IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO:BVIHCV 2008/403

BETWEEN:

ELENA RYBOLOVLEVA

Claimant

And

(1) DMITRI RYBOLOVLEVA

(2) XITRANS FINANCE LTD

(3) RINGHAM INVESTMENT FINANCE SA

(4) TREEHOUSE CAPITAL INC

Defendants

Appearances: Mr Robert Levy, Mr Niall McCulloch and Mr Oliver Clifton of Walkers for the Claimant
Mr Robert Ham, QC, together with Mr Michael Fay and Ms Clare-Louise Whiley of Ogier for the First and Third Defendants
Mr Nigel Tozzi, QC, together with Mr Phillip Kite and Mr Nicholas Fox of Harney, Westwood & Riegels for the Second and Fourth Defendants

JUDGMENT IN CHAMBERS

[2009: May 27, May 28, June 9]

[1] **Bannister J [ag]:** These applications arise out of a dispute between husband and wife, who are respectively the first defendant and the claimant in these proceedings. I will refer to them as the husband and the wife. They are of Russian origin and were married in

Russia in 1987. In 1995 they took up residence in Switzerland and it is common ground that they both have Swiss domicile, although the husband qualifies that, by adding that their domicile is Swiss 'at least in the Swiss sense'. The husband is said to be fabulously wealthy. Mr Levy, who appeared before me together with Mr Niall McCulloch and Mr Oliver Clifton for the wife, suggested that it would be beyond the court's conceptual capacity even to begin to envisage the scale of his wealth. No one suggested otherwise and I am content to proceed on that basis.

[2] The second defendant Xitrans Finance Limited, ('Xitrans'), was incorporated in this jurisdiction in 2002. The husband says that he incorporated it to hold chattel assets subsequently acquired by him – works of art, furniture and so forth - and it is common ground that Xitrans is the owner of a number of such chattels, which have been referred to in these proceedings as 'the assets'. It goes without saying that they are of immense value. It is not in dispute that the husband was the holder of the original single bearer share in Xitrans. That share was subsequently cancelled and replaced by a registered share certificate in May 2003. There is an issue about that exchange which I shall deal with later. In June 2005 the husband transferred the Xitrans shares standing in his name to a company incorporated in Cyprus called Merco Trustees Limited ('Merco'). Merco is a provider of professional trustee services. The current state of Xitrans' register of members shows Merco as its only member. The husband's evidence is that Merco was to hold the shares subject to the terms of a settlement called the Virgo Trust, of which the discretionary beneficiaries are the husband, his two daughters and any future children and remoter issue of the husband. There are issues both as to the transfer of the shares to Merco and as to whether the Virgo Trust has any separate identity or is nothing more than the husband wearing, as it were, a different hat. I shall return to those issues.

[3] The third defendant, Ringham Investment Finance SA ("Ringham") has always been dormant. The wife has abandoned any claim against it. The only outstanding issue connected with Ringham is one of costs.

[4] The fourth defendant, Treehouse Capital Inc ("Treehouse") was incorporated in this jurisdiction in September 2003 as a wholly owned subsidiary of Xitrans. It was used to hold the contract for and pay for a motor yacht known as the "MV Anna", of which it remains the owner.

[5] On 22 December 2008 the wife instituted divorce proceedings against the husband in Switzerland. Those proceedings are on foot and remain to be determined.

[6] On 29 December 2008 the wife issued proceedings in this court against the husband and the three other defendants. The claim form sought declarations (inter alia) that the wife was entitled to half the assets of the husband and wife in the BVI as a result of the divorce proceedings to which I have referred and that such assets were 'matrimonial assets' under Swiss law and available for distribution by the Swiss court upon divorce. In addition, the wife claimed that Xitrans, Ringham and Treehouse were beneficially owned by the husband and/or the wife and held their assets as bare trustees for the husband and wife 'or either of them'. These claims were refined in the statement of claim to make it clear that the wife was claiming half of the shares in Xitrans and Treehouse as well as half the assets of each of those companies. These latter claims might for convenience be described as the constructive trust claim.

[7] On the following day, the wife moved the court ex parte for a freezing order and for permission to serve the husband in Switzerland. The proposed freezing order sought to restrain all four defendants from removing any of their assets from the British Virgin Islands or from dealing, etc, with such assets. Bizarrely, these assets were said to embrace a large number of artworks, which, so far as I can tell, had never been near the British Virgin Islands, but no one other than myself seemed perplexed by that point.

[8] These applications were supported by an affidavit made on instructions by Ms Lett, a solicitor with Walkers. There was no first hand evidence from the wife. Ms Lett's affidavit included statements that 'recent events' showed that the husband had been taking steps to ensure sole control of the parties' joint assets and to remove them from the reach of the

wife and the Swiss courts. Details were given of the transfer of certain valuable artifacts from Geneva to, respectively, London and Singapore. The affidavit went on to give evidence that the wife had received information about proposed future movements of artifacts by the husband and said that the source of that information was a company called Fine Art Transports Natural Le Coultre S.A. ("NLC").

[9] The applications were heard by the Honourable Madam Justice Olivetti. In dealing with the freezing order she asked Mr Levy, for the wife, why it had been felt necessary to move ex parte. Mr Levy's response was to summarise the gist of paragraph 50 of Ms Lett's affidavit which, in short, said that the husband had told mutual friends (who were unwilling for their identities to be revealed) that he had taken steps to ensure that the wife would be deprived of the most significant part of the joint assets.

[10] The judge granted the freezing order and gave the wife permission (without, so far as the transcript discloses, any discussion of the justification for granting it) to serve the husband in Switzerland. The freezing order, modified by an order of the Honourable Mr Justice Foster (Ag) of 18 February 2009 to delete unnecessarily oppressive disclosure orders, remains in force.

[11] The statement of claim was dated 9 January 2009. It claims that Xitrans, Ringham and Treehouse were formed for the purpose of purchasing and holding assets on behalf of the husband and wife; states that the wife does not know whether or not she is a shareholder in any of those companies; pleads that under Swiss law and in the absence of a marriage contract, all assets 'earned' during the marriage are divided equally on divorce; and claims that the chattel assets were so acquired and that the wife is accordingly entitled to half of them and that the second to fourth defendants hold those assets on trust for the husband and wife. The pleading goes on to allege an oral agreement made 'on or around May 2002 to September 2003' whereby the husband and wife agreed that the second to fourth defendants would hold the assets jointly, alternatively that it was the common intention that that should be the case. It then sets out alleged breaches of these trusts, namely the movement of items which formed the basis of the freezing injunction application. The

prayer sought declarations that both the shares in the second to fourth defendant companies and the assets which they owned were held in trust for the husband and wife and specific reference was made to Swiss law.

[12] With that brief introduction I can turn to the applications which are before me. They are:

(i) an application by Xitrans and Treehouse dated 9 February 2009 that the claims against them be struck out under CPR 26(3) or dismissed under CPR 15; alternatively that the proceedings be stayed against them on forum grounds; and that the freezing injunction be discharged;

(ii) an application of the same date by Ringham in substantially similar terms; and

(iii) an application made on 20 March 2009 by the husband asking for the grant of permission to serve out to be set aside as against him, but otherwise in similar terms to the orders sought by Xitrans and Treehouse.

[13] Before dealing with these applications, I must mention that on the Friday of the week before they came on for hearing, the wife radically amended her statement of claim. This was very late and caused considerable difficulties to the defendants' counsel, some of whom were in the course of travelling from the UK to this jurisdiction. Difficulties were even experienced in obtaining copies of the amended pleading, but in the event and despite making fully justified complaints about this manner of conducting litigation, Mr Nigel Tozzi, QC for Xitrans, and Mr Robert Ham, QC for the husband took things, as one would expect, in their stride. Nevertheless, and without intending any criticism, it did seem to me that some of the submissions made to me proceeded, perhaps unsurprisingly, on the footing that the ghost of the original pleading was still in the room and requiring to be addressed. The most significant changes made by the amended pleading are as follows:

(i) the claim against Ringham is deleted;

(ii) a new paragraph 9 pleads provisions of the Swiss Civil Code providing that upon divorce each party is entitled to 50% of the *net value* of the 'Acquired Property' of the other;

(iii) new paragraphs 10 to 13 plead Article 646 of the Swiss Civil Code, and claim that this gives the wife a 50% *beneficial interest* in the Acquired Property *and* half of their net value;

(iv) a new paragraph 14 announces that the claims based on Swiss law will be pursued in Switzerland and seeks a stay of those claims pending determination in Switzerland;

(v) the claim that it was agreed between husband and wife that the assets of Xitrans and Treehouse were to be held on trust for the husband and wife in equal terms is deleted and replaced with an allegation of a similar agreement in relation to the shares of Xitrans and Treehouse;

(vi) a new paragraph 18 bases a similar claim in relation to the shares on an alleged common intention and says that the wife acted to her detriment in agreeing, despite the terms of the common intention, that the husband should be the sole registered holder of the Xitrans shares;

(vii) a new paragraph 19 pleads that in breach of these agreements the husband had himself registered as sole shareholder of Xitrans (despite the fact that the new paragraph 18 pleads the exact opposite);

(viii) a new paragraph 20 challenges the cancellation of the bearer share in Xitrans and its replacement by registered shares;

(ix) new paragraphs 21 and 22 challenge the transfer of the registered Xitrans shares to Merco;

(x) new paragraphs 23 to 25 challenge the validity of the Virgo Trust under the laws of Cyprus, first because of non compliance with technical provisions of Cyprus law, secondly because (so it is said) the Virgo Trust is no more than an alter ego of the husband and thirdly because the husband did not own the shares in Xitrans, but only had a 50% interest in them;

(xi) a new paragraph 26 seeks a stay of the claims relating to Cypriot law pending their determination save, 'for the sake of clarity' (sic), (a) the claim alleging that the transfer of the Xitrans shares to Merco was a breach of trust and (b) the claim alleging that the transfer to Merco was invalid as a matter of BVI law;

(xii) the allegations of wrongful dealing with the artwork upon which the claim to the freezing order was based are deleted;

(xiii) a claim for rectification of the share register of Xitrans and/or Treehouse to reflect whatever orders are made by the court is added to the prayer.

The emphases above are mine.

Service out of the jurisdiction

[14] It is convenient, I think, to start with the application by the husband to have service of the proceedings upon him in Switzerland set aside, since, as will become apparent, that issue involves what is the only outstanding claim against Xitrans, that is to say the claim for rectification. Since the constructive trust claim to a beneficial interest in Xitrans' assets has been abandoned and restricted to a claim to a beneficial interest in its shares, that part of the case discloses no cause of action against Xitrans. Xitrans is not concerned with the beneficial interests in its issued shares (see Article 12 of its Articles of Association). The constructive trust claim is made against the husband, not against Xitrans. I shall expand upon this point in a little more detail when I come to deal with the applications to strike out or dismiss the constructive trust claim.

[15] When the matter came before Olivetti J, a claim against Xitrans was in issue, because the wife was claiming that she owned half its assets and (although the point is no longer live) one can well see grounds for treating the husband as a necessary and proper party to that claim. The fact that that claim has been abandoned must, I think, be treated as retrospective, so that it now turns out (although she could not have known it at the time), that there was no claim before Olivetti J against Xitrans to which the husband could be said to have been a necessary and proper party. The only 'claim' which the wife now asserts against Xitrans is her amended claim for rectification, which of course must also be treated as having retrospective effect.

[16] Mr Levy, for the wife, relies upon CPR 7.3(2)(a) as justifying the exercise of the court's discretion to permit the wife to serve the husband out of the jurisdiction. The relevant parts of CPR 7.3 for present purposes are as follows:

> 7.3 (1) The court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this rule.
>
> (2) A claim form may be served out of the jurisdiction if a claim is made –
>
> (a) against someone on whom the claim form has been or will be served, and –
>
> (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
>
> (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim.

[17] In my judgment, there is no issue, let alone a real issue, in these proceedings between the wife and Xitrans as to rectification. Xitrans is in no position to raise any argument against the court making a declaration that, as against the husband, the wife is entitled to be registered in respect of half of the shares. If the court were to decide that issue in the wife's favour, the relief granted would not be by way of an order directed at Xitrans requiring it to rectify its register of members. Rather, the court would order the husband to transfer half of his holding to her, thus putting her in a position to require Xitrans to register her as a member in respect of those shares. If, of course, Xitrans then refused to register, there would at that point arise an issue between the wife and Xitrans. But that would not be an issue in these proceedings. It would have to be an issue in new proceedings brought to establish the wife's entitlement to be registered as a result of having become a transferee. It is this analysis which demonstrates that there is no issue at all between the wife and Xitrans founded upon the new paragraph H in the amended prayer.

[18] Accordingly, the jurisdiction to permit service out under CPR 7.3(2)(a) is not in my judgment engaged in these proceedings. It follows that the permission granted to the wife to serve the husband in Switzerland must be set aside, with the result, so far as he is concerned, that the present proceedings are at an end. It also follows, although not for the reasons advanced by Mr Tozzi, QC that there exists no *lis* between the wife and Xitrans justifying the continuation of these proceedings against Xitrans. Given that it is a wholly owned subsidiary of Xitrans, the amendments to which I have referred leave the wife without a claim against Treehouse. I shall strike out the claim against Xitrans and Treehouse accordingly. As set out in paragraph 13(i) above, the claim against Ringham has been deleted from the amended statement of claim and for this reason, I dismiss the claim against Ringham. The consequence is that the freezing order, which is in any event reduced by the amendments outlined above to an injunction in respect of the Xitrans shares only, must be set aside and the proceedings against the husband stayed.

[19] That is sufficient to dispose of these applications, but in case this matter goes further and because they have been fully argued before me, I think that I should express my conclusions on the other issues that I have been asked to decide.

Strike out/summary judgment

[20] As I have said, the amended statement of claim seeks a stay of the Swiss and (subject to qualifications) Cypriot issues. The defendants were content with that to the extent that those issues survived their applications, but applied at the outset for the whole claim, including those parts of it based upon Swiss or Cypriot law, to be struck out or dismissed. In reality, the argument on this part of the case was almost exclusively focused upon the constructive trust claims and it is with those claims and with the reasons advanced before me why they should, on the merits, be struck out or dismissed, that this section of this judgment is concerned.

[21] In dealing with this part of the applications, I was reminded of the tests to be applied under CPR 26.3 and CPR 15. Although I was referred by Mr Levy both to domestic authorities on these provisions and to English authority on the strike out threshold, I

prefer to be guided by the language of the rules themselves. Thus, I would not have struck out any part of the wife's constructive trust case on the grounds argued before me unless I was satisfied that it does not disclose *any* reasonable ground for bringing the claim and I would not have given judgment against the wife on any part of her constructive trust claim unless I was satisfied that she had *no* real prospect of succeeding on it.

[22] Turning to the wife's claim to be entitled to a 50% beneficial interest in the shares of Xitrans, it seems to me that logically the first issue requiring to be decided is the question which law is to be applied in deciding that claim. Parts of the wife's case in relation to the shares rely upon the Swiss Civil Code, but there are other elements in her claim to beneficial entitlement to the shares which do not. As I have already mentioned, the wife herself gives no direct evidence, but doing the best one can from the evidence of Ms Lett and from the wife's pleaded case, the proper inference to be drawn is, in my judgment, that any agreements reached or understandings formed can only have been reached or formed in the course of the conduct of the couple's married life in Switzerland. By the light of nature, therefore, Swiss law would seem to be the system of law with which the parties' agreements and understandings have the closest connection and by reference to which the rights, if any, to which they gave rise should be resolved.

[23] Mr Levy, however, relied upon *Macmillan Inc v Bishopsgate Investment Trust Plc*[1] and *Re Harvard Securities Ltd*[2] as authority for the proposition that these issues must be determined in accordance with BVI law. He says that the subject matter of the constructive trust is shares in a BVI company; and that all questions regarding entitlements to them must be settled in accordance with the *lex situs*, in other words, the law of the place of incorporation. I cannot accept this submission. The issue in *Macmillan* was whether certain pledges or mortgages of shares created in favour of defendants to the claim prevailed over the rights of their beneficial owner, the claimant. In other words, the question, in essence, was whether property in the shares had passed

[1] [1996] 1 WLR 387
[2] [1997] 2 BCLC 369

to the defendants such as to prevail over claimant's interest. The Court of Appeal, applying the principle that questions as to the property in, or as to priorities over, shares are governed by the *lex situs*, held that that was a question of New York law, because the company whose shares had been dealt with was incorporated in New York. The relevant issue for present purposes in *Harvard Securities* was whether certain English clients of Harvard had acquired an equitable interest in shares in Australian companies which Harvard had told the clients had been purchased on their behalf but in respect of which no transfer had taken place. Neuberger J, applying Australian law as the law of the place of incorporation of the companies whose shares were in dispute, held that they had not. Again, the question was whether property had passed.

[24] The allegations made by the wife in the present case are (although she does not plead it in these words) that by reason of the agreements or understandings reached or formed between her and her husband, the husband's conscience is impressed such that he holds the Xitrans shares upon trust for them both in equal shares. Although the consequence of such a result is often described as giving the party in whom the property is not vested a beneficial interest in it, the true nature of the process at work is that equity is acting upon the conscience of the defendant to prevent him from defeating the common intention by standing upon his strictly legal rights[3]. The claimant's interest is not in truth proprietary. The jurisdiction being exercised is *in personam*. No actual property passes to the claimant under a common intention constructive trust until the court orders it to be transferred. Accordingly, I find nothing in either *Macmillan* or *Harvard* which would have required me to decide this issue under the law of the BVI. On the contrary, it seems to me that the legal effect of the agreements and understandings upon which the wife relies is most naturally to be decided under the law of the place where the parties to these arrangements or understandings were resident and domiciled and where, in the absence of any evidence to the contrary, it is to be presumed that the arrangements and understandings were concluded or formed. Of course, it may be (and I shall have to consider the point in a moment) that Swiss law is completely indifferent to the sort of actings or understandings upon which the wife relies, but that would not be a

[3] *Grant v Edwards* [1986] Ch 638 at 656, 657

reason for improving her position by choosing some other system of law under which she would, if she established her case, be entitled to relief.

[25] Mr Tozzi, QC for Xitrans and Treehouse, and Mr Ham, QC for the husband relied heavily on two reports of Dr Vogt, partner in a Swiss law firm (in the case of Mr Tozzi, QC by some sort of residual reflex reaction, since as a result of the amendments to which I have referred no constructive trust claim survives against Xitrans). There can be no doubt that Dr Vogt says that the concept of the trust is unknown in Swiss law, although he also says that Swiss law will recognize a foreign trust set up by a Swiss resident, but only if it is governed by a choice of law clause imposing some law other than Swiss law. If no such choice of law has been made, Swiss law will apply by default and the trust will, according to Dr Vogt, automatically self-destruct, since Swiss law does not recognize the trust concept (except, it would appear, for the purposes of immediately repudiating it). Dr Vogt accepts that the husband could have made a gift of half the shares in Xitrans to the wife, but he says he would either have had to 'physically hand them over to her and endorse them' or have made a written 'agreement to make a gift' (a concept which an English lawyer might equally have problems in recognizing). He discusses the possibility of fiduciary mandate, but I do not need to go into that since no-one suggest any such thing in the present case.

[26] Mr Tozzi, QC and Mr Ham, QC pressed me with the fact that none of this material is contradicted by the wife's expert, Professor Jeanvin. That may be strictly true, but I notice that Professor Jeandin says, in paragraph 26 of his witness statement:

> *'However, it is often the case that spouses both appear to be the original possessors of property . . . in this case, therefore, the presumption of co-ownership between spouses applies (Article 200.2 SCC)*

The provision to which Professor Jeandin refers is part of Swiss marital property law, but the principle to which he refers appears to be of general application as between husband and wife. Dr Vogt deals with Professor Jeandin's point as follows:

'Whilst it is correct that (to cite Professor Jeandin paragraph 26) it is often the case that spouses both appear to be the original possessor of property, this applies mostly to household goods, such as [he cites a former judge of the Swiss Federal Supreme Court] *' kitchen utensils, tools, household provisions such as the wine cellar.'*

[27] It seems to me that once that point is reached it is impossible for me to decide that Swiss law could not accord to an art collection, part of the *ménage* of a billionaire couple acquired in the pursuit, on what evidence I have, of a joint enterprise between the two of them, the same status as might be enjoyed, in an ordinary household, by a corkscrew or a frying pan. In any case, it is noticeable that the application of this principle is only said to apply 'mostly' to household goods. Its limits (if any) are left undefined and it is not for me to attempt to define them.

[28] In any case, there was no evidence before me to indicate that, because the effect of the agreements and understandings upon which the wife relies would give rise, if the wife succeeded on them, to what English law characterizes as a constructive trust, Swiss law would on that basis alone conclude that the arrangements and understandings were devoid of all legal consequence.

[29] Mr Tozzi, QC and Mr Ham, QC pressed me with the evidence of Mr Stoyanov, who arranged for the acquisition of Xitrans in Switzerland. He says that he was forewarned that the husband and wife would be visiting him on a particular day and that an offshore company would be required, since (as he says in terms) the Geneva law firm which was generally assisting them could not provide it as quickly. He proceeds to describe dealing, in the presence of husband and wife, with the formalities of the transfer of Xitrans, and goes on, in paragraph six of his affidavit, as follows:

'Next to the corporate organization, at the said meeting of 6 June 2002, I had to clear the contractual aspect. In particular, I had to ensure who the client was

going to be and was told to prepare the contract, as I did, with [the husband] *as being the sole principal and beneficial owner of the company and its future assets, Mr Sazonov having already authority to give me instruction. Accordingly, I have ever since regarded* [the husband] *as my sole principal.'*

[30] I have to say that what particular 'contractual aspect' Mr Stoyanov thought he was dealing with is quite unclear to me. One could hazard a guess, but that is no substitute for a copy of the contract itself, which Mr Stoyanov conspicuously fails to exhibit. I have to say that, far from finding this evidence clinching, as Mr Tozzi, QC and Mr Ham, QC urged me I should, I find it strangely unconvincing, even on paper. Mr Tozzi, QC and Mr Ham, QC (with some justification) point to the fact that the wife leads no evidence in response to what Mr Stoyanov says but it appears that the instructions to which Mr Stoyanov refers came from Mr Sazonov, who is not said to have been present at the meeting and who has not made an affidavit in these proceedings. The wife may, therefore, have been as unaware of the communication of those instructions or, for that matter, of the terms of the contract, as I am today and there may be no evidence which she could usefully have given upon the point. The wife does give evidence of efforts of hers to persuade Mr Stoyanov to produce his file, which have been rebuffed, but I cannot regard that refusal as pointing one way or another.

[31] Mr Tozzi, QC and Mr Ham, QC rely heavily on passages in the wife's complaint in the Swiss divorce proceedings. Put very shortly, she supplies a list of various assets which she says are jointly owned. The English translation then proceeds as follows:

'It is also necessary to mention here the multitude of offshore companies set up by [the husband] *and of which he is the beneficial owner, for the purposes of possessing works of art, the yacht, certain properties or the jets, in particular the following entities:* [after which she names a number of entities, including Xitrans and Treehouse].

[32] Mr Levy drew my attention to the fact that the words 'beneficial owner' are a translation of the French words *'l'ayant droit economique.'* There is no evidence before me as to the legal significance of those words and I am not prepared, in the absence of such evidence, to accept their translation as 'beneficial owner' as being accurate for all purposes.

[33] It seems to me if the questions raised by this evidence are to be resolved, they must be resolved in the course of a trial on oral evidence with disclosure and cross examination. I cannot say that this part of the wife's case discloses no reasonable ground for bringing it or decide that she has no real prospect of succeeding on this issue. For these reasons, I would have refused to strike it out or dismiss it on the grounds advanced by Mr Tozzi, QC and Mr Ham, QC before me.

The exchange of bearer shares and the transfer to Merco

[34] Mr Levy contended that the exchange of bearer shares for registered shares in Xitrans and their subsequent transfer to Merco were defective on various grounds. I am not sure what the point of these arguments was but I am satisfied that there is nothing in them. Article 15 of Xitrans' Articles of Association provides that its shares may be transferred by a written instrument signed by the transferor and containing the name and address of the transferee or (I quote) *'in such other manner or form and subject to such evidence as the directors shall consider appropriate.'* For what it is worth, it seems to me that the fact that the directors have given effect to the exchange and transfer is sufficient evidence that they were satisfied with the documents which were produced to them.

[35] A considerable amount of time and effort was expended during the hearing on the question whether the Virgo Trust, upon whose terms Merco holds the Xitrans shares, is anything more than the alter ego of the husband. Given the reasons for my decision, the matter is academic, but in deference to the arguments put to me I should say what my conclusions would have been had anything turned upon these points. Mr Levy relies upon the husband's position as Protector and the designation of Xitrans as a Special

Company under the terms of the Virgo Trust. It is plain that those facts give the husband very extensive intrusive powers to interfere in the management of the trust, but the short answer to Mr Levy's contention, as it seems to me, is that whatever powers the husband may have, the trust still remains a trust with beneficiaries other than the husband to be considered by the trustees. Mr Levy also relied upon clause 19(a)(i) of the trust document, which provides that the trustees are to exercise all and any of their rights as owners [of the Xitrans shares] as directed by him in writing. Mr Levy says that this would enable the husband to direct the trustees to give the shares to him. I do not think that the words relied upon extend to dealing with the shares. They are directed to the exercise of voting and such other powers as are attached to the shares. Mr Levy would, in my judgment, have to satisfy the court that the whole set up was a sham. I do not consider that the matters upon which he placed reliance begin to demonstrate that. Even if he did establish that, I cannot see where it would have got him.

Forum non conveniens

[36] For the reasons given above, there are no issues requiring resolution within this jurisdiction. It is plain that the Swiss issues must, as the wife now recognizes, be dealt with in Switzerland and, to the extent that they have a separate life, the Cypriot issues may have to be litigated in Cyprus It is sufficient for present purposes if I say merely that, had it been necessary for me to decide the future of this litigation upon forum grounds, I would have granted a stay in reliance upon general forum principles, without reserving questions about the exchange of the bearer share and the transfer to Merco to be decided here.

The freezing order

[37] I have discharged the freezing order on grounds other than those originally argued. I should say, though, since it may go to the question of costs, that had it been necessary for me to decide whether I should discharge the order by reason of the non-disclosures to which I have been referred by Mr Tozzi, QC and Mr Ham, QC, I would have done so. I have already set out above the justification given to Olivetti J for moving *ex parte.* It is now accepted that this was, to the knowledge of the wife, unfounded. The involvement

which the wife had with at least one of the transport companies (NLC, which had been given in the freezing order evidence as the source of information about movements intended to be made behind her back) in connection with the movements which took place before the proceedings were commenced was not disclosed. The misrepresentation (for which Mr Levy bears no responsibility) and non-disclosure, amounted, in my judgment, to sufficiently grave misconduct on the part of the wife to justify a discharge of the injunction and a refusal, in the light of the relevant authorities, to re-grant it.

Conclusion

[38] For the reasons given in paragraphs 13 to 17 above, I set aside the permission granted to the wife to serve the husband out of the jurisdiction and stay the proceedings against him. For reasons also contained within those paragraphs, I strike out the claim against Xitrans, Ringham and Treehouse. The freezing injunction accordingly falls away.

Edward Bannister
Commercial Court Judge
9 June 2009