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

CLAIM NO: BVIHC (COM) 61 OF 2011

BETWEEN:

(1) MR VITALY ARKHANGELSKY
(2) MRS JULIA ARKHANGELSKAYA
(3) OSLO MARINE GROUP PORTS LLC

Applicants/Claimants

and

(1) BANK OF ST PETERSBURG CJSC
(2) ALEXANDER SAVELYEV
(3) HAVANA TRADING LIMITED
(4) MOSKOVSKIY DVOR
(5) SEVZAPALIANS LLC
(6) SEVERO-ZAPADNAYA AGRARNAYA KOMPANIYA LLC
(7) MEDINVEST LLC
(8) GRAHAM-BELL LLC
(9) AGENTSTVO PO UPRAVLENIYU AKTIVAMI LLC
(10) AKVA-LADOGA CJSC
(11) GELIOS LLC
(12) KHORTITSA LLC
(13) DOM NA MALOY MOYKE LLC
(14) STRATEGIYA KORPORATIVNYKH INVESTITSIY I FINANSOV LLC
(15) ANEKS FINANCE CJSC
(16) NAZIA CJSC
(17) GROUP OSLO MARINE LLC

Defendants

Appearances: Mr Richard Millett QC, Mr Mark Forte, Mr Richard Evans and Mr Jerry Samuel for the Applicant Claimants

JUDGMENT

[2011: 21, 30 June, 8, 15, 22 July]

(Application for permission to serve parties out of the jurisdiction – CPR 7.3(2)(a) – whether real issue between Claimants and third Defendant which it is reasonable for the Court to try – whether remaining Defendants necessary and proper parties to the trial of any such issue - whether BVI appropriate forum – whether risk that unless claim is tried in BVI Claimants will be deprived of justice – whether Claimants entitled to freezing order – whether judgment to be embargoed)

[1] **Bannister J:** On 21 June 2011 I heard an application by the Claimants, purportedly made under a non-existent CPR 7.1(c),[1] for permission to serve these proceedings on the first, second and fourth to seventeenth Defendants in the Russian Federation on the grounds that there is between the Claimants and the Third Defendant ('Havana'), which is a BVI incorporated company, a real issue which it is appropriate for the Court to try and that the remaining defendants are necessary or proper parties to the trial of that issue. There is a second application for a worldwide freezing order, whose outcome is obviously dependent upon what happens in the first.

[2] I circulated a draft judgment for handing down on 30 June 2011. I proposed to hold against the Claimants and indicated that the applications would be dismissed. At the hearing for handing down I was invited by Mr Mark Forte, for the Claimants, not to hand the judgment down, but to adjourn the hearing until 8 July 2011. The reasons for doing so were not particularly clear, but there seemed no harm in taking that course. On 8 July 2011 I was again asked to defer handing down the judgment and asked whether I would be prepared to hear Mr Richard Millett QC by telephone on Friday 15 July. I agreed to that request. On 14 July 2011 the Claimants filed a twenty six page skeleton argument, together with an amended statement of claim, directed at a wholesale re-argument of the applications and designed to repair the holes in the original application.

[1] why this error for 7.3(2)(a) crept into the documents is a mystery

[3] I am not at all sure whether I should have acceded to this application which was, in effect, an attempt to reargue the entire case. In any event, I agreed to do so, and listened on 15 July 2011 for three hours to Mr Millett QC addressing me by telephone. What follows is my judgment as originally prepared together with interpolations where necessary to deal with further argument addressed to me on 15 July 2011 which I am going to refer to as the rehearing.

(a) the facts

[4] The first and second Claimants are husband and wife and Russian Nationals. The first Claimant had been in business in the St Petersburg area since some time before 2006. His interests included shipping and related businesses together with insurance and reinsurance. His wife, the second Claimant, held shares in some of his interests and appears to have assisted him generally in the conduct of those businesses. The third Claimant, which is ultimately owned and controlled by the first and second Claimants, had a wholly owned subsidiary which was the owner of an eight hectare port facility in St Petersburg, referred to variously as the Western Terminal and the Zapadny Terminal. I shall call it the Western Terminal. The first Claimant holds ninety per cent of the shares of the seventeenth Defendant, the other ten per cent being held by the second Claimant. The seventeenth Defendant is, apparently, in liquidation. It owned a company called (in English) Scandinavia Insurance LLC ('Scan'). Scan's business was insurance and reinsurance.

[5] The first and second Claimants' businesses (for convenience I shall refer to them collectively as 'the group', without implying any particular legal relationship) had the benefit of loan facilities from the first Defendant bank ('the Bank') at apparently very high rates of interest[2]. In late 2008, the global financial crisis struck and, as is well known, the freight market crashed, with serious consequences for the group. The first Claimant realised that companies within the group would not be able to pay the interest due on their bank borrowings, especially given the onset of the Baltic winter, and that it was necessary to negotiate an interest moratorium. He did this successfully with another of the group's bankers and approached the Bank for a similar arrangement. In early December 2008 he had a meeting with the second Defendant, the Bank's Chairman ('Mr Savelyev'). This appears to have passed off satisfactorily and the first Claimant was told the Bank would consider the request. At a subsequent meeting at the end of December 2008 Mr Savelyev's attitude had, according to the first Claimant, changed. He told the first Claimant that he would not

[2] some of the loans were paying over 22%

allow an interest moratorium unless additional security was provided, in the form of an assignment of the shares of Western Terminal and Scan to SPV's owned by the Bank, on the basis that they would be retransferred once the group had discharged all of its indebtedness to the Bank. To the disinterested observer this seems to have been nothing more than a fairly simple form of security.

[6] In his affidavit the first Claimant says that he protested at this proposal and pointed out that the Bank was, in his view, comfortably secured. The first Claimant says that Mr Savelyev then threatened him and his family. He is said to have said: 'You won't get out of here until you agree to sign the contracts'; 'think of your children's future'; and 'you want to celebrate New Year, don't you?' The bones of the transaction were then outlined: the Western Terminal and Scan shares were to be transferred for nominal consideration to SPV's owned by the Bank. Once all the indebtedness of the group to the Bank had been paid, the shares would be retransferred on the same terms. There would be a six month interest 'moratorium' on the loans outstanding to the Bank. According to the first Claimant, Mr Savelyev told him at this meeting that provided that the group companies fulfilled their obligations to the Bank *after the expiry of the moratorium*, the Bank would not interfere in the business of the companies, seek early repayment or increase the rate of interest on the loans (my emphasis).

[7] Intimidated, he says, by Mr Savelyev's threats and under the impression that this was merely a form of mortgage security, the first Claimant agreed to these proposals. Shortly thereafter the Bank proffered a Memorandum, which the first Claimant signed. I should set it out in full:

'CERTIFIED TRANSLATION FROM RUSSIAN

MEMORANDUM

Saint-Petersburg December 30, 2008

The Group Oslo Marine Holding (hereinafter referred to as "the Group") in the person of the President Arkhangelsky Vitaly Dmitrievitch, and

THE JOINT STOCK COMPANY of open type "BANK "SAINT-PETERSBURG" (hereinafter referred to as "the Bank") in the person of the Chairman of the Board Saveliev Aleksandre Vasilievitch,

Agreed as follows:

1. In order to secure the loans granted to the Group listed in item 1.1. of this Memorandum, special companies (the Purchasers) purchase shares in the following Group companies:

- Zapandny Terminal" LLC (100% of shares);
- "Strakhovoye Obschestvo "Skandinaviya: LLC (100% of shares)

For prices specified in relevant sale and purchase contracts.

1.1. The Group is the Bank's debtor under the following contracts:

1.1.1. "LPK "Skandinaviya" LLC

- Under the loan contract No 3500-07-0852 of November 30, 2007 in the amount of 450 000 thousand roubles expiring on November 27, 2009,
- Under the loan contract No 3500-9-08-01499 of June 25, 2008 in the amount of 144 998,7 thousand roubles expiring on December 31, 2009,

1.1.2 "Vyborskaya Sudokhodnaya Kompaniya" LLC

- under the loan contract No. 3500-08-01203 of March 28, 2008 in the amount of 310 000 thousand roubles expiring on March 26, 2009, extendable for 2 years
- under the loan contract No. 3500—08-01270 of April 17, 2008 in the amount of 342 000 thousand roubles expiring on April 15, 2009, extendable for 2 years
- under the loan contract No. 3500-08-01342 of April 30, 2008 in the amount of 360 000 thousand roubles expiring on April 28, 2009, extendable for 2 years
- under the loan contract No 3500—08-01538 of July 21, 2008 in the amount of 1088 000 thousand roubles expiring on July 17, 2009, extendable for 2 years

1.1.3 "LK "Skandinaviya" LLC

- under the loan contract No. 220/06 of October 31, 2006 in the amount of 1351,2 thousand roubles expiring on September 28, 2009
- under the loan contract No. 3500-06-00279 of December 15, 2006 in the amount of 157 504,8 thousand roubles expiring on December 11, 2009
- under the loan contract No 3500-08-01419 of May 23, 2008 in the amount of 23 144 thousand roubles expiring on May 21, 2009

1.1.4 "Onega" LLC

- under the loan contract No. 133/06 of June 30, 2006 in the amount of 31 800 thousand roubles expiring on June 27, 2009
- under the loan contract No. 3500-07-00910 of December 26, 2007 in the amount of 400 000 thousand roubles expiring on December 23, 2009 extendable for 1 year.

1.1.5 "PetroLes" LLC

- under the loan contract No. 3500-07-00352 of March 9, 2007 in the amount of 354 000 thousand roubles expiring on March 5, 2008.

- under the loan contract No. 3500-08-01198 of March 28, 2008 in the amount of 80 000 thousand roubles expiring on March 26, 2009 extendable for 1 year.

1.1.6 "SO "Skandanivaiya" LLC for bill discounting in the amount of 55 000 thousand roubles expiring on January 15, 2009.

1.1.7 Arkangelsky V.D. under the loan contract No. 3500-08-01759 of November 28, 2008 in the amount of 130 000 thousand roubles expiring on December 31, 2008 extendable for 1 year.

2. After the complete fulfillment of the Group's obligations to the Bank, sale and purchase transactions in reverse will be carried out for prices specified in reverse sale and purchase contracts which will be signed between the Purchasers and the current owners of "Zapadny Terminal" LLC and "Strakhovaya Kompaniya "Skandinaviya" LLC (the Sellers) simultaneously with the direct sale and purchase contracts.

3. The Purchasers undertake:

- Not to interfere in everyday commercial activities of the purchased companies on condition that the Group fulfills its obligations to the Bank under the said contracts on time and entirely.
- Not to dispose in any way of the shares of the purchased Group companies before the date of the repurchase contract on the condition that the Group fulfills its obligations to the Bank under the said contracts on time and entirely.

4. The sellers and the management of the companies on sale undertake:

  - No to sell or transmit to anyone these companies' assets,
  - Not to stop their activities, or
  - Not to worsen in any other way the material and financial situation of the companies.

5. The Bank undertakes:
  - Not to increase the interest rates on the loans granted to the Group on condition that the Group fulfill its obligations to the Bank under the said contracts on time and entirely;
  - Not to claim the early repayment of the loans specified in item 1.1. of this Memorandum on condition that the Group fulfill its obligations to the Bank under the said contracts on time and entirely.

The Group	The Bank
Signature (Arkhangelsky V.D.)	signature (Saveliev A.V.)
Seal of Oslo Marine Group LLC	

In this document 2 pages are bound.

"Oslo Marine Group" Holding	"Bank "Saint-Petersburg" JSC
The President Arkhangelsky V.D. signature	The Chairman of the Board Saveliev A.V.

Signatures'

[8] It will be observed immediately that the arrangement outlined by Mr Savelyev at the second meeting and which is set out in paragraph [6] above differs significantly from the terms of the Memorandum. The Memorandum does not promise that the Bank (or the SPV's) would not interfere in the group's business, demand early repayment, or raise the rates of interest on the loans so long that the group companies fulfilled their obligations to the Bank *after* the end of the moratorium. That would have made no commercial sense from the Bank's point of view. Indeed, it makes so little commercial sense as to make it inherently improbable that Mr Savelyev ever said such a thing, although for present purposes I proceed upon the basis that he did. It remains the fact, though, that what the Memorandum actually provided was that the Bank (and the SPV's) would not intervene in the group's business, dispose of the transferred shares, call in the loans early or raise the interest rates *provided that the borrowers complied with their obligations under the facility agreements on time and entirely* (emphasis added). In other words, the forbearance offered by the Memorandum was conditional upon impeccable and timely compliance with the group's obligations under the loan documentation from and after 30 December 2008.

[9] It will also have been noticed that the Memorandum makes no reference to an interest holiday. The first Claimant produces what are described as addenda to what he calls 'two loans'. In fact, the addenda, dated respectively 24 and 29 December 2008, appear to belong to two contracts of guarantee and, I infer, reproduced amendments made to the underlying facility agreements which the guarantees supported. The first addendum provides for repayment of the loan in question to be made not later than December 2009 and the second provides for payment of interest to be rolled up until 20 June 2009. The rolled up amount was to be paid in full by 28 June 2009. The Memorandum was signed by the first Claimant and by Mr Savelyev on 30 December 2008. The addenda were signed by other officers or employees of the Bank. The dates borne by the two available addenda would appear to suggest that amendment and restatement of the terms of the group's banking arrangements had begun before the meeting at which Mr Savelyev is said to have put the first Claimant in fear for his life.

[10] In paragraphs 46 to 59 of his affidavit the first Claimant paints this transaction as a piece of racketeering extortion (not his words, but that is the picture which he is concerned to give), part of

a conspiracy to gain control of Western Terminal and Scan. In my original draft judgment I had said that since the Bank was being asked to roll up six month's interest on loans totaling some 3.5 billion roubles[3] at rates varying between 11% and 22.5% and with the majority of them at rates of 16% or over[4], I would have thought that the taking of additional security from a borrower which had given notice that it was about to default was mere common prudence. At the rehearing, Mr Millett QC, who appeared together with Mr Mark Forte and Mr Richard Evans for the Claimants, pointed out that in the notes of an interview given to the St Petersburg police on 21 May 2010 Mr Savelyev is said to have maintained that the Bank was 'duly secured' and understood that the first Claimant intended to sell the businesses in order to safeguard their assets and develop their commercial potential. It is impossible to fathom from the notes what commercial purpose of the first Claimant's Mr Savelyev thought that he was describing. Nevertheless, Mr Archangelsky says, at paragraph [44] of his affidavit of 9 June 2011, that he was asked to provide security and I would not have expected a commercial bank to grant an interest moratorium in the circumstances in which the group admittedly found itself without taking it.

[11] The Western Terminal shares were transferred for a consideration of RUS9,900 to the fifth Defendant ('Sevzapalians'). The shares in Scan were transferred to the sixth and eleventh Defendants ('the Scan transferees'), for an aggregate consideration of RUS10,00. Agreements for re-transfer were also entered into, with a long stop date of 1 January 2011. Sometime around March or April 2009 the Scan transferees transferred their shares to six other SPV's for the same nominal amount as was paid on the original transfers. It is alleged (and appears to be the case) that these onward transfers were made to other SPV's owned by the Bank. Each of the SPV's is a Russian incorporated company. Each of the proposed defendants (other than Havana) is domiciled or resident in the Russian Federation.

[12] Both the original and amended statement of claim plead that during the first quarter of 2009 'long before expiry of the agreed six month moratorium' the Bank started demanding repayment of the group companies' borrowings. It is pleaded that that was a breach of the Memorandum and contrary to the signed addenda. These pleas confuse the contractual arrangements between the parties. Repayment of the group's borrowings had nothing to do with the six month interest roll up.

[3] around US$128m. I have omitted the disputed loan to the first Claimant

[4] the total figure for rolled up interest had the interest roll up run its course would have been roughly US$10m applying an average rate of 16% over six months

Repayment was covered by the Memorandum, which would, provided that the group complied with its obligations, continue in effect until repayment of the last outstanding loan. The Memorandum promised forbearance only for so long as the terms of the facility agreements were observed 'on time and entirely.' None of the facility agreements is in evidence.

[13] The first Claimants' affidavit refers to a general meeting of Western Terminal, called by Sevzapalians in April 2009, to remove the General Director, a Mr Vinarsky. It is said (and it appears to be the case) that this meeting was irregular in that proper notice had not been given to 1% of the members. Mr Vinarsky was dismissed despite the alleged irregularity. The first Claimant also says that around the same time the Bank filed a forged document with the authorities stating that he (the first Claimant) had been removed as General Director at an EGM of Scan. These events are described in both statements of claim as 'Seizure of Control.' A claim was subsequently brought by Mr Vinarsky for wrongful dismissal on the grounds that the general meeting at which he was dismissed was defective for want of notice. The claim succeeded at first instance but the decision was reversed on appeal upon what, if I might respectfully say so, appear to have been the impeccable grounds that an employee has no locus to complain of dismissal by the majority of his employer's members[5] merely because the rights of 1% of them may have been prejudiced in the process. It is not suggested that the dismissal of Mr Vinarsky or of the first Claimant caused any loss or damage to any of the Claimants.

[14] On 3 June 2009 the first and second Claimants fled the Russian Federation for Bulgaria and thence to France. A claim for grant of asylum in France was dismissed in 2010. An appeal is pending, which is not likely to be heard until 2012. Meanwhile the first and second Claimants remain resident in Nice. The Russian authorities have brought extradition proceedings against the first Claimant, based upon an allegedly fraudulent loan transaction. Those proceedings are being contested.

[15] On 20 June 2009 the police in St Petersburg, together with other 'authorities' and employees of Sevzapalians raided the Western Terminal premises and took physical control of the operations there. Further raids removed documents, hard drives and so forth. There are other allegations in the statement of claim about unlawful enforcement, including reliance by the Bank on forged

[5] assuming that they form the relevant organ of the company for the purpose of dismissing a General Director – there is no suggestion that they did not

guarantees. Mr Millett QC relied upon evidence of the removal, in a raid, of corporate seals as evidence of forgery. For reasons which will appear, that is not something which I have to decide, but I do not think that the seizure of corporate seals alone leads to an inference that they were going to be used to forge, rather than merely execute, documents.

[16] The events summarised above are categorized in the statement of claim as a 'Scheme'. The alleged object of the Scheme was to allow the Bank 'and/or other relevant Defendants' (whichever they may be) to seize ownership and control of Western Terminal and Scan as part of a conspiracy to seize those businesses by unlawful acts and/or means. The unlawful means were originally to be gathered principally from paragraphs 38 to 40 of the original statement of claim. In brief, they were the breach of the Memorandum and addenda; deceit on the part of the Bank/Mr Savelyev (because they had no intention of complying with the undertakings in the Memorandum or with the promised moratorium); and intimidation on the part of the Bank/Mr Savelyev (described in the pleading as the making of threats of 'physical discomfort' and of (unspecified) harm to the first Claimant and his family) inducing him to cause the group to enter into the Memorandum and related arrangements. It was said in the original pleading that each of the Defendants (including Havana) 'joined' in the commission of these alleged torts 'or else agreed to take advantage of them with the intention of causing economic damage to the Claimants.' These averments have been rearranged in the amended statement of claim but so far as I have been able to gather they remain substantially the same.

[17] As a consequence, the Claimants and Scan are said to have suffered loss and damage in excess of 4.5bn roubles.[6]

[18] In the original statement of claim there was an alternative claim against the Bank alone for an account. This claim was based upon the proposition that if the sale and retransfer arrangements were genuine security, then the Bank should have realised its security by sale of Western Terminal and Scan at public auction and should have accounted to the third Claimant and seventeenth Defendant for the net equity after satisfaction of the indebtedness. This the Bank has not done, in breach of Articles 350.1 and 350.6 of the Russian Civil Code. It is alleged that the other Defendants (including Havana) conspired with the Bank to commit these breaches. Although these

[6] some US$145m at today's exchange rates

latter allegations have been retained in the amended statement of claim, the self standing claim against the Bank for an account has been dropped from the prayer.

[19] The only claim in the prayer now made against all of the Defendants is for damages for conspiracy. Separate claims against the Bank and Mr Savelyev for damages for deceit and intimidation which had appeared in the original statement of claim have been omitted from the amended statement of claim.

(b) service out

[20] Permission is sought under CPR 7.3(2)(a), which is in the following terms:

> '7.3(2)(a) 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.'

[21] At the first hearing, Mr Richard Millett QC, who then appeared together with Mr Mark Forte and Mr Jerry Samuel, helpfully referred me to the decision of the Privy Council in multiple proceedings between **AK Investment CJSC v Kirgiz Mobile Tel Ltd and others**[7] ('AK Investment'). Although decided under differently worded rules, Lord Collins there took the view that the differences were not ones of underlying law. The case is of immense assistance generally. I approach the question of permission to serve out by considering first whether (to use the language of our CPR) there is, between the Claimants and Havana (the anchor Defendant) a real issue which it is reasonable for the Court to try. In the present case the only cause of action which this gateway requires me to consider is the cause of action in conspiracy, because that is the only cause of action common to both Havana and to the proposed Russian Defendants.

[7] [2011] UKPC 7

The claim against the anchor Defendant

[22] If the claim against Havana is bound to fail (or can be said not to be 'viable'), then leave to serve out should not be given[8]. In my judgment the conspiracy claim against Havana is not viable.

[23] The Claimants originally pleaded that Havana owns 50% of Sevzapalians (the other 50% being owned by the fourth Defendant) and that in March or April of 2009 Sevzapalians became the transferee from the sixth Defendant of 18% of Scan. Havana is also said to be an indirect 50% shareholder of the thirteenth Defendant. The only allegation that Havana was party to the supposed conspiracy in the original pleading was that as the joint owner of Sevzapalians and as holder of the other shares which I have mentioned, Havana 'must have been party to the conspiracy' and must have 'agreed to Sevzapalians (and its subsidiaries) carrying out their roles [in it].'

[24] This was an insufficient pleading of involvement in an unlawful means conspiracy. A claimant in such a case needs to establish active intentional participation. Dealing with a claim of procuring a breach of contract in **United Company Rusal Plc v Corbiere Holdings Ltd**[9] I said

> ' . . . it seems to me that the simple fact is that, assuming the breaches are established, there is no allegation (apart from the use of the words) of any act of procurement or inducement on the part of Corbiere of breaches by Interros of the Cooperation Agreement on the part of Corbiere. In the course of argument, Mr Maclean QC submitted, in effect, that the 'Scheme' (i.e. the aggregation of a majority 40% block) could not have gone ahead unless Corbiere had made the buyback offer and that at the least Corbiere assisted in what was done. I think that the objection to these submissions is (a) that there is no room for a 'but for' argument in this particular tort, which depends upon intentional actings and (b) that 'assisting' or 'participating' is not sufficient. When I asked Mr Maclean whether he had any authority for the latter proposition, he frankly said that he had not.'

[8] **AK Investment** at paragraphs [79], [80]
[9] NEVHCV 2011/0030, March 2011

[25] Although I was dealing there with a case of procuring a breach of contract, it seems to me that what I said applies equally to the quality of participation in overt damage causing acts intended to damage the claimant which need to be proved before someone can be held liable as a party to an unlawful means conspiracy. It is not sufficient to hide behind 'must have been' formulae. The mere holdings of blocks of shares giving no control whatever over the acts of other parties to the alleged conspiracy does not entail the conclusion that the shareholder 'must have been' a conspirator. As for 'agreeing to what happened', an allegation to that effect will not ground a case of participation in an unlawful means conspiracy any more than it will ground a case of procuring a breach of contract. In my judgment there was in the original statement of claim no sufficient allegation that Havana was party to any combination to cause harm to the Claimants by means of intentional unlawful acts. Nor was there any evidence to support a suggestion that it was. I appreciate that the case is at a very early stage, but there must be *some* evidence to back the allegations made. Hence the requirement in the CPR that the application be supported by an affidavit. In this case, there is no evidence at all. All there was at the original hearing were the allegations to which I have referred.

[26] In the amended statement of claim, however, a new paragraph 44 is added. This pleads that Havana actively and overtly participated in the conspiracy by investing in Sevzapalians, by contributing to 50% of its share capital and by having 50% control over it. I pause to notice that '50% control' is a contradiction in terms. The pleaders might as well have pleaded 'by having no control.' It is then pleaded that Havana knew that Sevzapalians had been created for the purpose of carrying out acts in prosecution of the Scheme and that it knowingly permitted 'and/or procured' Sevzapalians to participate in the fraud. The amended statement of claim goes on:

> 'Havana was a creature of the Bank and/or Mr Savelyev and wholly under its control and its directing mind and will was the Bank and/or Mr Savelyev such that its and/or his knowledge and intention in respect of the frauds is to be attributed to Havana.'

[27] This amendment completely destroys what case (if any) the Claimants may previously have had against Havana. In context, 'creature' signifies a person without the capacity to act or think independently of its creator – in other words, a mere instrument. As a mere creature of the Bank (or of Mr Savelyev) Havana cannot be said to have joined a combination with it. A conspiratorial

combination must be proved against separate legal persons each of which, or of whom, must have the capacity to form, and have formed, a separate intention to injure the claimant through damage causing acts committed by all or some of them. Once it is pleaded (I have no doubt accurately reflecting the facts on the ground) that Havana was a mere creature with no separate will of its own, it becomes impossible to allege that it conspired with the Bank or with Mr Savelyev. Similarly, the allegation of 'overt participation[10]' becomes impossible to maintain.

[28] The point is well illustrated by paragraph 35 of the skeleton argument used for the further hearing:

> 'The essence of this conspiracy is *the combination of the Bank/Mr Savelyev* (or under his direction) misappropriating two very valuable assets belonging to the Claimants by unlawful means and in breach of the Bank's own obligations. *The Bank and/or Mr Savelyev directed each of the SPVs to receive the fruit of the fraud and the ultimate parent companies of each of the SPVs to disguise and conceal both the fruits of the fraud and the true beneficial ownership.*' [emphasis added]

What is being described here is a conspiracy between the Bank and Mr Savelyev, with the other Defendants acting on their instructions. That does not make the other Defendants co-conspirators.

[29] The skeleton argument continues:

> 'In this context, it is sufficient that each of the participants in the scheme can have attributed to it the knowledge of the Bank and Mr Savelyev.'

This submission confuses knowledge with participation. I was referred in this regard to **Belmont Finance Corp v Williams Furniture (No 2)**[11]. That case does not help the Claimants. It did not decide that a mere creature or instrument can conspire with its creator or user. It decided that a director of a company could conspire with the company and that in certain circumstances the knowledge of the director could be imputed to the company. That is not this case. In this case the averment that the SPVs (including Havana) were mere creatures without will of their own defeats any allegation of active participation in a combination. If there was a conspiracy at all, it was,

[10] the necessary averment is in fact of 'overt acts' giving rise to the inference of participation in the combination alleged

[11] [2000] 2 All ER (Comm) 271

according to paragraph 35 of the further skeleton argument, a conspiracy between the Bank and Mr Savelyev.

[30] For these reasons, I do not consider that there is a real (or, indeed any) issue between any of the Claimants and Havana.

[31] That is sufficient to dispose of the application for permission to serve out, but in case I am wrong in the view expressed above, I must go on to deal with the position as between the Claimants and the Defendants other than Havana.

Serious issue to be tried

[32] In the original statement of claim paragraphs 35, 36 and 38 pleaded as follows[12]:

> 'The Scheme
>
> 35. It is apparent from the events set out above that the purpose of the transactions which the Bank/Mr Savelyev required the Group to undertake (namely the sale of Western Terminal and Scan) was not to provide the Bank with temporary additional security, but instead to allow the Bank and/or the other relevant Defendants to seize ownership and control of Western Terminal and Scan.
>
> 36. Given the number of entities involved and in particular the number of transactions that took place in parallel, it must have been the case that the seizure of ownership and control of Western Terminal and Scandinavia Insurance took place pursuant to an agreement between the parties involved to seize those businesses by unlawful acts and/or means ("the "conspiracy"). The Claimants cannot particularise the date of the agreement until disclosure herein but allege that it must have been before the conclusion of the Memorandum.
>
> …..
>
> 38. The Scheme pleaded above and the actions of the Bank pursuant to it were a breach of contract, viz, the contractual arrangements contained in the Memorandum and the addendums agreed pursuant thereto. The breach of contract constitutes an element or the element of unlawfulness for the purposes of the tort of conspiracy and is itself actionable as a matter of Russian law.'

[12] in the amended statement of claim the corresponding paragraphs are numbered 41, 42 and a slightly extended 45, but I do not think that there is any reason to alter the original references and quotations. See paragraph [28] above

[33] The conspiracy alleged in these paragraphs is a conspiracy to conceive and execute the 'wrongful seizure' of Western Terminal and Scan in breach of contract. There was, when I prepared my first judgment, no properly pleaded allegation that Western Terminal or Scan was seized in breach of contract. The only breaches relied upon in the original statement of claim were breaches of the Memorandum and addenda. The material terms of the addenda, so far as they were then before me, were the terms which rolled up interest. There was no allegation and certainly no evidence that interest was ever demanded in contravention of that agreement. Nor was there any sufficient allegation of breach of the Memorandum. As I have mentioned, the promises made in the Memorandum were conditional upon the group fulfilling its obligations to the Bank on time and entirely for the outstanding period of the loans. I pointed out in my first draft judgment that in order to establish a breach of any promise made by the Bank in the Memorandum the Claimants must plead and prove that all of the group companies, at the moment of alleged 'seizure', had, at all times from and after 30 December 2008, complied with that condition. This is not something that need only be pleaded in reply. It is a material averment before the cause of action can be said to have arisen, since there will have been no breach of the Memorandum unless the group companies had fully complied with the condition. Until it is known that they had, no breach is established. To put it another way, the group could have had no complaint against the Bank under the Memorandum unless it was in a position to say that it had at all material times complied with the relevant facility agreements on time and entirely. This element of the alleged conspiracy was therefore not made out on the pleadings.

[34] In the original draft judgment I had said that I could not believe that the omission to plead this essential averment was a matter of oversight on the part of the very experienced Counsel who pleaded the statement of claim. I went on to say that there was no material in the first Claimant's affidavit to support a case that the group companies had complied with all of their obligations under the relevant facility agreements until the moment of 'seizure'. I referred to a letter from Ince & Co dated 15 April 2009 setting out the details of a breach of a banking covenant said to have occurred in respect of a loan contract numbered 01342 on 13 March 2009 and which triggered the Bank's enforcement powers. This evidence that the group was in breach of its banking covenants by at the latest 13 March 2009 and thus in breach of the conditions in the Memorandum is consistent with the fact that no complaint of premature enforcement in breach of contract has been advanced before the Russian Courts. The only complaints advanced in the Russian courts appear to have

been founded upon hopeless suggestions that the transfers themselves were nullities for want of adequate consideration or that they infringed fair dealing provisions of Russian company or trade law. The very fact that resort had to be made to such oblique arguments demonstrate, (and demonstrates) at any rate to my satisfaction, an inability to mount a case based upon a simple allegation that the Bank was not entitled to enforce its security when it did. It is not surprising that ultimately these claims were given short shrift.

[35] My original belief turns out to have been misplaced. The amended statement of claim now includes an allegation that none of the borrowers in the group was in breach of any banking covenants for repayment or interest under any loan. The amended pleading goes on to allege that all borrowers had fully performed, (or had not breached) all of their obligations with the sole exception of the matter referred to in the Ince & Co letter, which is said not to have been a breach of any relevant covenant or obligation under the loan contracts referred to in the Memorandum. No valid reason was advanced at the rehearing why Ince & Co were wrong to say that the breach of the anti-lien covenant or of the other covenant referred to on page two of their letter did not render the mortgage securing the loan enforceable, as Ince & Co claimed that it did.

[36] The amended statement of claim goes on to say that if there were breaches of loan contract No. 01342 they were, as it is put, 'de minimis.' That would be a novel idea in respect of a mortgage security governed by English law and there is no evidence of Russian law to suggest that the principles would be any different there.

[37] The letter from Ince & Co attached and relied upon two demands for repayment under two loan contracts. The first related to a loan numbered 01203, said to have been due for repayment on 26 March 2009, and the other to the 01342 loan which was the subject of Ince & Co's letter. That loan had a contractual repayment date of 28 April 2009, and the notice relied upon breaches of obligations under the loan agreement. It is fair to say that this notice can be read as meaning that the contractual due date had passed, but taken together the terms of the letter from Ince & Co it is, in my judgment, clear that the Bank was calling in the loan in consequence of the borrower's breaches of covenant.

[38] The amended statement of claim pleads that the notices were a breach of the moratorium and so invalid, but the moratorium, as I have tried to point out, dealt only with the interest roll up and the

only obligation which the Bank undertook pursuant to the Memorandum was not to call loans in early, provided that the borrowers performed their contractual obligations to the letter. I cannot see how it can possibly be said, in the light of the documents to which I have referred, that the Bank was not entitled to make these demands or that they involved any breach of the Memorandum. Mere assertion that Ince & Co were wrong is not sufficient. As I have said earlier, there is no evidence that in the multitude of proceedings, civil and criminal, which these events have provoked in Russia it has ever been suggested that the Bank was in breach of contract in calling in these loans. The amended statement of claim attempts to plug this hole by saying that because the Bank had already[13] acquired Scan and Western Terminal, neither company pursued its challenge to the Bank's claims. This seems to me to be inadequate as an explanation, in light of the fact that numerous other proceedings have been brought against the Bank by parties other than Western Terminal and Scan in relation to these events.

[39] In these circumstances it is not necessary for me to consider the allegation in the amended statement of claim that the two letters of demand to which Ince & Co's letter referred were 'shams, designed to paper over that the Bank and/or Mr Savelyev had already seized the shares and provide a (false) *ex post facto* basis for having done so.' No doubt Counsel were supplied with sufficient material to enable them to plead these serious allegations of wrongdoing, but, if so, it has not been shared with the Court and in any case I am not prepared to contemplate that Ince & Co would have made themselves accessory to any such scheme.

[40] The amended statement of claim goes on to allege that the Bank's claims against Scan and the first Claimant were fraudulent, since the guarantees upon which they were based were forged 'to the knowledge of the Bank.' Paragraph 43(ii) of the amended statement of claim alleges that 'the Bank was responsible for bringing legal proceedings against Western Terminal and Scan (in the latter case based upon forged guarantees, so that the assets of those companies could be removed by the conspirators.' This is not, however, an allegation of conspiracy and even if I am wrong about that there is no allegation that Havana was party to a conspiracy to forge guarantees, so that these allegations can be ignored when considering whether the proposed Russian defendants are necessary or proper parties to a claim against Havana in this jurisdiction.

[13] the 'already' is not given any chronological reference point

[41] Paragraph 39 of the original statement of claim pleaded, and paragraph 46 of the amended statement of claim now pleads, a conspiracy to commit the torts of deceit and intimidation. It is in the following terms:

> '46. Further, the Scheme pleaded above and the actions of the Bank and the other Defendants pursuant to it comprised the torts of deceit, intimidation and conspiracy to commit such torts, in that:
>
> (i) the Bank and Mr Savelyev deceived each of the Claimants (in that what Mr Savelyev said was said to Mr Arkhangelsky and intended by him to be relied on by him and by Mrs Arkhangelsky and OMGP as the ultimate direct owners of Scan and the direct and indirect owners of Scan);
> (ii) what they said was false and known to be false in that they had no intention of complying with any of the undertakings made in the Memorandum or the promised moratorium;
> (iii) the Bank and Mr Savelyev intimidated Mr Arkhangelsky and (through him) the other Claimants by threats of physical discomfort and harm to him and his family into entering the Memorandum and related agreements;
> (iv) each of the Defendants joined in the commission of those torts or else agreed to take the advantage of them with the intention of causing economic damage to the Claimants.'

[42] The Claimants plead that what Mr Savelyev said to the first Claimant at the second meeting was deceitful, because, so it is said, the Bank and Mr Savelyev had no intention of abiding by the terms of the Memorandum. As I have pointed out, the material terms of the Memorandum differed significantly from what Mr Savelyev is said to have told the first Claimant at the meeting. I find it difficult in those circumstances to understand the basis for the plea of deceit. It is not suggested that in signing the Memorandum the first Claimant was in any way misled by Mr Savelyev as to the meaning of the document itself and which he signed. The signed Memorandum must therefore be taken, to the extent that it differs from what was said at the second meeting, to have superseded the terms of that conversation.

[43] Furthermore, although the first Claimant complains about the manner in which he was induced to provide the security (if that is indeed what it was), he does not suggest that its actual provision was prejudicial to the Claimants. Indeed, he was content with the breathing space the arrangements gave him and hoped to be able to turn it to account[14]. The execution of the sale agreements, in other words, caused the Claimants no damage. The complaint always comes back to the

[14] see paragraph 59 of his first affidavit

suggestion that the security was wrongfully enforced (and General Directors wrongfully removed). In my judgment, therefore, the underlying claim in deceit is unsustainable as a basis for conspiracy.

[44] Finally, paragraphs 42 to 46 of the original statement of claim[15] alleged that (if the security taken in December 2008 was valid) then the Bank and the companies which took the original transfers of the shares in Western Terminal and Scan failed, having enforced the security, to hold a public auction and to account to the third Claimant and seventeenth Defendant for the resulting surplus in breach of Articles 350.1 and 350.6 of the Russian Civil Code ('the Code'). The Claimants allege that Havana, among others, conspired together and with the Bank 'to assist the Bank' to breach those provisions of the Code.

[45] Only the enforcing Bank could put itself in breach of the Code and only by omitting to take the steps required by the Code. The other Defendants may (or may not) have been delighted that the Bank was in breach of these provisions, but the essence of a conspiracy is that it involves the taking of common positive action (unlawful *means*) aimed at and which damages the claimant. It is hopeless to speak of a *combination* to refrain from doing something which only one party to the combination has any obligation to perform. It would be quite different if it had been alleged that Havana had issued threats or otherwise intimidated the Bank into failing comply with its statutory obligations, but even the Claimants have shrunk from pleading that.

[46] In order to deal with this difficulty the amended statement of claim now pleads that by taking transfers of shares knowing that they were not paying full market value for them and that the Bank had not exposed them for sale at public auction and by posing as independent transferees when they were not, the transferee Defendants overtly conspired with the Bank to harm the Claimants by breach of Articles 349 and 350 of the Russian Civil Code. Whether or not that is correct in respect of the transferees[16], it is irrelevant for present purposes, since Havana took no transfers of any shares and was therefore party to none of the overt acts now relied upon. It follows that no claim lies against Havana under this head. It further follows that none of the proposed Russian Defendants can be said to be a necessary or proper party to a claim against Havana in that regard.

[15] see now paragraphs 49 to 53 of the amended statement of claim

[16] I would have thought not, since they are categorised as companies with no real and genuine business purposes, but whose sole function was to act as vehicles for the commission and concealment by the Bank and/or Mr Savelyev of their frauds on the Claimants (paragraph 15 of the amended statement of claim)

[47] In my judgment neither statement of claim makes out the existence of any combination by the Russian defendants to cause harm to the Claimants by means of intentional unlawful acts intended to cause loss to the Claimants and which did cause such loss. No case is made out for the existence of a combination causing loss to the Claimants by means of breach of contract because no breach is made out. No case is made out for saying that any damage causing deceit was practiced upon the Claimants or that any Defendant conspired to exercise such deceit. No case is made out that any Defendant conspired with the Bank or Mr Savelyev to intimidate the first Claimant and even if there was, no loss was caused to any of the Claimants by the signing of the Memorandum, which by itself was positively beneficial to the group. Any allegation that the Defendants other than the Bank and Mr Savelyev 'joined' in the alleged deceit or intimidation is unsustainable and merely 'agreeing to take advantage of the deceit or intimidation' (with or without the intention of causing economic loss to the Claimants) is an insufficient plea of participation in an unlawful means conspiracy. The case against the Russian defendants is further weakened by the categorization of the SPVs as mere vehicles.

[48] In my judgment, and for the reasons given above, neither the original nor the amended statement of claim nor the evidence in support gives any ground for taking the view that there is a serious issue to be tried between the Claimants and the foreign Defendants in conspiracy[17]. The same reasons are also relevant to the question whether there is a real issue between the Claimants and Havana. They go to show, in addition to the reasons which are particular to Havana alone and which are dealt with above, that there is not.

[49] I should add, lest it be thought that I have overlooked the point, that at the rehearing Mr Millett QC took me in detail to statements made by Mr Savelyev, other Bank officials and one Gavrilov, Sevzapalians' General Director, given to the City of St Petersburg police in the course of an inquiry into these events instigated, as I understand, by the first Claimant. I have already referred above to parts of Mr Savelyev's statement. Mr Millett QC says, with force, that the contents of these statements present a wholly different version of events from that contained in the first Claimant's affidavit and in the original and amended pleadings. That appears to me to be true and would no doubt be fruitful ground for cross examination were this case ever to see the light of day. My task

[17] the Claimants may have some sort of claim against the Bank and/or Mr Salvelyev but, if so, it is not a claim in conspiracy involving any of the third to sixteenth Defendants

on this application, however, is not to see who is telling the truth but whether there is a real issue to be tried against Havana to which the prospective Russian defendants are necessary or proper parties. Even if everything contained in the statements to which Mr Millett QC has referred me is false, it does not make a case against Havana or against the prospective Russian defendants in conspiracy. I say no more about these statements, therefore, beyond the fact that I have read them and found them to be of no assistance to me.

Appropriate forum

[50] If, contrary to my view, there is between the Claimants and Havana a real issue which it is reasonable for the Court to try and if, again contrary to my view, there is a serious issue to be tried in relation to the Russian Defendants, I must go on to consider whether the British Virgin Islands are an appropriate forum for trial.

[51] The Claimants very properly accept that the British Virgin Islands are not the natural forum for the determination of these proceedings. But they say that it is nevertheless the appropriate forum because, put shortly, the Claimants will not obtain justice in the Russian Federation.

[52] It is useful at this point to summarise the civil proceedings that have been prosecuted in Russia by or on behalf of the Claimants since the events of March/April 2009.

[53] The second Claimant had locus to and did bring proceedings in the Arbitrazh Court of St Petersburg to have the transfer of 99% of the third Claimants holding in Western Terminal declared void. She succeeded at first instance (25 June 2009) and on appeal (24 September 2009). The first Claimant says, however, that forged papers were presented to the Court withdrawing the second Claimant's claim. That attempt failed but when the second Claimant went to Court to protest that the document was a forgery the police are said to have threatened her life. The case went on to reach the Federal Court[18] which, on 22 December 2009, reversed the decisions below, for reasons which are not readily apparent from the very badly translated transcript. The first Claimant says that when he was informed of this outcome, the second Claimant's lawyers told him that they had been told by the court staff that Madame Matvienko, the Governor of St Petersburg, had telephoned the Presiding Judge directing the Court to find against the second Claimant.

[18] or, possibly, 'Cassation Court'

[54] Next, Bissonia Holdings, a major shareholder of the third Claimant, made a very similar attack on the transfer of the Western Terminal shares, but with an additional claim that this was a large scale transaction requiring shareholder approval, something which had not been obtained. Sevzapalians' defence was that the transaction was carried out in the ordinary course of business. The court rejected that. Sevzapalians is then alleged to have submitted a forged resolution of the board of Bissonia approving the transaction, which it appears the court once more refused to accept. The court took the view, however, that shareholder approvals were rendered unnecessary by the provisions of the third Claimant's articles of association. There is no way of knowing whether or not that conclusion was fair and just. The court also admitted expert evidence from Sevzapalians that the shares had zero value. Bissonia apparently failed to file evidence in answer and two further appeals were unsuccessful. The failure to put in evidence of value is attributed by the first Claimant to the fact that Bissonia's lawyer had been suborned and was acting against the claimant's interest.

[55] The second Claimant brought parallel proceedings in relation to the Scan transfers, where it was held at first instance that the share transfers were not void as gratuitous. More than one appeal appears to have been lodged, with an outcome, so far as I can understand it, similar to that reached by the Federal Court in relation to the second Claimant's Western Terminal complaint.

[56] The seventeenth Defendant brought similar proceedings in relation to the Scan shares. At first instance, the transaction appears to have been held void or voidable. On appeal, where the seventeenth Defendant does not appear to have been represented (on account, so it is said, of the subornation of its counsel), the court accepted that Scan was valueless on account of its liabilities.

[57] Although the course of these proceedings and the reasoning behind the decisions is not always easy to follow, it does not appear to me that any of the judgments is irrational or inherently biased, particularly in the light of the failure on the Claimants' side to put in any valuation evidence.

[58] I was presented with a report dated 10 June 2011 written by Professor Bowring of Birkbeck College, London. In it he makes very strong points about deficiencies in the rule of law in the Russian Federation and I appreciate that similar or identical criticisms have been accepted by judges elsewhere as evidence that claimants who have fallen out with the Russian authorities are likely to be denied justice in Russia, especially where their claims are inimical to the perceived

interests of politically powerful personages inside the Russian Federation. There is little in the report, however, which is specific to the instant case. Professor Bowring does, however, say[19] that Madame Matvienko is one of the most loyal collaborators of Prime Minister Putin and that to become her enemy is to become the enemy of Mr Putin, which he describes as a very dangerous situation indeed. Professor Bowring goes on to conclude

> 'It is plain to me that [the first Claimant] has now found himself in this situation.'

Professor Bowring does not disclose the evidence upon which he based this conclusion, although he says that Madame Matvienko's son (who has a 4.1% holding in the Bank) has been prosecuted for robbery in the past (the charges were dropped) and that to fall out with him, too, would be extremely dangerous.

[59] The first and second Claimants are now in self imposed exile, resisting attempts by the Russian authorities to extradite the first Claimant from France on criminal charges relating to an alleged fraud in the sum of around 1.3m euros.

[60] It is plain from all this material that if the first and second Claimants were to go back to Russia the first Claimant would be arrested. There are also some slender grounds for thinking that powerful political figures might attempt to influence judicial decisions if the first and second Claimants were to renew attempts in Russia to obtain redress for what they see as wrongs done to their economic interests by the Bank. On the other hand, I have to bear in mind that Russian courts and tribunals have listened to them in the past and, as I have said, I cannot read the decisions of those courts and tribunals (insofar as I have been able to understand them) as outlandish or plainly unjust. On the other hand again, it is far from clear to me what avenues still remain open to the Claimants in Russia against the Bank/Sevzapalians in light of the decisions in the proceedings to which I have briefly referred above.

[61] Further, I cannot simply assume that the Russian authorities are not justified in seeking the extradition of the first Claimant. If they are, then the sorry consequences which might await him were he to return to Russia would be the consequences of his own conduct rather than of unjust oppression at the hands of a foreign power. I simply have no way of knowing. All I can say is that there seems to me to be a tendency nowadays (no doubt the result of certain notorious high profile

[19] at paragraph 67 of his report

cases) to slip subconsciously into the mindset (a) that no-one can obtain a fair trial in Russia and (b) that anyone whose interests may not coincide on all points with those of the Russian ruling classes is liable to be thrown into jail. There is no doubt that such things have happened, but I was not convinced that the material which I had put before me justified me in coming to the conclusion that that were he to return to Russia there would be a real risk that the first Claimant would be treated outside the ordinary norms of justice or that if the first or second Claimants or their associates could think of any other claims to bring against the Bank or Sevzapalians in Russia the courts of that country would not deal with them according to law.

[62] There is, of course, the evidence of the malign intervention by Madame Matienko, but that is double hearsay and begs the question why court staff should have been privy to what one would suppose to have been a highly sensitive and confidential communication. I should also repeat that the first Claimant has complaints about orchestrated police harassment relating to his former businesses, none of which I see any reason to disbelieve. I remind myself, too, of the claims that the Claimants' counsel was suborned and thus failed to put in crucial valuation evidence on their behalf, although I find it difficult to accept that it was not open to them to engage other counsel to do the job instead. So that this evidence did not persuade me, when I drafted my original judgment, that there was a real risk that the Claimants could not obtain justice for any further claims they may wish to make against one or more of the Defendants (other than Havana) in the Russian Federation.

[63] At the second hearing, however, Mr Millett QC drew my attention to a second affidavit signed by the first Claimant on 20 June 2011 (and, I am told, now sworn). In paragraph 15 of that affidavit the first Claimant says that he has been informed by one of the lawyers representing him in Russia that he regularly meets the City of St Petersburg police officer in charge of the criminal investigation to which I referred above. The lawyer says that every time they meet the officer tells him that if the first Claimant drops his claims against the Bank and returns to Russia, he will only serve a limited prison sentence of three to six months, whereas if he remains in France and if the extradition proceedings are ultimately unsuccessful, the Bank will arrange for him to be killed in France. He says that this threat is made to frighten him and is an indication that if he is extradited to Russia he will spend a very long time in prison or worse.

[64] Presumably the first Claimant means that if he ever returns to Russia without dropping his claim against the Bank, he will spend a very long time in prison or worse, since the indication is, apparently, that if he returns and drops the claim he will suffer only a relatively modest term of imprisonment. I asked Mr Millet QC why, if he genuinely fears assassination in France, the first Claimant does not get on the next flight back to St Petersburg. The answer was that the first Claimant likes living in Nice, where he has bought an apartment. I did not find this evidence persuasive.

[65] Even if it is said that I am wrong to reach this conclusion, I nevertheless consider that the existence of a risk, whether as to fair trial or as to personal safety or both, would still not make the British Virgin Islands the appropriate forum for the trial of this case. Unlike some of the other cases to which I have been referred, this one has absolutely no connection with the home jurisdiction (apart from the fact that a company incorporated here is a 50% shareholder in two of the parties which participated in the security arrangements and is a transferee from one of the parties which took shares in Scan – which is no connection at all). In my original draft judgment I said that I did not consider that room should be made in the Court's crowded calendar here to try a case with which the proposed Russian Defendants are unlikely to engage and which has nothing to do with this jurisdiction. At the rehearing Mr Millett QC criticised this last sentence. He said that once it is decided that there is a risk of harm should the first Claimant returrn to Russia, the question whether the proposed Defendants would engage with proceedings here is irrelevant. I accept that criticism.

[66] It still remains my view, however, that in this particular case the choice is not between a trial here and no trial at all. It is between a trial in Russia and no trial at all. The fact that trial in Russia might be difficult or even dangerous does not mean that this Court should entertain a case which has no connection whatsoever with this jurisdiction. That choice is one for the Claimants, not this Court.

Conclusion

[67] For all of these reasons, permission to serve out is refused.

Freezing order

[68] In the light of my decision on service, the question of the grant of freezing relief does not arise.

Embargoing this judgment

[69] At the conclusion of the rehearing Mr Millett QC asked me, if I was against him on this application, to embargo publication of the judgment until an application could be made to the Court of Appeal for permission to serve out and for a freezing order. I am not prepared to do that. It is my firm view that in the absence of very special circumstances there is an overriding public interest in making the decisions of the Court available to lawyers and to the public at large as soon as they are reached. That is particularly so in cases such as the present, where the Court is aware of another attempt to bolt unsustainable conspiracy claims on to causes of action which do not justify permission to serve out, purely for the purpose of identifying a locally domiciled 'conspirator' as anchor defendant. Quite different considerations arise where the Court is dealing with officers such as liquidators or with trustees who may be at odds with beneficiaries, where absolute confidentiality to maintain value for creditors or to avoid legally privileged material becoming available may justify sealing proceedings or a particular judgment.

[70] Mr Millett QC said that unless the judgment was embargoed, the proposed Defendants (other than the Bank) would learn about it and rearrange their affairs so as to make themselves judgment proof. On the facts of the present case this appears to me to be fanciful. As I have already mentioned, none of the proposed Defendants is seen by the Claimants as anything other than an instrument of the Bank. The events in question are now over two years old and if the Bank had wished to make itself judgment proof outside Russia it has had ample time to do so. It is clearly impossible for the Bank (without going out of business) to make itself judgment proof in Russia, although there would clearly be obstacles put in the way of enforcement in Russia of any judgment obtained here. That, however, would not be the result of the absence of a freezing order, but because of other considerations.

[71] It is true that so-called 'gagging orders' are occasionally made as ancillary to the grant of **Norwich Pharmacal** relief. Whether they are appropriate depends upon the facts of each particular case. Where, however, a litigant has been refused permission to serve out, it seems to me to be wrong in principle to keep the Court's reasoning from the public merely in order to assuage what I regard as unjustified fears that if permission can be obtained on appeal and a freezing order granted, publication of the judgment will in the meantime have damaged the prospects of any ultimate recoveries.

[72] Further, if I were to embargo the judgment, the Court would simply lose control of it. The Court does not have carriage of an application for permission to appeal nor can it prevent an appeal being abandoned. Whether the judgment would eventually be published in such circumstances would become wholly uncertain. I do not think that that would be right.

[73] For these reasons, I will not embargo the judgment.

Edward Bannister

Commercial Court Judge

22 July 2011