BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.26 OF 2005

BETWEEN:

SIBIR ENERGY PLC

Appellant

and

[1] GREGORY TRADING S.A.
[2] RICHARD ENTERPRISES S.A.
[3] FERENCO INVESTMENT & SERVICESLIMITED
[4] SHAW INVEST & FINANCE CORP.
[5] CARROLL TRADING S.A.
[6] TRANQUILLO TRADING S.A.
[7] OJSC SIBERIAN OIL COMPANY
[8] ROMAN ABRAMOVICH

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

Appearances:

Mr. Guy Phillips, QC and Mr. Sa'ad Hossain for the Appellant
Mr. Mark Howard, QC and Mr. Daniel Jowell for the Respondents

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2006: May 10; 11;
September 18.

JUDGMENT

[1] BARROW, J.A.: The appellant asserts that the proper law of the claim that it brought against four companies incorporated in the British Virgin Islands,[1] to account for property on the basis of their 'knowing receipt' that the property was obtained in breach of a fiduciary duty, is the law of the forum. It is accepted by the appellant that apart from the British Virgin Islands (the BVI) being the place of

[1] Among others.

incorporation of those defendants (the BVI defendants) there is nothing that connects the claim with the BVI and that every other connecting factor is with Russia.

The basis of the claim

[2] The basis of the claim that the appellant brought, as helpfully summarized in the skeleton arguments for the appellant from which I borrow and sometimes quote, is that pursuant to a joint venture agreement (the JV Agreement) between the appellant and the 7th defendant a power was conferred upon the 7th Defendant whereby it was in a position to control the affairs of a subsidiary of the appellant, named Yugraneft.

[3] "The conferral of that power imposed obligations upon the 7th defendant not to abuse the power and not to exercise it in such a way as to benefit itself. Those obligations would be regarded by the BVI Court as fiduciary in nature.

[4] "In breach of the fiduciary obligations owed by it to the Claimant [the appellant], the 7th defendant exercised the power conferred upon it so as to cause its own beneficial interest in a company called Sibneft-Yugra to be increased from 50% to more than 99% (and Yugraneft's beneficial interest in that company to be correspondingly reduced from 50% to less than 1%).

[5] "The 7th Defendant was at all times liable to account to the Claimant as a constructive trustee of the more than 49% interest in Sibneft-Yugra acquired by it in breach of the fiduciary obligations owed by it to the Claimant.

[6] "The 7th Defendant caused the interest in Sibneft-Yugra acquired by it in breach of the fiduciary obligations owed by it to the [appellant] to be transferred, first to (*inter alios*) the 4th and 5th Defendants, and then to (*inter alios*) the 1st and 2nd Defendants.

[7] "Each of those Defendants (the BVI Defendants) acquired the interest so transferred to it with actual knowledge that the interest it was receiving was traceable to the 7th Defendant's breach of fiduciary obligations owed by it to the Claimant, and was thus an interest of which the Claimant was the beneficiary under a constructive trust. That being so, it is unconscionable for the BVI Defendants to retain the benefit of that receipt as against the Claimant, and each of the BVI Defendants is also liable to account to the Claimant as a constructive trustee of the value of the interest received by it."

[8] The appellant emphasizes that its claim against the BVI defendants is not based on any relationship, whether fiduciary or otherwise, between the BVI defendants and the appellant; that there was no pre-existing relationship between these defendants and the appellant. Rather, the appellant asserts, the BVI defendants are liable in equity solely because of their knowledge of the circumstances in which they came to receive the assets.

[9] According to the appellant's skeleton argument, in reliance upon Rule 200(2) of Dicey & Morris, The Conflict of Laws (13th edition, 2000) Hariprashad-Charles J held that the proper law of the obligation of the BVI defendants to account to the appellant as constructive trustees is Russian law. The appellant says the judge held that Russian law was to be chosen as being either the law of the place of the receipt of the benefit for which the appellant claims the defendants must account or the law of the place of incorporation of the company in which the participation interests[2] were obtained and hence were located. In this case Russian law was the law of both the place of receipt and the place where the property (the participation interests) was located.

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[2] In our legal system the reference would be to shares. The judge's findings indicate that participation interests and shares are comparable but are not synonymous and that the participation interests are rights that are recorded in the constitutional documents of the company which are held in Russia; at [78] of the judgment. Further in the judgment, at [86], the judge characterised such rights as "immovable property"

[10] In the judge's view it followed from that determination that the appellant's claim against the BVI defendants must fail because, as the appellant accepts, the appellant has no cause of action against the BVI defendants under Russian law. Accordingly, the judge summarily dismissed the claims against the BVI defendants.

The law which judges conscience

[11] The appellant contends that the judge was wrong to hold that the law applicable to the obligation of the BVI defendants to account as constructive trustee is Russian law. The appellant argues that the judge should have held that the applicable law is BVI law under which the court will pay regard to Russian law in arriving at its decision on unconscionability. The appellant's thesis is that the court should choose, as the proper law, the law which judges the culpability of the defendants' knowledge because a mental state is always to be judged by the law of the forum.

[12] The appellant accepts as correct the general principle stated in Rule 200 in Dicey and Morris that the obligation to restore the benefit of an enrichment obtained at another's expense is governed by the proper law of the obligation. However, the appellant rejects the suggestion contained in the second part of the rule as to how the proper law is to be determined. Rule 200 states:

> "(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
> "(2) The proper law of the obligation is (semble) determined as follows:
> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract.
> (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);
> (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

[13] The starting point of the appellant's submissions is that the second part of the rule, by its use of the word "semble", is a tentative formulation. The appellant observes

that in Barros Mattos Junior v Macdaniels Ltd[3] Lawrence Collins J, who is the General Editor of Dicey and Morris, pointed out that Rule 200(2)(c) has not been approved by the Court of Appeal and remains a "tentative formulation". The appellant claims that in the Fourth Supplement (2004) to the 13th edition of Dicey and Morris the editors have had to alter their views, in light of recent cases, with regard to at least one category of equitable claims for restitution, namely, those founded on the defendant's dishonest assistance in a fiduciary's breach of duty. In such cases, the appellant argued, the authorities show that where the defendant is alleged to be liable to account in equity as a constructive trustee the governing law is not the law of the place of enrichment or the law of the place where the assistance was rendered but rather the governing law is English law, although English law will take note of the law of the place of enrichment when determining the issue of dishonesty. In its written submissions the appellant considers a number of decisions in which it says this approach was adopted, including Arab Monetary Fund v Hashim[4], Dubai Aluminium Co. Ltd v Salaam[5], Grupo Torras SA v Al-Sabah[6] and Kuwait Oil Tanker SAK v Al Bader.[7]

[14] In response the respondents say that the cases on dishonest assistance are irrelevant because none of the claims brought against the BVI defendants is brought in dishonest assistance; they are all brought in knowing receipt. The causes of action are different because knowing receipt is a form of restitutionary claim for unjust enrichment, whereas dishonest assistance is an allegation of wrongdoing for participation in a fraud for which compensation is sought. The respondents contend that different choices of law rules apply to these two different claims and so the cases on dishonest assistance are of no help in identifying the applicable law for a claim in knowing receipt. In any event, the respondents submit, the appellant is wrong in its submission that the applicable law to a claim in dishonest assistance is the *lex fori*.

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[3] [2005] EWHC 1323 at [117]
[4] ((unreported), 29 July 1994
[5] [199] 1 Lloyds rep. 415
[6] [1999] CLC 1469
[7] [2000] 2 All ER (Comm) 271

[15] The appellant accepts that the two causes of action are different and does not urge this court to apply the choice of law rule for the one to the other. Rather, what the appellant argues is that in applying the law of the forum to a claim in knowing receipt, just as it does in a claim for dishonest assistance, the court will still take account of how the impugned action would be regarded by the relevant foreign law, that is, the law of the place of the enrichment. One of the objects of this submission, as I understand it, is to draw the force away from any criticism that the law of the forum is imposing the notions of conscience of the forum (the BVI) on a transaction that has taken place entirely in a foreign jurisdiction and that such notions may be alien to the law of the foreign jurisdiction. In that light I simply note the object of the appellant's reliance on the cases on dishonest assistance and pass on.

The law of the obligation to account

[16] As stated before, the appellant accepts that a claim to an obligation to restore a benefit is governed by the proper law of the obligation. However, the appellant says, that merely raises the further and key question: what is the law of that obligation? In the appellant's submission the obligation to account is not based on the law of any prior relationship or obligation, since there was none as the appellant has emphasized, but is based purely on the defendants' knowledge of the circumstances in which they came to receive the assets in question, which knowledge is what makes it unconscionable for the defendants to retain the benefit of the receipt. That being so, the appellant says, the question is: by what law does the issue of knowledge, or of unconscionability, fall to be determined? There is only one possible and obvious answer, the appellant argues: the law of the court of equity concerned to exercise jurisdiction over the conscience of the defendant, namely, BVI law.

[17] The appellant submits that there is ample support for this approach in the choice of law rules that are applied to other equitable claims.[8] Although such claims may differ in some respects in their characterisation and choice of law rules, the appellant says, a common thread runs through them that where the court is required to judge the conscience of a defendant before it, that judgment is reached in accordance with the law of the forum.

[18] In support of this assertion the appellant refers again to Kuwait Oil Tanker in which the issue of unconscionability was held to be an issue for English law as the law of the forum. To the same effect, submits the appellant, is the decision in Dubai Aluminium where the judge identified the overall question which he had to decide as to the honesty or otherwise of the parties before him, "as a matter of English law". The appellant cites Grupo Torras at first instance as another instance of the application of the law of the forum because in that case conduct which was properly to be regarded as dishonest under a foreign law, but in respect of which foreign law gave no civil remedy, was made subject to a successful constructive trust claim in England.

[19] In neither of the last two cases was it ever suggested that any law other than English law might be relevant to the issue whether it was unconscionable for the defendant to retain the assets which he had received, the appellant argues. The appellant also relies on an extract from Professor Adrian Briggs, The Conflict of Laws[9] (2002), as supporting the argument that the issue whether or not the conduct of the BVI defendants is to be regarded as unconscionable is and can only be an issue of BVI law. The passage reads:

> "[T]here may be cases where an undiluted dose of English equity would be a little too harsh. On this view, notice will be taken of foreign law if it has a significant connection to the case. But on this view, the maximum role of the foreign law will be to contribute data for the purpose of helping decide what English equity requires – if it requires proof of dishonesty, standards prevailing in the place where the defendant acted will assist in

[8] Here again the appellant relies on claims in dishonest assistance.
[9] At p. 202

> evaluating his conduct as honest or dishonest – or expects of a defendant in a given case. If this is correct, the availability to a claimant of English equitable obligations would again depend not upon the prior application of choice of law rules, but only on the existence of personal jurisdiction. So far as can be deduced from cases on dishonest assistance, in particular, this is approximately the basis of liability as it is currently understood : as long as the foreign law (usually in practice the place where the defendant acted) imposes a form of liability resembling the nature of the English action, the claim will proceed on the basis of English law; were it to be shown that under foreign law there was no ground for even arguing that there would be liability, this would be a weighty factor in denying that there was dishonesty for the purposes of the English claim. In other words, English equity applies, without regard to choice of law, but with notice taken of foreign law."

[20] There are only two English cases that contain even obiter dicta capable of being regarded as supporting the conclusion reached by the judge, the appellant submits and proceeds to show why the dicta in El Ajou v Dollar Land Holdings plc[10] at first instance and Kuwait Oil Tanker v Al Bader[11] were not to be relied upon. Finally, the appellant argues, the judge erred in agreeing with the observation in Dicey and Morris[12] that the rule that the appellant now seeks to advance would 'be tantamount to saying that there is no choice of law applicable to equitable claims'. To quote the appellant: "That is not so. The rule for which the Claimant contends is that the law applicable to the claim in question is the law, which governs the obligation of the BVI Defendants to make restitution. Inasmuch as that obligation arises because it would be against conscience for the BVI Defendants not to make restitution, the law which governs it is the law of the court whose concern it is to inquire into the conscience of the BVI Defendants, namely, the court of equity to whose jurisdiction the BVI Defendants are, by reason of their incorporation in the BVI, subject. That is not "tantamount to saying that there is no choice of law applicable to equitable claims"; there is a choice of law applicable to this type of claim, and it is the choice of law arrived at on the basis of a principled and logical application of rule 200(1) of *Dicey & Morris* itself."

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[10] [1993] 3 All ER 717
[11] [2000] 2 All ER (Comm) 271 at [190]
[12] note 88 to paragraph 34-032

The law with the closest connection

[21] At the heart of very comprehensive written submissions by the respondents, which I dare say were rendered necessary by the considerable ambition of the submissions lodged by the appellant, is the proposition derived from Dicey and Morris[13] that the law of the obligation is the law of that country which has the closest and most real connection with that obligation. The general approach of the English conflict of law rules " has been to subject claims in the law of obligations to the law with which the obligation has its closest and most real connection", that is, "of identifying the law which has the most significant connection with the claim".[14] It is a proposition, the respondents note, that is similarly stated in Cheshire & North's Private International Law[15]: "The proper law of the obligation refers to the law of the country with which the obligation has the closest and most real connection". The respondents' submissions contained, as well, a detailed examination of the case law in which this principle was applied. I will not attempt to summarize my review of the cases because the survey of the case law that was done in consummate fashion by Lawrence Collins J in Barros Mattos Junior[16] makes gratuitous any attempt on my part to do the same.

[22] In that case Lawrence Collins J noted[17] that the formulation of Rule 200 of Dicey and Morris has been the same since the 8th edition in 1967 and stated:

> "The commentary on Rule 200(2)(c), paragraph 34-029 and 34-030, points out that where money is paid to another person with whom no prior contract or supposed contract exists, the enrichment is likely to be most closely connected with the country in which it occurred. The rationale for the formulation is that in the absence of a prior relationship, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore. The commentary goes on to say that although the proposed Rule, and the passage just mentioned, have been judicially approved, in view of the diversity of situations in which a restitutionary claim may arise, it may be that the place of the enrichment will

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[13] Paragraph 34-014
[14] ibid
[15] 13th ed., (1999) at 685
[16] At paragraphs 84 to 105
[17] At paragraph 85.

not always give an answer which corresponds to the law which has the closest connection with the claim.' [18]

[23] After making that observation the learned judge then proceeds to review the cases to see the extent to which they bore out the proposition that the proper law of the obligation to restore is the law of the country where the enrichment occurs (Rule 200(2)(c). The cases considered included Chase Manhattan bank NA v Israel-British Bank (London) Ltd[19]; El Ajou v Dollar (supra); Macmillan Inc v Bishopsgate Investment Trust plc (No. 3)[20]; Arab Monetary Fund v Hashim (supra); Kuwait Oil Tanker v Al Bader both at first instance[21] and on appeal[22]; and Trustor AB v Smallbone[23]. Lawrence Collins J showed in that review that it is not in all instances the law of the place of enrichment will be the proper law and stated so in his conclusion.[24] As I understand the cases this is essentially because the law of the place of enrichment will not invariably be the law that has the closest connection with the claim. Dicey and Morris makes this very point.[25] Cheshire & North makes the point even more firmly[26] and argues against the tentative Rule 200(2)(c) and in favour of "a flexible solution". However, while there may be debate whether the principle contained in Rule 200(1) is to be applied by reliance upon even a tentatively advanced clause (2)(c), in my respectful view the review by Lawrence Collins J and the discussion of the cases in both of the leading texts put it beyond argument, not just that the obligation to restore the benefit of an enrichment obtained at another's expense is governed by the proper law of the obligation, which the appellant accepts, but (to use again the language of Cheshire and North)[27] that "The proper law of the obligation refers to the law of the country with which the obligation has the closest and most real connection." That was the premise on which all the treatments proceeded.

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[18] At paragraph 86
[19] [1981] Ch 105
[20] [1995] 1 WLR 975, affd. [1998] 1 WLR 387
[21] November 16, 1998 (unreported)
[22] [2000] All ER (Comm) 271
[23] May 9, 2000 (unreported)
[24] At paragraph 117
[25] At paragraph 34-030
[26] At p 687
[27] See footnote 15, above and the text to that note

The connecting factors in this case

[24] In the instant case all the connecting factors are with Russian law. These are listed by the respondents as follows:

- Russia is the country where the enrichment (in the sense of both immediate receipt and of the place of enjoyment of the ultimate benefit) took place;
- Russia is the country where the Claimant suffered its alleged loss (where its participation interests were allegedly diminished);
- Russia is the country of habitual residence and centre of operations of both the Claimant (which does business only in Russia) and all of the Defendants (all of which operate solely in Russia and have Russian directors);
- Russia is the country where any alleged fiduciary relationship (or its Russian equivalent) was created and Russian law was the law governing any such relationship (i.e. by virtue of the alleged JV Agreement and/or the appointment of Matevosov as director of Yugraneft);
- Russia is the country where any original "constructive trust" or "equity" (or its Russian equivalent) arose (by virtue of the alleged breach of the alleged JV Agreement in Russia);
- Russia is the country where the original fiduciary relationship (or its Russian equivalent) was alleged to have been breached (by virtue of the alleged breach of the alleged JV Agreement);
- Russia is the country where the "participation interests" were issued and hence where the disposal and loss was allegedly caused;
- Russia is the country of incorporation of the company in respect of the alleged loss of whose participation interest the Claimant seeks restitution (Sibneft-Yugra is a Russian company, as is Yugraneft);

No mechanical application of a rule

[25] In its written argument the appellant contends that the judge did not "address the specific issue of the choice of law rule applicable to an equitable claim for an account on the basis of knowing receipt, as she regarded it as sufficient mechanically to apply the choice of law rule applicable to a common law claim for money had and received".[28] With respect, it is a criticism that I reject. I reject, as well, the suggestion that it was (simply) in reliance upon Rule 200(2) of Dicey and Morris that the judge held that Russian law was the proper law of the obligation to restore. The judgment contains a proper analysis of the learning and the weight of judicial pronouncements and proceeded on this basis to a conclusion as to the proper law. Interestingly, that conclusion seems to be based most clearly on the footing that the participation interests are immovable property "whose *lex situs* is established at the company's place of incorporation. It follows that the applicable law in the present [case] can only be the place where the company in question, Sibneft-Yugra was incorporated (Russia)."[29]

[26] The appellant's reference to a mechanical application of the choice of law rule comes from an observation by Lawrence Collins J in Barros Mattos.[30] As noted earlier[31], the appellant had also relied on the observation of that judge that the formulation of Rule 200(2)(c) in Dicey and Morris was "a tentative formulation" that had never been the ratio of any decision by the English Court of Appeal. It is useful to see both observations in context:

> "117. My conclusions on this aspect are these. The weight of dicta on the applicable law of receipt-based restitutionary claims is against the claimants. There is however, no decision of the Court of Appeal in which approval of Rule 200(2)(c) or the application of a similar principle, is the ratio. Rule 200(2)(c) is a tentative formulation of the application of the basic principle in Rule 200(1) where the parties have no prior connection. There is no decision that Rule 200 (20)(c) must be treated as a free-standing rule

[28] Paragraph 31 of the Skeleton argument of the Claimant/Appellant
[29] At paragraphs [84] to [87]
[30] At paragraph 117
[31] See paragraph 21, above

mechanically applying the law of the place where bank accounts are kept irrespective of the factual circumstances and irrespective of the particular issue.

"118. Here parties in Nigeria agreed that one was to sell to the other dollars for delivery in Switzerland in exchange for Nigerian currency in Nigeria. This is just the kind of case where the law of the place of the enrichment will not necessarily give an answer which corresponds to the law which has the closest connection with the claim or with the issue.

"119. This is an uncertain and developing area of the law and is not suitable for final determination on this application, particularly where the connections with Nigeria have yet to be fully explored in disclosure and trial.

[27] Those limitations on the application of Rule 200(2)(c) of Dicey and Morris that were stated by Lawrence Collins J must not be misapplied. Indeed, those limitations have limited application to the instant case. Unlike the complicated situation in Barros Mattos where connections with Nigeria apart from connections with Switzerland needed to be explored in disclosure and at trial, to determine with which country the obligation had a closer connection, the situation in the instant case is as uncomplicated as clarity could desire. As shown by the respondents' listing of connecting factors, all connections are with Russia. There can be no concern in the instant case that Rule 200(2)(c) may have been relied upon as a freestanding rule that mechanically applied the law of the place where the property was received or kept, irrespective of the factual circumstances and irrespective of the particular issue. In the instant case there are no factual circumstances and particular issues that could possibly permit the application of any other law but Russian law. It seems clear to me that whatever reference point may be chosen, the law that has the closest connection (indeed, any connection) with the claim or the issue is Russian law. BVI law is as purely unconnected with the claim as may be conceived. BVI law is not the proper law of this claim.

Conclusion

[28] For the reasons given I would dismiss the appeal, with costs to the respondents. Subsequent to the date of the hearing the solicitors for the parties communicated

to the court that costs of the appeal, including all ancillary applications, have been agreed at US$250,000.00. I would therefore award costs in that amount and order that that sum that was paid into court by the appellant for security for costs of the appeal be forthwith paid out to the respondents.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal