BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0311

BETWEEN:

(1) ROBELCO LIMITED
(2) OLEG ZHEREBTSOV

Applicants/Claimants

-and-

(1) SVOBODA CORPORATION
(2) AUGUST MEYER

Respondents/Defendants

Appearances:

Miss Karen Troy and with her Mr William Hare and Mr Glenroy Forbes of Forbes Hare for the Applicants/Claimants
Mr Stephen Dougherty of Appleby for the Respondents/Defendants
Mr William Peake of Maples & Calder in an observer capacity for the European Bank for Reconstruction and Development.

2008: January 22, 24
2008: January 28

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** On 20 December 2007, I granted, amongst other things, an interim injunction restraining the Respondents until further Order from exercising and from instructing and/or permitting any proxy, corporate officer, servant or agent whosoever to exercise in favour of any resolution removing any of the 2nd Applicant, Oleg Zherebtsov and/or Vladimir Senkin and/or Mikhail Leshenko as Directors of Lenta Ltd and/or otherwise displacing the 2nd Applicant as Chairman of the Board of Directors of Lenta Ltd the voting rights attaching to the shares in Lenta Ltd that are registered in the name of the First

Respondent and of which the Second Respondent is the ultimate owner until 15 January 2008 ("the return date").

[2] At 3.35 p.m. on 14 January 2008, (a few hours before the return date) the Respondents filed a Notice of Application seeking a discharge of the interim injunction which was granted on 20 December 2007 ("the December injunction"). The application was supported by the affidavit of the Second Respondent, August Meyer ("Mr Meyer").

[3] On the return date, the Applicants sought an Order for the continuation and extension of the December injunction. They complained about the tardiness of the Respondents' application to discharge. As a consequence, the Court adjourned both applications to 22 January 2008 for the inter partes hearing and continued the December injunction.

The parties

[4] The First Applicant, Robelco Limited ("Robelco") is company incorporated in Cyprus and is the owner of 35% of the issued shares in Lenta Ltd ("Lenta"), a Business Company which was incorporated in the British Virgin Islands ("BVI") on 16 July 2003 and re-registered under the BVI Business Companies Act ("the BCA") on 24 October 2004. The registered agent for Lenta is Tricor Services (BVI) Limited ("Tricor") at Palm Grove House, PO Box 3340, Road Town, Tortola, BVI. Lenta owns 100% of the shares in OOO Lenta, a company incorporated in the Russian Federation that is one of Russia's largest hypermarket operators.

[5] The Second Applicant, Oleg Zherebtsov ("Mr Zherebtsov") is the sole shareholder of Robelco. He founded Lenta and was its General Director before becoming a member of the Board of Directors. He is at the date of this judgment, the Chairman of the Board of Directors.

[6] The First Respondent, Svoboda Corporation ("Svoboda") is a company incorporated in the BVI. Its registered office is also at Palm Grove House, PO Box 3340, Road Town, Tortola,

BVI. Svoboda is the holder of 36% of the issued shares in Lenta. The Second Respondent, Mr Meyer is the sole Director of Svoboda. He was a Director of Lenta.

[7] The other major shareholder in Lenta is the European Bank for Reconstruction and Development ("EBRD") which holds 11% of the issued shares. The EBRD provided a loan of up to US$30 million to Lenta in 2004 to help fund its expansion efforts. It was as a result of this loan that EBRD received the 11% of the shares in Lenta.

Historical background

[8] On or about 20 December 2007, Lenta had 7 Directors. These Directors were nominated pursuant to Regulation 45 of Lenta's Articles which expressly states that Mr Zherebtsov has the right to nominate 3 Directors which are termed the Principal Member Directors; the other members have the right to nominate 2 Directors termed the Other Members Directors; Mr Zherebtsov has the right to nominate two other Directors whose nomination will be subject to the other members which are termed Independent Directors and the EBRD has the right to nominate one or two Directors.

[9] The 3 Principal Member Directors were Mr Zherebtsov, who was also the Chairman of the Board, Mr Vladmir Senkin ("Mr Senkin") and Mr Mikhail Leschenko ("Mr Leschenko"). Only one Independent Director was appointed and this was Mr Robert Voss ("Mr Voss"). The Other Members Directors were Mr Loren Bough and Mr Greg Lykins. Mr Sevki Acuner was appointed as the EBRD Director.

[10] On 3 December 2007, Mr Zherebtsov received a Notice convening a Special Meeting of Members to be held on 21 December 2007. The Notice purported to have been sent by him as it stated "by Order of the Chairman of the Board". He did not send this Notice. Mr Meyer said it was sent out on his instructions as the sole Director of Svoboda and those words were included on instructions of his legal advisors. It is accepted that Mr Zherebtsov was informed that it was Mr Meyer who called the meeting. The Agenda for that meeting included the passing of a resolution that required a simple majority to remove all of the Directors save and except the EBRD Director.

[11] On 12 December 2007, Mr Zherebtsov received another Notice of a Special Meeting of Shareholders to be held on 28 December 2007. This time it was clear that the meeting was called by Svoboda through Mr Meyer. The Agenda for the meeting included a resolution to request that the Board of Directors of the Company appoint a Mr Sergei Yuschenko ("Mr Yuschenko") as Chief Executive Officer of Lenta and as General Manager of LLC Lenta as well as a resolution to request that the Board of Directors issue a Power of Attorney for Lenta to Mr Yuschenko for the calendar year 2008.

[12] Mr Zherebtsov stated, and this is not opposed, that Svoboda and Mr Meyer have attempted before to reconstitute the Board of Directors of Lenta. On 23 November 2007, a motion was proposed at an Extraordinary Meeting of the shareholders to have all decisions regarding the funding and budgets rest only with the shareholders and to dissolve the current Board of Directors. The motion was passed by the majority of shareholders present with only Robelco voting against and the EBRD representative abstaining. It was later pointed out to the shareholders that the removal of all the Directors at that meeting was ineffective as Regulation 44 of the Articles prohibited such a complete dismissal of the Board of Directors.

[13] Mr Zherebtsov stated that the Memorandum and Articles clearly seek to give effect to what was contractually agreed between the members of Lenta as to its management in that his shareholding is now a minority shareholding and it was expressly agreed that the Board of Directors of the Company would ultimately be under his control. This appears to be the case as Regulation 45 gives him the right to nominate 5 Directors (2 of which need approval by other members) and to nominate the Chairman of the Board (who would have a casting vote if there was an even number of Directors).

[14] In light of the above events, Mr Zherebtsov alleged that Svoboda and Mr Meyer are seeking to remove the Board of Lenta with the exception of the EBRD's Director and vest in the CEO, Mr Yuschenko, complete management control of Lenta with the result that Mr Yuschenko would be answerable directly to the shareholders (amongst whom he is a minority) rather than to the Board, whose voting majority he is constitutionally entitled to

control. It is this concern that prompted him to apply ex parte for the injunction as set out in paragraph 1 of this judgment.

Subsequent Events since 20 December 2007

[15] It appears that the Meetings scheduled for 21 and 28 December 2007 respectively were not held because of the Court's Order. Mr Zherebtsov subsequently informed Mr Yuschenko that Lenta did not intend to renew his contract for 2008 and next served a Notice of a Board Meeting for 14 January 2008 to consider the following resolutions to cancel all existing Powers of Attorney granted by Lenta effective the date of the resolution, to grant Mr Zherebtsov the power to execute documents on behalf of Lenta for the calendar year 2008, to review Mr Yuschenko's performance as General Manager of Lenta LLC and to approve a resolution to decline to renew his contract.[1]

[16] Svoboda and Mr Meyer served a Notice of an Extraordinary Meeting of Shareholders to be held on 25 January 2008. The Agenda for this Meeting was to pass resolutions to again remove all Directors barring the EBRD Director and to appoint 3 replacement Directors[2]. Subsequently, Mr Zherebtsov was sent a set of Written Resolutions[3] by email that members were invited by the Respondents to adopt. The Written Resolutions were passed by a simple majority of the members (50.25%)[4] removing Mr Voss (who was nominated by Mr Zherebtsov) and appointing 3 other Directors to include Mr Yuschenko and Mr Meyer. Tricor, having received a signed copy of the Written Resolutions, altered the Register of Directors to reflect these changes. Tricor was contacted by the legal advisors of Mr Zherebtsov and has written indicating that it "undertakes not to carry out any further work or accept instructions from individuals purporting to represent Lenta until the matter has been resolved"[5].

[17] The Meeting scheduled for the 14 January 2008 was adjourned to 16 January 2008 and on that date, Mr Meyer and Mr Yuschenko along with the other Director who was purportedly

[1] Hearing Bundle, Tab 12 page 50
[2] Hearing Bundle, Tab 12 page 52
[3] Hearing Bundle, Tab 14 pages 10 to 11
[4] See paragraph 8 of Mr Nader's first affidavit
[5] Hearing bundle, Tab 14 pages 23 and 24.

appointed by the Written Resolutions were in attendance. Their participation was not recognized by the other Board members. Mr Voss was also in attendance. According to Mr Nader, the Board, as it was originally constituted at the 14 January 2008, passed the main resolutions proposed. Signed copies of the resolutions were exhibited to the affidavit of Mr Nader along with the Minutes of that Meeting[6]. They were signed by four Directors.

Applicable legal principles

[18] On 8 January 2008, this Court delivered a written judgment in **Eton Consultants Holdings Ltd et al v Dorot Properties & Holdings Ltd et al**[7], in which the procedure to be adopted by the Court in hearing applications for interlocutory injunctions and the tests to be applied were comprehensively spelt out. The Court referred to the landmark case of **American Cyanamid Co. v Ethicon Limited**.[8] At page 407, Lord Diplock had this to say:

> "*The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried* [emphasis added]. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought."

[19] According to **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arise: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, where does the balance of convenience lie?

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[6] Hearing Bundle, Tab14 pages 11 to 17

[7] BVIHCV2007/0209, High Court of Justice, British Virgin Islands – Judgment of Hariprashad-Charles J.

[8] [1975] AC 396, H.L.

[20] Some of the key principles derived from the speech of Lord Diplock in **American Cyanamid** (at pages 406-409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations. These are matters to be dealt with at the trial.

5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

6. Some additional factors that the Court needs to bear in mind are: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the Court may reach as to the relative strength of the parties' cases.

7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[21] That question is the threshold requirement. Lord Diplock in **American Cyanamid** said it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious"?, is

there "a serious question to be tried"?, is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test [9].

Is there a serious issue to be tried?

[22] The Applicants contended that there is plainly a serious issue to be tried as to whether, by virtue of Regulation 47, the Respondents can remove the Directors who were nominated by Mr Zherebtsov by simple majority without them ceasing to be nominees of Mr Zherebtsov. The Applicants are of the view that Regulation 47 cannot be read in isolation and must be read together with Regulations 45, 46, 48 and 61. When read together, the Court can find that there is an implied term that the Directors nominated by Mr Zherebtsov can only be removed by the shareholders if they have ceased to be nominees of Mr Zherebtsov.

[23] The Respondents contended that there is no issue to be tried, much less as serious one. Learned Counsel for the Respondents, Mr Dougherty was confident that Regulation 47 is so clear in its terms that a Director can be removed by majority vote of the shareholders, that there is no need to imply any terms into the Articles. He next submitted that, in any event, Mr Zherebtsov is not a member and he is only given the rights under Regulation 45 if he is a member.

Whether a term should be implied into the Articles?

[24] It is imperative that I recite fully Regulations 45 and 47 of Lenta's Articles. Regulation 45 states:

> "Mr Oleg Zherebtsov shall, whilst he remains a member, have the right, in his sole discretion, to nominate three (3) of the Directors (**the Principal Member Directors**").The other members shall have the right to nominate two (2) of the Directors ("the **Other Members Directors**"). Mr Oleg Zherebtsov shall also have the right to nominate two (2) Independent Directors, whose nomination shall be subject to the other members. Mr Oleg Zherebtsov shall have the right to nominate the Chairman of the Board who shall have a casting vote where (i) the number of

[9] Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419, CA *per Browne L.J* See also Seaconsar v Bank Markazi [1994] A.C. 438, H.L., Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547.

Directors appointed to the Board is an even number, and (ii) there would otherwise be a deadlock of the Board. ***The members agree to exercise their votes in favour of the respective nominees for the Director positions*** [emphasis added]. Each Director shall be appointed by a simple majority vote of the members."

[25] Regulation 46 gives the EBRD as long as it continues to hold shares in Lenta the right to nominate at least one person as a non-executive Director termed the "EBRD Director". Regulation 47 states:

> "Without prejudice to Regulation 46, the Directors (other than the EBRD Director) may be removed by a simple majority vote of the members. Mr Oleg Zherebtsov and the other members' respective rights in Regulations 45 and 46 to nominate a Director(s) shall also include the right to nominate a replacement for the removed Director upon written notice to the other members."

[26] Section 11 (1) of the BCA states that "the memorandum and articles of a company are binding as between the company and each member of the company and each member of the company". It is accepted that articles of association form a contract between a company and its members. It is unlike an ordinary contract because it is indefeasible on the grounds of misrepresentation, common law mistake, mistake in equity, undue influence or duress and it cannot be rectified on the grounds of mistake[10]. It differs also from ordinary contracts in that it can be altered by a special resolution without the consent of all contracting parties.[11]

[27] The Courts regard articles of association as commercial documents and apply a liberal construction to them. In **Holmes v Keyes**[12] Jenkins LJ stated:

> "I think that the articles of association of a company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the articles, in preference to a result which would or might prove unworkable."

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[10] Per Steyn LJ, Bratton Seymour v Oxborough [1992] BCLC 693 at page 698.
[11] Section 12 of BCA
[12] [1959] Ch 199 at 215 CA

[28] In **Equitable Life Assurance Society v Hyman**[13]**,** Lord Steyn explained that there is a distinction between the processes of interpretation and implication. He adumbrated that the purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear. He further stated that:

> "The critical question is whether a relevant restriction may be implied into article 65(1). It is certainly not a case in which a term can be implied by law in the sense of incidents impliedly annexed to particular forms of contracts. Such standardized implied terms operate as general default rules….. If a term is so implied, it could only be a term implied from the language of article 65 read in its commercial setting. Such implied terms operate as ad hoc gap fillers."

[29] It is plain that terms can be implied from the language of the articles of association to give them reasonable business efficacy. There are however limits to the use of evidence of surrounding circumstances as an aid to the construction of the articles of association. Lord Walker of Gestingthorpe in **HSBC Bank Middle East (Representative of Class B Investor Shareholders) and Others v Paul Clarke (Joint Provisional Liquidator of Oracle Fund Limited) and Others**,[14] approved the following passage of Steyn LJ in Bratton Seymour v Oxborough:

> "I will readily accept that the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances".

[30] The restrictions on implying terms into the articles of association are important because the articles cannot be rectified by the Court. The BCA provides that the articles can only be amended by resolution of the members.[15] If there is any inconsistency between different parts of the articles, the Courts will follow the canons of construction and look to the whole, seeking to achieve concord between the different provisions and compliance with the law.[16]

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[13] [2000] UKHL 39, [2000] 3 All ER 961
[14] [2006] UKPC 31, Judgment delivered on 21 June 2006
[15] Section 12 BCA
[16] Oakbank Oil Co. v Crum (1882) 8 App Cas. 65 HL

[31] Mr Zherebtsov stated[17] that the Articles seek to give effect to the agreement of the members as to its management (as he was then a minority shareholder) that the Board of Lenta would ultimately be under his control and hence the provisions regard voting. Regulation 45 requires that the members agree to exercise their votes in favour of the respective nominees for the Director positions. The Regulations have to be drafted in accordance with the BCA, so that the appointment and removal of Directors shall be done by majority votes of the members of Lenta.

[32] If Regulation 47 is read in isolation, then it appears that the nomination of the Directors in accordance with Regulation 45 would be powerless in that on nomination, the members will support the nominees and vote for them but, within the next day or two, they can remove those Directors by a simple majority vote. Prima facie, it appears that a term can be implied that the requirement of the members in Regulation 45 to exercise their votes in favour of the nominees is a continuing one and that these Directors cannot be removed unless they cease to be nominees of the person(s) who nominated them. Prima facie, the term may be implied from the language of the Regulations so as to give business efficacy to them.

[33] A finding as to whether a term should be implied in this case involves a difficult question of law which calls for detailed and mature considerations. These are matters that according to **American Cynamid** should be dealt with at the trial as it does seem to me that there is a serious issue to be tried.

Is Mr Zherebtsov a member?

[34] The Respondents contend that Mr Zherebtsov can only rely on Regulation 45 if he remains a member and, according to Mr Dougherty, he is not a member. Section 2 of the BCA defines a member in relation to a company to include a person who is a shareholder. Section 78 defines a shareholder as a person whose name is entered on the register of members as the holder of one or more shares or fractional shares in a company. There is

[17] First Affidavit of Oleg Zherebtsov paragraph 22

no dispute that Mr Zherebtsov's name is not entered on the register of members of Lenta. Therefore, as is defined by the BCA, Mr Zherebtsov is not a member.

[35] Learned Counsel for the Applicants, Miss Troy raised the issue of estoppel. According to her, the Respondents are estopped from arguing that Mr Zherebtsov is not a member as (1) he holds shares in Lenta through Robelco, (2) he has been treated as a shareholder and (3) in the M & A's and the Subscription Agreement, Mr Zherebtsov is included in the definition of a key shareholder.

[36] First, Robelco owns 35% shares in Lenta and Mr Zherebtsov is the sole shareholder of Robelco. Svoboda owns 36% shares in Lenta and Mr Meyer is the sole shareholder of Svoboda. An argument, albeit extraneous, could be raised in respect of Mr Meyer. If Mr Zherebtsov is not a member, then Mr Meyer is not a member also. To quote the great poet George Bernard Shaw "The moment we want to believe something, we suddenly see all the arguments for it, and become blind to the arguments against it." It is beyond dispute that both Messrs Zherebtsov and Meyer own shares in their respective Companies.

[37] Then, the Memorandum and Articles of Association ("M&As")[18] and the Subscription Agreement[19]of Lenta, however, define key shareholders as Svoboda, Robelco…together with the Robelco ultimate owner and the Svoboda ultimate owner. Regulation 45 describes the nominees of Mr Zherebtsov as the Principal Member Directors.

[38] There is evidence before the Court that the Investment Manager, Ms Katherine Lean (who swore to an affidavit in these proceedings) considers Mr Zherebtsov to be a member. Mr Meyer also does. In his affidavit he stated: "I have been informed by, and do verily believe, Katherine Lean, that when she sent the Notice out to **Members, including Oleg Zherebstov**…"[20]

[18] See Exhibits to the First affidavit of Oleg Zherebtsov at page 133
[19] See Exhibits to the First affidavit of Oleg Zherebtsov at page 50
[20] See Paragraph 5 of First affidavit of August Meyer filed on 14 January 2008.

[39] Mr Meyer who is the sole shareholder of Svoboda which holds 36% of the shares in Lenta and who holds no shares in Lenta (similar to Mr Zherebtsov) is considered a shareholder. The Notice of Special Meeting of Members to be held on 28 December 2007 states: "Notice is hereby given by shareholder, August Meyer, that a special meeting of the Members of Lenta…"

[40] It appears from the evidence so far adduced that prima facie, the intention of the parties was that both Mr Zherebtsov and Mr Meyer would be considered shareholders and thus members as long as they continue to be the ultimate owner of Robelco and Svoboda respectively and those 2 companies continue to hold shares in Lenta. It does not appear as simple as argued by Mr Dougherty that Mr Zherebtsov is not a member by virtue of the definition contained in the BCA. By that definition, Mr Zherebtsov was never a member, however Regulation 45 provides for the voting rights of Mr Zherebtsov whilst he remains a member. Prima facie, the drafters of the M&As must have considered him a member at that time. Nothing has changed in regard to the shareholding in Lenta since the drafting of the M&As. I am therefore of the view that there is a serious issue to be tried on this point which may even require cross-examination.

[41] To sum up, I find that the Applicants' claim is not frivolous and vexatious, that there are serious issues to be tried and that the Applicants do have a real prospect of success.

Damages as an adequate remedy

[42] In **American Cyanamid,** Lord Diplock said at page 408:

> "If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

[43] Lenta is the 100% shareholder in OOO Lenta which is one of Russia's largest hypermarket chains. OOO Lenta operates 26 hypermarkets and has another 8 under construction. It appears that the dispute between the two major shareholders involves the management of the company. Before 20 December 2007, the management and control of the Company

was vested in the Board with Mr Zherebtsov as Chairman. Mr Zherebtsov is of the view that the actions of Mr Meyer are designed to remove the Board of Lenta and vest complete management control of Lenta in Mr Yuschenko, the CEO. Thereafter, Mr Yuschenko would be directly answerable to the shareholders of which Robelco is in the minority. This, he averred, is supported by the attempt of Mr Meyer to remove the entire Board and to have all decisions regarding funding and budgets rest with the shareholders. Mr Zherebtsov does not want Mr Yuschenko to be General Manager of OOO Lenta while Mr Meyer appears to support Mr Yuschenko. Mr Zherebtsov has purportedly appointed Mr Senkin to be the General Manager of OOO Lenta.

[44] If the interim injunction sought by the Applicants is not continued, then his nominee Directors will be removed. He has the right to nominate replacements but will be faced with the stumbling block of obtaining a simple majority of shareholders to vote in their favour for their appointment. Even if his nominees were appointed, in any event, they can be removed by a simple majority vote. If the 6 Directors are removed without replacements then there will not be a quorum for Board meetings[21]. The management of Lenta rests with the Board. This dispute will no doubt cause harm to Lenta and OOO Lenta, and by extension, harm to Robelco and Svoboda as shareholders. I agree with Miss Troy that steps may be taken at this stage which might only be reversed (if illegal) by expensive and protracted litigation. Additionally, Mr Zherebtsov has control of the Board. If resolution is passed then he will lose his management and control of Lenta as Robelco is a minority shareholder. In my opinion, damages may not be an adequate remedy for the parties concerned.

Balance of Convenience

[45] The proposed resolution of 21 December 2007 sought the removal of 6 Directors leaving only the EBRD Director. Regulation 51 provides that a single Director can only act alone for the purpose of appointing another Director. Regulation 61 states that a quorum for a meeting of the Board shall be 4. In special circumstances, this might be reduced to 3 but, in each case, there must be a Principal Member Director. It appears from these Articles that one Director cannot carry out the function of the Board. The injunction was granted to

[21] Discussed below.

maintain the status quo until the issues are resolved. I am more convinced that the status quo has to be maintained because of the flurry of activities that have taken place since the December Injunction. On a provisional finding, most of these activities appear to be contrary to the M&As of Lenta.

[46] A resolution was passed removing Mr Voss and appointing three other Directors who were nominated by the other members. Mr Zherebtsov did not nominate any of these Directors. It is clear from Regulation 45 that the other members can only nominate 2 Directors. Therefore, by appointing 3 new Directors who appear to have been nominated by the other members is contrary to Regulation 45. The Applicants raised other objections to this resolution but I do not think they are necessary for purposes of this application except to add that Regulation 36 contemplated that written resolutions can be passed via electronic communications and this would include emails.

[47] Mr Zherebtsov called a Board Meeting to consider the performance of Mr Yuschenko. This meeting was scheduled for 14 January 2008 and commenced then but was not completed because of the lateness of the time in Russia and was set to resume on 16 January 2008. Mr Zherebtsov had unilaterally informed Mr Yuschenko that Lenta did not intend to renew his contract. This, in my provisional finding, should be a decision of the Board. There has been massive mayhem as regards the General Manager of Lenta. The Applicants say it is Mr Senkin. The Respondents say it is Mr Yuschenko. On 16 January 2008, the Board meeting was resumed and a majority of the Board resolved not to renew Mr Yuschenko's contract and to authorize Mr Zherebtsov to appoint his replacement.[22]

[48] The status quo has to be maintained otherwise there would be utter disorder at the management level of OOO Lenta. In fact, Miss Troy has asked for additional interim measures and in my judgment, this is necessary to maintain the status quo.

[22] See RN-1 14/12-20 Minutes and Resolutions.

Applicants' failure to give full and frank disclosure

[49] The Court has a discretion whether or not to grant an injunction and in doing so, it must bear in mind not only the legal test but other factors including the Applicants' motivation for the injunction and their duty to make full and frank disclosure.

[50] It is trite law that because the injunction was obtained ex parte, the Applicants had a duty to make full and frank disclosure to the Court of all material facts and to present fairly to the Court matters which the Respondents might rely upon by way of defence.[23]

[51] Mr Dougherty argued that the Applicants did not make full and frank disclosure to the Court at the ex parte hearing. He identified 2 such non-disclosures which he said are material: (1) Mr Zherebtsov stated that he did not know who procured the Notice of the Members Meeting to be sent out on 3 December 2007. However, Miss Lean exhibited email correspondence which attached the Notice and Agenda and indicated that the Notice came from Mr Meyer. She also stated that she discussed the fact that the Meeting was called by Mr Meyer on behalf of Svoboda; and (2) in the submissions on behalf of Mr Zherebtsov, it was stated that there is a Power of Attorney vested in Mr Zherebtsov and this is not the position. According to the Respondents, this was not mentioned in Mr Zherebtsov's affidavit.

[52] Mr Zherebtsov said that he exhibited the fax cover sheet which came with the Notice. He said he did not have all the documents when he swore his first affidavit as he was in Denmark and he did not recall receiving the Notice by email. Having seen Miss Lean's affidavit, he now accepts that he had inadvertently overlooked that email and it does refer to Mr Meyer as the person calling the Meeting. In respect of the conversation, he does not recall 'face to face' conversation with Miss Lean.

[53] In respect of the Power of Attorney, he said that it reflected a misunderstanding of oral instructions given to his legal advisors as it did not appear in his affidavit.

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[23] Gee on Commercial Injunctions 5ed edition

[54] It is common ground that an injunction could be discharged if there is material non-disclosure. A consequence of applications for interim injunctions being made without notice is that the applicant who seeks the injunction is under a duty to give full and frank disclosure of any defence or other fact going against the grant of the relief sought. The case of **Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac**[24] is supportive of the point that the applicant has a duty to make "a full and fair disclosure of all the material facts." The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries. The extent of the inquiries that will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.

[55] In deciding in a case where there has been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is important that the Court assess the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. If the duty to disclose is not observed, the Court may discharge the injunction.

[56] In addition, a Court must take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It should also include the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied. The Court must also bear in mind the overriding objective and the need for proportionality in accordance with the overriding objective of CPR 2000.

[24] [1917] 1 K.B. 486, 514, per Scrutton LJ.

[57] Suffice it to say, the discharge of the order is not automatic on a finding of any material non-disclosure. The Court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The Court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The Court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. Ultimately, an interlocutory injunction may be discharged for serious and culpable non-disclosure.

[58] Analysing the law and the facts of the instant application, I am of the considered opinion that the non-disclosures are not material enough to result in a discharge of the December injunction.

Conclusion

[59] In the premises, I will continue the injunction as extended on 15 January 2008 and further extended on 24 January 2008 as amended. The Applicants will have their costs of this application to be agreed or assessed in accordance with CPR 65.

[60] Given the outcome of this decision, Mr Sergei Yuschenko will cease to be the General Manager of Lenta LLC (or OOO) and Mr Vladimir Senkin is the duly appointed General Manager of Lenta LLC (or OOO).

The Order

[61] For the avoidance of any doubt, I will recite the Order in its entirety:

AND UPON reading the Notice of Application herein filed on behalf of the Applicants/Claimants on 20 December 2007, the Notice of Application herein filed on behalf of the Respondents/Defendants on 14 January 2008 and the evidence contained in the Affidavit of Oleg Zherebtsov sworn and filed on 20 December 2007 and exhibit "OZ-1" thereto, the Second Affidavit of Oleg Zherebtzov sworn and filed on 16 January 2007 and exhibit "OZ-2" thereto, the Affidavit of Robert Nader sworn and filed on 18 January 2008 and exhibit "RN-1" thereto, the Affidavit of August Meyer sworn and filed on 14 January 2008 and the Affidavit of Katherine Lean sworn on 17 January 2008 and filed on 21 January 2008 and exhibit "KL-1" thereto

AND UPON the Applicants/Claimants continued undertaking through the First Applicant/ Claimant that, if the Court later finds that this Order has caused loss to any of the Respondents/Defendants and decides that such Respondent/Defendant(s) should be compensated for that loss, the Applicants/Claimants will comply with any Order that the Court may make

IT IS ORDERED that:

1. The injunction granted in paragraph 1 of the Order of 20 December 2007 and further amended on 24 January 2008 herein is continued until the determination of the substantive claim before the Court.

2. Pursuant to CPR 17.1(1)(b), the First and Second Respondents/ Defendants and each of them are restrained until the determination of the substantive claim before the Court whether themselves or through any corporate officer (as regards Svoboda Corporation), proxy, servant or agent whosoever from:

(1) further disseminating either copies or the substance of the Register of Directors of Lenta Ltd as amended to record the removal of Robert Voss as a Director of Lenta Ltd and the appointment of Dmitry Kostygin, Sergei Yuschenko and August Meyer to its Board of Directors;

(2) further publishing or disseminating either any copy or the substance of the Written Resolutions dated 15 January 2008 that purport to have effected the said changes in the composition of the Board of Directors of Lenta Ltd;

(3) taking any further step pursuant to or in reliance on the Written Resolutions dated 15 January 2008 that purport to have effected the said changes in the composition of the Board of Directors of Lenta Ltd;

(4) taking any further step pursuant to or in reliance on the Confirmations incorporated into the Written Resolutions dated 15 January 2008 that purport to confirm that Sergei Yuschenko is the lawful and true Chief Executive Officer of Lenta Ltd and Director General of Lenta OOO (or LLC) and that Vladimir Senkin is not the Chief Executive Officer of Lenta Ltd or Director General of Lenta OOO (or LLC);

(5) taking any further step to procure the removal of any person as a Director of Lenta Ltd, other than a person currently serving as an Other Members Director; and/or

(6) nominating or taking any step to procure the nomination of any person as a Director of Lenta Ltd, other than as a replacement for an Other Members Director who has resigned, been removed or otherwise ceased to be an Other Members Director.

3. In relation to the First and Second Respondents/Defendants, it is declared that:

(1) the Directors of Lenta Ltd are Oleg Zherebtsov (Chairman of the Board), Vladimir Senkin, Mikhail Leschenko, Loren Bough, Robert Voss, Greg Lykins and Sevki Acuner.

(2) Mr Sergei Yuschenko has ceased to be the General Manager of Lenta LLC (or OOO) and Mr Vladimir Senkin is the duly appointed General Manager of Lenta LLC (or OOO).

4. Costs to the Applicants/Claimants to be assessed under Part 65 if not agreed.

Indra Hariprashad-Charles
High Court Judge