciary duty under Russian law by the Russian defendants in Russia. Indeed, extracts from the claim form indicate that: (1) proof of the claim will involve rulings on Russian law, (2) proof of breach of fiduciary duty under Russian law, and (3) proof of wrongdoing in Russia by Russian actors in a Russian setting. Since the subject matter of the wrongful conduct alleged is governed by foreign law, the relevant foreign court is the more appropriate court to apply the foreign law to the facts.

The Eleftheria [1970] P. 94 applied; **Sphereinvest Global High Yield Fund Ltd v Eximtech Investments Ltd** BVIHC(Com)2011/0087 (delivered 20th October 2011, unreported) distinguished.

2. The learned judge applied the factors identified in **Spiliada Maritime Corporation v Cansulex**¹ by referring to the facts and matters pleaded in support of the appellant's claim. Based on the ingredients of the appellant's claim that there were allegations that the BVI respondents were involved in a scheme to acquire the Stupino shares fraudulently and in breach of their fiduciary duty since 2008, the court was entitled to consider how the allegations were to be proved. Equally, the court had to consider how it was to be proved that the BVI respondents were part of a conspiracy to divert the assets of the fifth respondent to third parties. In the Court's view, this was not speculation but an assessment of which was the more appropriate forum as the judge was fully apprised of the competing factors suggesting the BVI or Russia as the more appropriate forum.
3. Even if the Court concluded that the judge should properly have treated Russia as the natural forum, it would nonetheless grant a stay if the appellant could establish by cogent evidence that it would not be able to obtain justice in Russia. The risk of injustice must be clear and convincing. In the case at bar, the allegations narrated by the appellants of the existence of political pressure do not come near establishing that there cannot be a fair trial. Further, the assertion that the seventh respondent is 'well connected and could expect to receive a favourable outcome in the Russian courts' is speculative and unsupported by the cogent evidence that the case requires. Accordingly, the evidence relied on does not amount to special circumstances.

Millicom Tanzania N.V. v Golden Globe International Services Limited et al BVIHCMAP2016/0036 (delivered 10th May 2017, unreported) followed.

4. The learned judge did not misdirect himself with regard to the exercise of his discretion. He referred to the relevant authorities and correctly applied them. He did not take into account irrelevant matters or fail to take into account matters he ought to have considered. His decision was not plainly wrong. Therefore, there is no basis for this Court to interfere with the judge's decision.

Re Abidin Daver [1984] CA 398 applied.

¹ [1987] AC 460 at pp. 475-478.

JUDGMENT

[1] **NELSON JA [AG.]:** This is an interlocutory appeal by Ben Oldman Special Situations Fund LP (“the appellant or BOSS”) against an order dated 31st October 2017 of Adderley J in the British Virgin Islands (“BVI”) Commercial Court staying an action against the four respondents (“the BVI respondents”) on the ground that the BVI was not the forum conveniens to try the action and accepting the contention of the BVI respondents that Russia was.

The application for a stay in an appellate court

[2] It is useful to begin by recalling that the decision by a judge at first instance to allow or refuse a stay involves an exercise of the judge’s discretion. Therefore, the grounds on which the appellate court is entitled to interfere with the judge’s decision are limited. In **Re Abidin Daver**,² Lord Brandon of Oakbrook stated the following principles which I respectfully adopt:

“The grounds on which an appellate court is entitled to interfere with a decision ... are of a limited character. It cannot interfere simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong.”

[3] Before the learned judge, there was common ground as to the principles applicable to applications for a stay on the ground of forum non conveniens. Reliance was placed on **Dicey, Morris and Collins Conflict of Laws**³ and the cases of **Spiliada Maritime Corporation v Cansulex**,⁴ **Nilon Ltd. v Royal**

² [1984] CA 398 at p. 420 (HL).

³ Dicey, Morris & Collins: The Conflict of Laws (15th edn., Sweet & Maxwell 2006) Volume 1 at p.533.

⁴ [1987] AC 460 at pp. 475-478.

Westminster Investments SA⁵ and SPC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd.⁶

- [4] We have carefully considered the rival contentions in this appeal and hold that Adderley J properly exercised his discretion in staying the action herein on the basis of the principles applicable to forum non conveniens applications.

The Facts

- [5] The appellant is a Cayman incorporated credit hedge fund focused primarily on European corporate debt. It is managed by Ben Oldman Partners, an alternative investment fund based in Tel Aviv, Israel.
- [6] By a facility agreement dated 26th November 2007 (“the Loan Agreement”) between the fifth respondent, CJSC “VMZ Red October” (“Red October”) and VTB Bank Europe plc (“VTB”), a credit facility of up to US\$80 million was made available to Red October. VTB was one of a syndicate of lenders who participated in the US\$80 million loan to Red October. The original lender was VTB.
- [7] On 11th May 2016, HSH Nordbank (“HSH”) and Banque Cantale Vaudoise (“BCV”), participators in the lending syndicate, assigned to the appellant their rights in respect of the obligations of Red October owed to the syndicate of lenders participating in the Loan Agreement. Red October is a Russian company with no connection with the BVI.
- [8] None of the lenders carried on business in the BVI. The BVI respondents are incorporated in the BVI but have no directors based in the BVI. The ultimate beneficial owner of the BVI respondents’ companies is Mr. Berdyshev, a Russian who resides in Russia. The BVI respondents have no connection with the BVI other than that of being incorporated in the BVI.

⁵ [2015] UKPC 2.

⁶ BVIHCMA2015/0012 (delivered 4th July 2016, unreported).

- [9] Red October is a Russian company. At the time of the loan, it owned and operated one of Russia's largest steel works, the Red October facility in Volgograd, employing several thousand people in supplying the Russian defence industry. Red October is now in liquidation in Russia, having been the subject of bankruptcy proceedings since 26th November 2009.
- [10] The present proceedings arise out of the default by Red October on or about 31st July 2009 in repaying loan amounts paid to it by VTB. Loan advances were made for specific purposes pursuant to clause 3.1 of the Loan Agreement. Those purposes were not fulfilled. Indeed, it was alleged that, Red October's management, headed by the sixth respondent, acquired with those loan advances shares for themselves in a Russian company, OJSC Stupino Metallurgical Company ("Stupino") transferred on 24th January 2008 to a nominee (a Russian company, SpetStal- Invest). The seventh respondent is the son-in-law of the sixth respondent and a director of Stupino. The sixth and seventh respondents are alleged to be the masterminds behind the alleged fraud. It is alleged that the BVI respondents are nominees for the sixth and seventh respondents and the transferees of Stupino shares from SpetStal-Invest.
- [11] On 27th September 2016, the appellant issued a claim form in the BVI, which was subsequently amended pursuant to leave granted on 9th February 2017.
- [12] The appellant's case is that the Stupino shares in the hands of the BVI respondents are traceable proceeds of money in breach of a Quistclose trust governed by English law in favour of the appellant's predecessors in title. As a result, the appellant contends that the Stupino shares are held by the BVI respondents on constructive trust (governed by English or BVI law) for the appellants. Upon discovering that the Stupino shares had been transferred out of the names of the BVI respondents, the appellant merely modified its claim to hold the BVI respondents liable for any loss arising from such transfer.

Interim orders

- [13] The appellant has a freezing injunction over the BVI respondents' interest in the Stupino shares. That injunction was granted ex parte on 4th October 2016 and was continued on 9th February 2017 at an inter partes hearing pending the outcome of this appeal. If the BVI respondents succeed in this appeal, the injunction would also be stayed.

The appeal

- [14] Adderley J heard the stay application on 24th October 2017 and granted a stay in favour of the BVI respondents on 31st October 2017.

The case contended for by the appellant

- [15] At this early stage of the action in the court below, before a defence has been filed, the case against the BVI respondents is to be gleaned from the following paragraphs in the pleadings:

“5. At all material times, RusSpetsStal, the Sixth and/or Seventh Defendants (together **the Controlling Persons**) were “persons which could give binding instructions to or otherwise determine action of” the Borrower within the meaning of Article 10(4) of the Russian Insolvency Law and Article 56(3) of the Russian Civil Code as in force at the date of the commencement of the Borrower’s insolvency proceedings or “controlling persons” of the Borrower within the meaning of Article 2 and for the purpose of Article 10(4) of the Russian Insolvency Law as currently in force.”

...

11. The Borrower acquired promissory notes from Gazprombank which would be used to siphon out advances paid under the Facility Agreement to SpetStallInvest to make the share purchase. The amounts of the notes matched exactly the consideration payable for the Stupino Shares. Notes were issued on 14 December and 24 December 2007.

12. On 18 December 2007, in anticipation of the imminent payment of advances under the Facility Agreement, the Borrower agreed to sell its promissory notes to SpetStallInvest. No disclosure of affiliation between RusSpetsStal and SpetStallInvest was made to the Borrower, despite the conflict of interest arising and the obligation to make such disclosure.

13. The agreement aforesaid was a breach of fiduciary duty owed to the Borrower under Russian law, inter alia Articles 53(3) of the Civil Code and/or Article 71 of the Law on Joint-Stock Companies. The Claimant will rely, inter alia, on the Plenum Guidance of the Highest Arbitrazh Court.”

...

22. In the alternative, the acquisition of the Stupino Shares resulted from a breach of fiduciary duties owed to the Borrower under Russian law. Further:

22.1 Russian law entitles the Borrower to full compensation for the breaches aforesaid, under Article 15 Civil Code and, in the premises this includes a requirement *inter alia* for any benefit received as a result of the acquisition to be disgorged;

22.2 Accordingly, and in any event, upon the transfer of the Stupino Shares to SpetStallInvest in breach of fiduciary duty a constructive trust in favour of the Borrower arose; and

22.3 The trust aforesaid was governed by English law.

23. In the premises –

23.1 the Advances paid to the Borrower under the Facility Agreement (or their value) can be traced to the Stupino Shares, and

23.2 At all material times, the Stupino Shares were trust property or property acquired in breach of fiduciary duty.

Borrower's insolvency caused by its Controlling Persons

24. On or about 26 May 2009, the Controlling Persons caused the Borrower to divest its major assets to a newly-created subsidiary, LLC RusSpetsMash.

25. The transfer aforesaid resulted in the deliberate insolvency of the Borrower for the purpose of the Russian Insolvency Law. On or about 31 July 2009, the Borrower therefore ceased to make any further repayments under the Facility Agreement and various sums have become due and owing to the Lenders, *inter alia* the Claimant.

...

27. On 26 November 2009, the Arbitrazh (Commercial) Court of the Volgograd Region (**ACVR**) ordered that the Borrower be put into supervision procedure, the first stage of the Russian insolvency procedure.

28. On 2 June 2010, the ACVR held that the transfer of assets aforesaid by the Borrower was intended to defeat its creditors (*inter alia* the Lenders under the Facility Agreement) or otherwise prejudice creditor interests, contrary to Article 10 of the Russian Civil Code, and accordingly that the transfer was void under Article 168 Civil Code.

29. The Controlling Persons caused, procured or permitted the Borrower – notwithstanding that the transfer aforesaid was void – not to recover or seek to recover its assets.

...

32. By reason of the matters aforesaid, the Controlling Persons, by their actions aforesaid—

32.1 caused loss to the Borrower (which is a breach of fiduciary duty owed to the Borrower by RusSpetsStal as its managing

company under Article 53(3) of the Civil Code and Article 71 of the Joint-Stock Company Law),

32.2 caused the insolvency of the Borrower (which is punishable under Articles 56(3) of the Civil Code and Article 10(4) of the Insolvency Law which apply to each of the Controlling Persons), and

32.3 caused loss to the creditors of the Borrower, *inter alia* the Claimant as a Lender under the Facility Agreement, because –

32.3.1 the Borrower's last remaining assets were sold on or about 8 November 2015, and

32.3.2 the estate of the Borrower is insufficient to pay its creditors.

Constructive trust/knowing receipt of trust or misapplied property by the current nominees 33. In about June 2012-

33.1 SpetStallInvest was the defendant to an action brought in the Arbitrazh (Commercial) Court of the Moscow District by OOO Turbounion, which claimed ownership of 23-odd shares in Stupino, and

33.2 Turbounion applied to the Court aforesaid for an injunction against SpetStallInvest preventing the transfer of any Stupino shares.

...

37. At all material times:

37.1 The First to Fourth Defendants have been the nominees of or controlled by or for the Sixth and/or Seventh Defendants;

37.2 None of the transfers aforesaid were made at arm's length to the Defendants as bona fide purchasers for value without notice;

37.3 The First to Fourth Defendants:

37.3.1 knew or ought to have known that the Stupino Shares transferred to them were traceable to a breach of fiduciary duty owed to the Borrower; and/or

37.3.2 by May 2015 at the latest (by reason of being served with evidence filed in claim no BVIHCM 2015.0058) had knowledge of the breach of fiduciary duty aforesaid but have not returned the Stupino Shares or acknowledged the ownership claims made herein

37.4 so that the conduct of the First to Fourth Defendants is unconscionable.

38. In the premises, each of the First to Fourth Defendants is constructive trustee of the Stupino Shares registered in its name, for the Claimant alternatively the Borrower.

Damages claim against the Sixth and Seventh Defendants as Controlling Persons

39. Paragraphs 24 to 32 hereof are repeated.

40. The Liquidator of the Borrower has not made any claim against the Controlling Persons. Accordingly, the Claimant has standing as a creditor of the Borrower under Article 56(3) of the Russian Civil Code and Article

10(4) of the Insolvency Law to claim “secondary liability” against the Sixth and Seventh Defendants.”

- [23] These extracts from the claim form indicate that: (1) proof of the claim will involve rulings on Russian law; (2) proof of breach of fiduciary duty under Russian law; and (3) proof of wrongdoing in Russia by Russian actors in a Russian setting.
- [24] It must also be borne in mind that the foreign defendants have not been served and have taken no part in the proceedings. As the claim form makes clear, the ability to make the Stupino shares subject to a Quistclose trust depends on the ability to establish breaches of fiduciary duty under Russian law by the Russian defendants in Russia. One is forced to agree with the learned judge that the present case was overwhelmingly a Russian case.
- [25] The subsequent insolvency of the fifth defendant has generated litigation in England, Russia and Cyprus. The previous BVI proceedings have been discontinued by consent. In those proceedings, there was no Quistclose trust claim. The Court will refer to those proceedings so far as relevant.

The Grounds of Appeal

Grounds 1.1. and 1.2: The predominant claims analysis and finding that appellant was pursuing claims in tort

- [26] The appellant contended that the learned judge considered that the starting point for determining locus in any case (including a proprietary claim) was to identify the “predominant tort”. Mr. Shivji contended that the judge was plainly wrong to find that the claimant’s claim was pursued in tort, including breach of statutory duty and fraud. In fact, the claimant’s claim, he contended, was solely a proprietary one based on a trust.
- [28] We consider that the submission of Mr. Choo Choy, QC is nearer the mark. Counsel drew the Court’s attention to the language of the learned judge at paragraph 28 of the judgment where the judge said:

“As far as the evidence goes it is not disputed that the parties to what I refer to as the predominant tort all reside or have businesses in Russia ...”

[29] At paragraph 26 of the judgment Adderley J stated:

“The predominant tort, as I refer to it, did not occur in the BVI, the persons who were involved in the diversion of the loan proceeds to purchase the Stupino shares to the BVI Defendants are not persons located in the BVI ...”

[30] Again at paragraph 57 of the judgment the learned judge stated:

“When all of the relevant facts are considered, there can hardly be a clearer case that what I refer to as the predominant tort, what Blenman JA in **SFC Swiss Forfeiting** referred to as “the centre of gravity of the dispute”, Lord Mance in **VTB Capital** referred to as “the fundamental matters in dispute”, and Gonsalves QC JA [Ag.] in **Anjie Investments** called “the essential and underlying wrong” or the “primary wrong or the substantive or underlying wrong”, all took place in Russia. That is a claim based on breach of statutory duty and fraud. The actions giving rise to the Quistclose trust or alternatively the constructive trust pleaded by BOSS also undoubtedly all took place in Russia and were carried out by persons domiciled in Russia.”

[31] Thus, the learned judge was clearly focusing on the place of commission of the wrongful conduct that gave rise to the so-called Quistclose trust, constructive trust and personal claims. It is clear that the judge did not find that the appellant was advancing a claim in tort and was unaware that the appellant presented its case as a proprietary claim.

Grounds 1.3: The judge speculated as to the positive case the BVI respondents might advance

[32] The appellant relied on a passage from the speech of Lord Clarke in **VTB Capital plc v Nutritek International Corporation and others**⁷ at paragraphs 193-194:

“... in the absence of a positive case, the focus of the court can only be on the ingredients of the claim. It should not speculate about the nature of

⁷ [2013] UKSC 5.

any positive case that might be advanced in the future. ... There is no reason why the defendants should not put in a draft defence...”

[33] What the learned judge was doing was applying the factors identified in **Spiliada** by referring to the facts and matters pleaded in support of the three claims. There was no assumption that, because no defence had been filed, there were admissions of the claims or the facts underlying them. Indeed, it is difficult to see how there could have been any draft defence when the BVI respondents were challenging the jurisdiction.

[34] Based on the ingredients of the appellant’s claim that there were allegations that the BVI respondents were involved in a scheme to acquire the Stupino shares fraudulently and in breach of their fiduciary duty since 2008, the court was entitled to consider how the allegations were to be proved. Equally, the court had to consider how it was to be proved that the BVI respondents were part of a conspiracy to divert the assets of the fifth respondent to third parties out of the reach of creditors. In the court’s view, this was not speculation but an assessment of which was the more appropriate forum, the BVI or Russia.

Ground 1.4: The judge wrongly stated that the Russian court has exclusive jurisdiction over the matter or that the claimant had submitted to the jurisdiction

[35] Again, this contention is without merit. The learned judge held that the appellant’s predecessors in title (the original lender assignors, VTB) had already submitted to the jurisdiction of the Russian court. In **Erste Group Bank AG v JSC ‘VMZ Red October’ and Others**,⁸ the Court of Appeal in England held on similar facts that a Bank’s participation in the Russian insolvency of the borrower resulted in its submission to and acceptance of the jurisdiction of the Russian courts in relation to all issues arising in the insolvency. This Court respectfully adopts these dicta. The alleged Quistclose trust over the Stupino shares is relevant to the liquidation

⁸ [2015] EWCA Civ 379 at para. 135.

of Red October, whose loan funds were said to be misapplied to acquire the Stupino shares.

Ground 1.5: The judge erred in regarding the lex situs of the Stupino shares in Russia as relevant

- [36] This factor was clearly relevant since the Arbitrazh (Commercial) Court of Moscow District had ruled on 7th July 2015 that it had exclusive jurisdiction over disputes connected with the ownership of the shares of [Stupino] according to the place of location of the legal entity [Stupino].⁹

Ground 2: The judge wrongly distinguished Sphereinvest Global High Yield Fund Ltd v Eximtech Investments Ltd¹⁰

- [37] **Sphereinvest** was eminently distinguishable from the present case, as Adderley J rightly held. The case concerned mainly orders for delivery up and transfer of documents held by five BVI companies on behalf of two non-Russian claimants through two foreign fiduciaries. The only issue in the case was the unlawful retention of the beneficiaries' documents.

- [38] The alleged wrongful conduct in **Sphereinvest** took place in the BVI. In the instant appeal, the wrongful conduct underlying the three claims against the BVI respondents was conduct that took place in Russia, among Russian individuals and legal entities incorporated in Russia and resident there. Paragraph 13 of the claim form alleges a "breach of fiduciary duty owed to the Borrowers under Russian law, *inter alia* Articles 53(3) of the Civil Code and/or Article 71 of the Law on Joint-Stock Companies." Since the subject matter of the wrongful conduct alleged is governed by foreign law, the relevant foreign court is normally the appropriate court to apply the foreign law to the facts.¹¹

⁹ See para. 28 of the judgment of Adderley J.

¹⁰ BVIHC(Com) 2011/0087 (delivered 20th October 2011, unreported).

¹¹ See: *The Eleftheria* [1970] P. 94 at p.105.

Ground 3: The judge wrongly considered that the English case of Erste Group had “striking similarities” with the present case

- [39] The facts of the **Erste** case arise out of the same Loan Agreement for US\$80 million between the fifth defendant and a syndicate of lenders arranged by VTB. Erste Group Bank was one of the participators in the lending syndicate and sought to bring its own action upon the default of the fifth defendant, Red October and a guarantor.
- [40] Erste Group Bank had been given permission to serve the proceedings out of the jurisdiction in relation to the claims for breach of contract and unlawful conspiracy. The jurisdiction of the court was called into question unsuccessfully. On appeal, the Court of Appeal allowed the appeal and set aside the permission to serve out, holding that the more appropriate forum was Russia. The Court of Appeal held that the judge had erred in granting permission under the relevant gateways of Practice Direction 6B. Since the case was more closely connected with Russia, the judge had erred in finding that England was the more appropriate forum. The judge had wrongly exercised his discretion.
- [41] There is no doubt that the learned judge found some comfort in arriving at his decision that Russia was the more appropriate forum from the same conclusion arrived at by the Court of Appeal in England on similar facts arising out of the US\$80 million-dollar loan syndicate. There are similar allegations of fraudulent behaviour. There are similar allegations of stripping the assets of Red October. Paragraph 7 of the report in **Erste** refers to the Amicable Agreement. At paragraph 39 of this judgment, Adderley J stated: “[t]he claims were similar to those in this case in that the claim was that the defendants were part of a fraudulent conspiracy to divert the assets out of Red October to third parties out of the creditors and contributing to the insolvency of Red October”.
- [42] However, the thrust of what the learned judge was saying was that an assessment of the conduct of the Russian individuals and legal entities in Russia according to

Russian law, as the claim form states in several places, was critical to the Quistclose trust claim, the constructive trust claim and the alleged conspiracy.

[43] At the end of the day, the learned judge was fully apprised of the competing factors suggesting the BVI or Russia as the more appropriate jurisdiction. The appellant has little basis for challenging the generous ambit of the judge's discretion by inviting this Court to conduct the evaluative exercise afresh.

Ground 4: Special circumstances which pointed to the BVI in any event

[44] Even if the Court concluded that the learned judge should properly have treated Russia as the natural forum, it would nonetheless grant a stay if the appellant could establish by cogent evidence that the appellant would not be able to obtain justice in Russia.

[45] The appellant alleges that it requires Mr. Gerasimenko to give evidence of the authenticity of documents it relies on. However, arrest warrants have been issued against him in Russia, which are politically motivated. Therefore, Mr. Gerasimenko has stated that he could not travel to Russia. That is also the position of another potential witness.

[46] The appellant's expert, Mr. Marinichev, considered that the sixth and seventh respondents are well connected and "could expect to receive a favourable outcome in the Russian courts". These respondents, it is alleged, have other influence in Russia including over the fifth respondent's liquidator. Mr. Marinichev also posits the existence of political pressure in the liquidation proceedings.

[47] The rule in relation to allegations of this sort is stated in this Court in **Millicom Tanzania N.V. v Golden Globe International Services Limited et al.**¹² It was pointed out that considerations of international comity militate against any such finding in the absence of cogent evidence. There must be "a real risk that justice

¹² BVIHCMAP2016/0036 (delivered 10th May 2017, unreported).

will not be obtained". The risk will not be lightly or easily inferred. "It must be clear and convincing." The allegations narrated above by themselves do not come near establishing that there cannot be a fair trial of the matters in this appeal.

[48] Further, the assertions that the seventh respondent is "well connected and could expect to receive a favourable outcome in the Russian courts" is speculative and unsupported by evidence and lack the evidential cogency that the cases require. Accordingly, the evidence relied on does not amount to special circumstances. Therefore, nothing points to the judge being plainly wrong in the exercise of his discretion.

Conclusion

[49] The learned judge did not misdirect himself with regard to the exercise of his discretion. He referred to the relevant authorities and correctly applied them. He did not take into account irrelevant matters or fail to take into account matters he ought to have considered. His decision was not plainly wrong. The appellant's appeal is dismissed with costs to the BVI respondents to be assessed if not agreed within 21 days.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar