BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0291

BETWEEN:

PETROVAL SA

Claimant

and

(1) STAINBY OVERSEAS LIMITED
(2) NORREYS WORLDWIDE LIMITED
(3) JOHN LUSH
(4) FRANCOIS OSTINELLI

Defendants

(5) CARIBBEAN CORPORATE SERVICES LIMITED
(6) MORGAN & MORGAN TRUST CORPORATION LIMITED
(7) OFFSHORE INCORPORATION LIMITED

Discovery Defendants

(8) ARTEM ZAKHAROV
(9) ALEXANDER NOVOSELOV
(10) EURO PACIFIC TRADE DEVLOPMENT LIMITED
(11) EVERON ASSOCIATES LIMITED
(12) BOYCE OVERSEAS LIMITED
(13) WEALE INVESTMENT HOLDINGS LIMITED
(14) MAJOR OIL & PROPERTY SERVICES LIMITED
(15) INNES OVERSEAS COMPANY LIMITED
(16) ODEY INTERNATIONAL HOLDINGS LIMITED

Defendants

Appearances:

Mr. Charles Hollander QC, Mr. Roger Masefield and Mr. Mark Forte instructed by Conyers Dill and Pearman for the Claimant

Mr. Philip Kite and Mr. Andrew Thorpe of Harney Westwood& Riegels for Defendants 1-4

Observers: Mr. Michael Fay for Everon Associates Ltd.

2008: January 25th and 31st, February 7th

JUDGMENT IN CHAMBERS

[1] **Joseph-Olivetti J.**:- This case concerns a dispute involving the Russian group, Yukos Oil, once reputed to be the second largest oil producer in Russia (12th in the world) and until recently controlled by the well-known and controversial oil magnate, Russian billionaire, Mikhail Khodorkovsky before its collision with the Russian fiscal authorities. In this action,

the Yukos Oil group, through one of its subsidiaries, Petroval SA, the Claimant, is attempting to recover what it alleges is its 100% interest in Petroval Singapore, a company that has substantial assets of which it alleges it was fraudulently deprived by principally Defendants 3 and 4. Presently, there are two applications before this court. The first is an application by the Claimant against Defendants 1-4 for in brief orders requiring them to comply with the terms of a freezing injunction. The second is one by the said Defendants for an order varying the terms of the freezing injunction.

The Preliminary Issue

[2] Learned Counsel for these Defendants, Mr. Kite, took a preliminary point at the hearing. In essence, Mr. Kite submitted that the application was for an order requiring compliance with a prior order and was therefore bad as the court would not make an "in vain" order. Counsel urged that the proper course to enforce the freezing injunction is by application under Part 53 CPR 2000 (committal and sequestration).

[3] In support of his contention, Mr. Kite relied heavily on what he interpreted as a ruling of Charles J. to that effect on what he said was an application for a similar order sought by the Claimant against other Defendants. Counsel submitted that that application was heard the day before this hearing (Thursday 24th January) and that that very point was determined, the issue having being raised by Mr. Fay on behalf of Everon Associates Ltd., another defendant. Counsel explained that Charles J. did not grant the Claimant's application on the basis that the court could not make an order requiring compliance with a prior order. Counsel urged this court to follow that ruling and to dismiss the Claimant's application without more. In further support he submitted the Claimant's Notice of Application before Charles, J. and the draft order (filed 23 January) with particular reference to Para. 3 thereof.

[4] Mr. Hollander Q.C., Counsel for the Claimant, although not personally present at the hearing before Charles, J. submitted that this was not what had transpired or that there was such a ruling. He submitted that that court had granted an extension of time for the particular defendants to comply with the order in question (a similar freezing injunction) they having complained that they did not have sufficient time to do so in the first place. In

any event, he urged that the applications were different factually and that it was necessary for the court to hear this application before determining the preliminary point.

[5] No transcript was laid before the court and in the face of this disagreement the court was in no position to decide what was actually determined at that hearing in so far as it was material. Further, the court was swayed by the submission that it was necessary to consider the application rather than merely look at the draft order in deciding this preliminary issue. In addition, the Court also considered that as two lawyers had traveled from England specifically for these matters it would have been more costly and a waste of resources to defer hearing the substantive applications pending a ruling on the preliminary point.

[6] I think it beneficial to say something of the nature of the action generally which was hinted at in the opening paragraph and to give a short history of relevant proceedings to date in so far as it affects the two applications before us.

[7] I take this brief summary in the main from the written submissions of the Claimant, the 7th affidavit of Mr. O'Sullivan, a solicitor with Byrne and Partners London filed on behalf of the Claimant and the second affidavit in opposition by Mr. Drew, a solicitor with Norton Rose, London, filed 23rd Jan. on behalf of Defendants 1-4. The action was instituted in December 2007. Initially it was only against the first five defendants. To date no defence has been filed as the time for so doing has not yet expired.

[8] The case for the Claimant has been argued in the context of an international commercial fraud. It stems from the efforts of the Yukos Oil group which is the beneficial owner of the Claimant to protect its assets in the aftermath of its falling out with the Russian state. It is concerned in the main with the circumstances in which an oil trading company, Petroval Singapore came to be incorporated in Singapore, as its name implies, in 2004. It is the Claimant's case that its former senior management, Mr. Lush and Mr. Ostinelli (Defendants 3 and 4) represented to the Claimant that they would take the shares allotted in the new company in their own names and would hold them on trust for the Claimant and would execute draft letters of confirmation to that effect.

[9] On the basis of that understanding the Claimant alleges that it paid for the incorporation of Petroval Singapore and allowed its highly profitable oil trading business which had realised gains of US$40M in 2004 to be transferred to Petroval Singapore for the payment of nil

consideration. However, secretly and in breach of trust Mr. Lush and Mr. Ostinelli then transferred their shares in Petroval Singapore to the Defendants 1 and 2 both BVI companies (Stainby and Norreys) ultimately owned or controlled by them. It is alleged that subsequently Messrs Lush and Ostinelli caused Norreys to enter into a series of circular bunker oil transactions with PSA, which had the effect of transferring US$7m out of PSA and into Norreys; and caused Petroval Singapore to pay out substantial dividends (in excess of US$30 million) and replaced this capital by taking loans in excess of US$20 million from Norreys and Stainby and caused it to by 75% of Petroval Bunker International ("PBI") for more than $6M.

[10] Defendants 3 and 4 have now refused to recognise the Claimant's beneficial interest in Petroval Singapore and apparently will contend that the Claimant intended to gift its lucrative business to them.

[11] On 7th December 2007 this court granted a plethora of orders ex parte, including, a world wide freezing injunction, a receivership order against Defendants 1 and 2 and a Norwich Pharmacal Order. The return date for the relevant orders was 4th January 2008.

[12] Subsequently, in late December and January, Charles J. made several orders, inter alia, joining other defendants and imposing like freezing injunctions against them, gave directions for the filing of evidence and the filing of applications by the Defendants to discharge the Freezing injunction and to challenge the jurisdiction of this court (the time for so doing has not yet expired). The return date on the freezing injunction was extended to March 13th. Charles J. also on 24th January made the order referred to.

[13] On 23rd January 2008 this court granted a further order against the 7th Discovery Defendant and orders against the 17th Defendant, Fiortino Investments Ltd, including inter alia, a world-wide freezing injunction and receivership order in terms of those granted on 7th December. To sum up, this litigation has gathered tremendous momentum even at this preliminary stage and has grown exponentially and somewhat mysteriously rather like the benighted child, Topsy who "just growed"[1].

[14] I agree with Mr. Kite that it is well established that the court will not make an order in vain and that the usual remedy to ensure compliance with an order is to engage the procedure for the enforcement of orders as set out in CPR 2000 Parts 43- 53. However, if we were

[1] Harriet Beecher Stowe-Uncle Tom's Cabin

only to look at the terms of the draft order sought on which so much emphasis was placed by Mr. Kite without considering the substance of the application then we will be allowing procedural matters to be the master of the law rather than its handmaiden and so act in breach of our duty to deal with matters justly. The nature of the relief claimed cannot be the decisive factor. I say this in the light of section 20 of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80 which empowers the court to grant all such remedies whatsoever as any of the parties may be entitled to as the court thinks just so as to avoid multiplicity of legal proceedings. Thus, it seems to me that the court is mandated to consider the substantive application before it in determining whether to grant the relief sought or not but I hasten to say that this is not necessarily so in all cases and I speak only of this particular situation.

[15] The Claimant's application is as per Notice of Application filed 15th January. In summary, it is an application for the court to determine whether Defendants 1-4 have complied with the freezing injunction and to make several orders which would have the effect of compelling compliance. See the draft order. The Claimant alleges that the Defendants are in breach of certain parts of the freezing order whilst the Defendants say that they have complied or ought to be excused from complying. The real issue for the court to determine on this application is whether the Defendants have complied or not and in the case of breach whether the breach is justified.

[16] However, says Mr. Kite, the Claimant should have issued committal proceedings and ought not to have made this application. I note that in applications for committal the onus is on the applicant to prove unequivocal breach of the order. "**The court will only punish as contempt a breach of the injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt**" - Halsbury's Laws of England 4th Edn. Vo.9 para. 66. And, the procedural requirements are stringent - see CPR Part 53.[2] A prudent Claimant would therefore hesitate to seek committal for contempt if from the outset the alleged contemnor claims compliance or justification for non-compliance and there are arguable grounds for so doing. Surely, it would be more

[2] However, I note that In Part 53.9 even on a committal application, the court can make a number of orders including accepting an undertaking from the judgment debtor or make a suspended committal order on such terms as the court thinks just, in other words make a further order to enforce compliance with its own order.

beneficial in such instances if an applicant is able to approach the court to determine the issue rather than be compelled to take the Draconian step of seeking committal. And, there is no doubt that this is not a straightforward case of breach as in for example a case where a court orders a person to give up possession of a house by a fixed date and that person blatantly remains in residence.

[17] I take heart in this approach from the extract from **Gee on Commercial Injunctions** 5th Edn. P. 553 which was cited by Mr. Hollander:-

> "There is a principle that the court will not use its powers of committal or sequestration when a lesser alternative could more appropriately be adopted. Thus, *e.g.* if a person refused to execute a document the court could, under s. 39 of the Supreme Court Act 1981 order that it be signed by someone else on his behalf and the document so signed would have the same effect as if executed on behalf of the Defendant. Also if the order turns out to be unexpectedly burdensome the court can stay its provisions or can decline to order immediate committal or sequestration or can fix a new time for compliance. **In commercial proceedings an application for committal is a "last resort to be used only in cases of flagrant refusal to disclose assets or for the disclosure of documents relevant to the disclosure of assets**". (Emphasis added.)

[18] It appears then that in commercial cases one does not lightly resort to committal proceedings unless the breach is flagrant. If then committal to enforce compliance is to be used in the last resort then what remedies does the court afford a litigant in a commercial case if he alleges breach but does not want to institute committal proceedings? Unfortunately, **Gee** dos not shed much light on the remedies available to a litigant in the shoes of the Claimant and what has been advanced by Mr. Hollander if I understand the argument is that the court can review its orders to enforce compliance in these circumstances. I tend to agree with that general proposition as it seems to be borne out by the approach sanctioned by CPR 2000 which gives the court wide case management powers which can be employed at any time and to such provisions as Part 26.4 (unless orders). I also remark that here a committal and or sequestration order would

be “in vain” as Defendants 3 and 4 reside outside the jurisdiction and Defendants 1 and 2 most likely have no assets here.

[19] Accordingly, I am of the view that a litigant can come to the court to resolve disputes about compliance with its orders and that the court can hear such disputes and impose sanctions or extend the time for compliance or fix a time for compliance as it sees fit.

[20] I have had regard to the arguments that the orders sought will be “in vain orders”. I accept Mr. Hollander’s submissions as I am not persuaded that in the main the orders sought with the exception of that at para. 4, on which counsel himself had reservations, are orders which can be so classified. I am satisfied, on consideration of the nature of the underlying disputes giving rise to the alleged non-compliance that there is a real prospect of compliance if the Claimant is successful and orders in terms of paras 1, 2 and 3 of the draft are made.

[21] Having so determined, the prior ruling of Charles J. relied on by Mr. Kite, whatever its true nature, is strictly not relevant and therefore there is no need to await the transcript which I had indicated that the court would request. The decisions of courts of concurrent jurisdiction, although they are entitled to the utmost respect, are not binding on each other. Furthermore, I am satisfied from a brief review of the Claimant’s application before that court including the supporting affidavit and the draft order that this present application on its facts is substantially different from the Claimant's prior application. What is more, the learned judge did not given a written ruling and therefore one cannot presume to say with any certainty exactly what was taken into account when she refused to grant the Claimant’s relief as prayed for in paragraph 3 of its draft order and instead granted what I interpret on its face as an extension of time for those Defendants to comply with the freezing injunction.

[22] Accordingly, the application by Mr. Kite to dismiss the application on the basis that it merely invites the court to make an order to comply with an order and so make a futile order is dismissed.

The Claimant’s Application and the Defendants’ cross-application

[23] I shall consider both together as the cross-application, although a distinct application is by its nature a defence to the Claimant’s application. The same evidence was relied on in

opposition to the Claimant's application as well as in support of the cross-application filed 16th January and the arguments on both applications were necessarily intertwined.

[24] In brief, the Claimant's complaint is that Defendants 1-4 are in breach of particular aspects of the freezing order and if it is successful it seeks various orders geared to ensuring their compliance. The breaches, for ease of reference are particularized at para. 7 of the 7th affidavit of Mr. Bernard O'Sullivan and summarised in the schedule to the draft order. I do not intend to set them out here in full but will deal with them under the main heads as identified by Mr. Hollander, although not necessarily in the same order. The heads are: provisions relating to Specific Assets, provisions relating to other assets; provisions relating to documents; and provisions relating to legal costs and living expenses.

[25] The Defendants' application is for variation of and the stay of certain terms of the Freezing Injunction in particular as it relates to disclosure of assets other than Specific Assets as defined in the Freezing Injunction and the disclosure of documents. They rely on the affidavits of Mr. Lush and Mr. Ostinelli made in ostensible compliance with the Freezing Injunction and that of Mr. Drew. I shall consider first whether there has been non-compliance as alleged and then if breaches are established whether they are justifiable or excusable and if the order should be varied as sought by the Defendants.

Provisions relating to legal costs and living expenses

[26] The freezing injunction in para. 5 thereof restrained the Defendants from disposing of or dealing with their worldwide assets up to the value of US$50,500,000 pending trial or further order. However, the usual exception to allow for expenditure on legal fees and living expenses was made in para. 23. Para. 23 permits Defendants 3 and 4 to spend US$17,500 per month towards their ordinary living expenses and also a reasonable sum on legal advice and representation, "**always provided such sums do not include any part of the Specific Assets which for the avoidance of doubt are held on trust for the Applicant before spending any money the Respondent must tell the Applicant's solicitors where the money is to come from**."

[27] Para. 24 does not prohibit Defendants 1 and 2 from disposing of assets within their ordinary and proper course of business and allows them to spend a reasonable sum on legal advice and representation, "**always provided such sums do not include any part**

of the Specific Assets which for the avoidance of doubt are held on trust for the applicant." And they are to give details of such dealings and disposals to the Claimant's solicitors."

[28] The Defendants on their own evidence have instructed numerous legal advisors in respect of this claim including Harney Westwood & Riegels ("Harneys") in the BVI, Norton Rose, London, Norton Rose Singapore, the Wong Partnership in Singapore and Messrs Pestalozzi Lachenal Patry in Switzerland[3] and have placed funds on account with Norton Rose, London. Noticeably, Defendants 3 and 4 did not give prior notice of this and they did not identify the source of the funds as required neither did Defendants 1 and 2 provide reports as required. (In passing I remark that the order refers to reasonable sums ofr legal advice and that the amount paid on account was not stated thus leading the Claimant's lawyers to submit that having regard to the number of lawyers engaged that the fees on account would have been substantial. This is by no means an unreasonable inference and leaves the issue of whether what was paid was reasonable or not in the air and a later bone of contention. A very unsatisfactory position indeed.

[29] When the Claimant's lawyers brought these breaches to the attention of the Defendants' lawyers, Norton Rose, London, their unequivocal response was to the effect that their **clients did not wish to comply** with the requirements of paragraph 23 of the freezing order in respect of the source of funds and they merely invited the Claimant to take their clients' word that the funds did not come from the Specific Assets. See O'Sullivan 7 para, 56 to 57 and BOS 13/ 171-173. I refrain from comment on this response save to say that such a response from ostensibly reputable lawyers to an injunctive court order is astonishing. Further, that it is bordering on the naïve to expect a litigant to accept an assurance from another litigant whom he claims has defrauded it.

[30] Suffice it to say that on this evidence alone it is indisputable that Defendants 1–4 have breached paras. 23 and 24 of the freezing injunction in two respects – they did not give prior notice before expending monies on legal fees and they did not identify the source of the funds to comply with the provision that monies expended must not include any part of

[3] By letter of 11th January 2008, Harneys revealed that Defendants 1-4 had placed funds on account with Norton Rose London in respect of legal fees. See O'Sullivan 7 Para 55 and BOS 13/ 174-173.

the Specific Assets. What is more they have indicated their unwillingness to do so for reasons which we will address subsequently.

[31] Now to living expenses. Mr. Lush and Mr. Ostinelli in their affidavits reveal that they both have properties which are subject to mortgages. See Schedules 4 and 5 of Mr. Ostinelli's affidavit and Schedules 1 and 2 of Mr. Lush's affidavit. From this the Claimant submits and I agree that it is a reasonable inference to be drawn, that these mortgages need to be paid and that payments are falling due and are being met. Likewise, it is a reasonable inference that Mr. Lush and Mr. Ostinelli are incurring living expenses. Yet they have given no indication that the sums being expended do not exceed the allowed sum and have not notified the Claimant where the monies are coming from to meet those expenses. On the face of it Defendants 3-4 are in indisputable breach of para. 23. The Defendants' answers to these allegations of breach are contained in particular in para. 69-73 of Mr. Drew's affidavit to which I will refer subsequently when I come to consider justification and variation.

Provisions relating to documents

[32] The freezing order (**para. 17-19 and 21-22**) enjoined the Defendants to inform the Claimant's solicitors of the existence and whereabouts of documents in their possession which relate to or evidence the existence, location, value or details of the Specific Assets and their current legal or beneficial ownership and to deliver them up to the Claimants' solicitors. There was a staggered time frame imposed for so doing. In addition they had to swear and serve on the Claimant's solicitors an affidavit setting out all the steps taken to comply.

[33] It is beyond doubt that on the evidence before this court the Defendants have not complied with this part of the freezing injunction.

Provisions relating to Other or Non Specific Assets

[34] Pursuant to the freezing order (para. 10) the Defendants within 5 working days of being notified of the order were to inform the Claimant's solicitors to the best of their ability of all their assets worldwide exceeding US$25,000.00 and give the value, location and details of

those assets. And, Pursuant to para. 12 the Defendants were, within 15 working days of being notified of the order, to swear and serve on the Claimant's solicitors an affidavit of the information referred to in para. 10 thereof.

[35] The Claimant complains that the Defendants did not provide the information within the stipulated timeframes and that the information subsequently provided fall far short of what was ordered. On 11 January 2008 Defendants 3 and 4 produced two unsworn affidavits which were later sworn and filed on 16th January.) It is noted that Mr. Ostinelli's affidavit is in part made on behalf of Defendants 1 and 2 as he asserts that he is 'predominantly responsible for the day to day management of the finances' of Defendants 1 and 2. See para. 13.

[36] On consideration of these affidavits it is apparent that they only deal with those assets over US$25,000.00 belonging to the Defendants of **which the Claimant has knowledge** and give no information about their other non-specific assets. That is a clear and deliberate breach.

Provisions Relating to Specific Assets

[37] Under para. 14 of the freezing order the Defendants were within given timeframes to inform the Claimant's solicitors of the value, location and details of the Specific Assets and of the legal and/or beneficial owners of same to the best of their ability.

[38] Under para. 16 the Defendants were within a given timeframe to swear and serve on the Claimant's solicitors an affidavit of that information.

[39] The Defendants did not provide the information within the stipulated time neither did they swear affidavit within the given time. However, Mr. Lush and Mr. Ostinelli swore late affidavits which did not provide the relevant information since they did not give the location and/or the identity of the legal or beneficial owners of the Specific Assets in all cases.

[40] The Claimant in its written submissions (para. 18(2)) highlighted the deficiencies in those affidavits. In sum, although they are only required to give information insofar as they are able they have not identified the location of the dividends paid to Everon by Stainby amounting to US$20.5. For example, simply stating as they did - "location – Everon" in Schedule is not good enough. Stainby paid the dividends to Everon and must be taken to have knowledge of the bank accounts into which it paid those funds. The details of

Everon's bank accounts must be disclosed. The same is true of the dividends paid by Norrey's. It is not sufficient simply to state the name of the recipients as Mr. Ostinelli did in Schedule 2 para. 3.

[41] Further the Defendants did not identify all the individuals who have present legal/beneficial title to the Specific Assets. The Defendants attempted to make good these omissions by relying on the affidavit of their solicitor, Mr. Drew. However, I agree with Mr. Hollander that Mr. Drew's affidavit cannot supply the omission of the Defendants as the order obligated the Defendants to swear the affidavits not their solicitor. Insofar as I have considered Mr. Drew's affidavit it was based in part on information supplied by his clients and it merely served to illustrate that the Defendant had more relevant information than they gave in their affidavits and omitted to provide same.

[42] Again on the evidence it cannot be debated that the Defendants have failed to comply with their obligation to give full disclosure of the Specific Assets.

Has the Defendant Established Justification for Non-compliance or for Variation?

[43] The Defendants seek to justify their non-compliance by saying that the court had no power to grant the injunction and that the Defendants are relying on their applications to vary and their intended applications to challenge the jurisdiction and to discharge the freezing injunction.

[44] I must mention here that the Defendants delayed filing their cross application and sought to explain that delay and to lay it at the door of the Claimant's solicitors. Suffice it to say that this delay was apparently due to a misapprehension between the Claimant's and the Defendants' solicitors as to the effect of a proposal made by the Defendants to provide information on their non-specific assets in a sealed envelope to the Court pending the determination of the Defendants' application to discharge the freezing injunction.

[45] The Court will not venture into the cause of this misunderstanding as it does not assist the questions before it but merely sheds some light on the fraught manner in which this litigation has been carried on. The court will only remind the legal representatives of their continued duty to corporate with each other in the conduct of proceedings and to assist the court to further the overriding objective.

[46] The Defendants have chosen not to give any evidence in support of their contention that the injunction ought not to have been granted save for the allegations in their affidavits that there is no merit in the claim and that Defendants 3 and 4 acted properly at all times and that the action is a means of the Claimant pressuring the Defendants. Instead, they opted to keep their evidence until they make the respective challenges. This they are entitled to do but as Mr. Hollander astutely submitted this means that this court has no evidence before it on these allegations. And to my mind such evidence would have been pertinent on the question of sanctions for breach and variation.

[47] The breaches identified cannot be excused on the basis that the order was irregular or ought not to have been made or was unnecessary. It is established law that an order of the Court even if irregular must be complied with. See **Isaacs v. Robertson [1985] A.C. 97** – "it is the plain and unqualified obligation of every person against whom or in respect of whom an order is made by a court of competent jurisdiction to obey it **unless and until that order is discharged**" – Lord Diplock p. 101-102. (Emphasis added) See also **Gee** op. cit.

[48] The Defendants say further that the provisions relating to disclosure of documents are onerous as the provision of these documents is not necessary for the preservation of the Specific Assets it will be costly to obtain them and they have given an assurance that they will not dissipate the Specific Assets and that in any event this amounts to pre-trial discovery.

[49] The ready answer which has already been given is that an order of the court must be complied with until it is stayed or set-aside. It does not lie in any litigant's mouth to say that he or she is not complying because the order is not necessary or that it is bad.

[50] Furthermore, these provisions do not amount to giving pre-trial discovery to the Claimant. Part of the remedy sought by the Claimant is a tracing remedy in relation to the Specific Assets and the documents in question are limited to documents relating to or evidencing the Specific Assets, their location and their legal and/or beneficial owner. The disclosure of these documents is necessary for the tracing, protection and preservation of the Specific Assets. Such provisions form the teeth of a freezing order and to dilute them or evade them would render the order useless. The Defendants are in undoubted breach and the reasons advanced are not sufficient either to excuse the breaches or to vary the order.

[51] In addition, the Defendants say that to give information about their non specific assets before their challenge to the jurisdiction and their application to discharge are heard would defeat the purpose of those applications and that in any event these parts of the order amount to an invasion of privacy.

[52] By way of good faith they have sworn affidavits of their worldwide assets we are told which are in the possession of Harneys and they propose that in lieu of requiring compliance now that the court allow them to provide the court with those affidavits under seal and to hold same pending the hearing of the discharge application. Categorically, this proposal cannot achieve the purpose for which the orders relating to non specific assets were made as the court has to means to itself police the orders. This offer to my mind was properly rejected by the Claimant.

[53] A further rationale advanced by the Defendants in support of their application to vary para. 23 of the order to remove any obligation to disclose the source of funds used for legal expenses and living expenses is that: "**clearly the purpose of that application would be undermined by making such disclosure … at this stage**."

[54] Precisely this same argument was relied on in **Grupo Torras v. Al Sabah (unreported 16 February 1984 Court of Appeal, England)** and in **Motorola Credit Corp v. Uzan** [2002] All E.R. (Comm.) 1945. In **Motorola Credit Corp** Waller J said:– "although it is an invasion of privacy to force any party to disclose assets, a freezing order in normal circumstances simply cannot be effective without disclosure. Once one has the situation which did exist in this case which was that on 13th June it was accepted that the freezing order should continue then prima facie David Steele J is right in saying that a disclosure provision would be the normal provision so that the freezing order can be properly policed and effective.

[55] "The second factor that weighs with me is that it may be that the defendants have an arguable case for setting aside the worldwide order but **Motorola**, clearly have a strong case that a fraud has been committed - a strong case that dissipation is a serious risk. Furthermore, the Defendant has done nothing to comply with the United States order to replace the shares or their value. Furthermore, if the Defendant wished to be free from this injunction he could have arranged for security to be given but he has offered none."

[56] As has already been remarked, there is no evidence before the court to gainsay the allegations made by the Claimant when it applied for and obtained the order and thus prima facie already it has been held that it has an arguable case.

[57] On the evidence before the court and in particular having regard to the Claimant's allegations that the Defendants are involved in a massive international fraud against it and to the dealings with the Specific Assets by way of payment of dividends, any prejudice to the Defendants in disclosing their worldwide assets is far outweighed by the prejudice to the Claimant if disclosure were to await the determination of the application to discharge the injunction taking into account the appellate procedure. There may be some small comfort to be gained from the fact that any information obtained by virtue of the order cannot be used for other purposes without the permission of the court. See Schedule B8. In sum the Defendants' argument to justify their non-compliance and to support their application for a variation is without merit.

Conclusion

[58] For the foregoing reasons the Defendants' application to vary is dismissed and the Claimant's application for orders to enforce compliance with the freezing injunction is granted. The court notes that the Claimant is seeking itself to vary the freezing injunction in terms of Schedule 2 of the draft order which essentially deals with provisions relating to the giving of information on the source of funds for legal fees and living expenses. I consider that the existing provisions are adequate for the purposes and do not give rise to any doubt as to what is required and therefore it is not necessary to vary the original order. In this respect I also take into account the intended application to discharge by the Defendants, directions for the filing and hearing of which have already been given and would not want to unduly burden them in the framing of their application. The Claimant is to have the costs of both applications to be assessed if not agreed pursuant to CPR 2000 Part 65.11.

[59] The court invited both counsel to assist with the drafting of appropriate orders when the ruling was given on 31st January and the court expresses appreciation for the help given.

[60] In closing I must remind all lawyers of CPR Part 30 which states that the general rule is that an affidavit should contain only **such facts** as the deponent is able to prove from his

or her own knowledge - I stress "**facts"** not argument. Too often the temptation to lace one's affidavit with argument and law proves irresistible. If deponents not being experts are allowed to speak to arguments and to draw inferences etc. then one might well wonder what role counsel is being relegated to and indeed whether such litigants need counsel at all – an intriguing thought.

Rita Joseph-Olivetti
Resident Judge
British Virgin Islands