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

CLAIM NO: BVIHC (COM) 2011/0087

BETWEEN:

(1) SPHEREINVEST GLOBAL HIGH YIELD FUND LIMITED
(2) SPHEREINVEST HIGH YIELD (CYPRUS) LTD

Claimant/Applicants

and

(1) EXIMTECH INVESTMENTS LTD.
(2) EUROINVEST ALLIANCE LTD.
(3) ZOLOTOI FINANCE LIMITED
(4) TARGET COINS CORPORATION
(5) MARKETING PREMIUM INC.

Defendant/Respondents

Appearances: Ms Sandra Corbett for the Applicants/Defendants
Mr Ben Mays for the Respondents/Claimants

JUDGMENT

[2011: 18, 20 October]

(Forum non conveniens – stay - Claimants seeking orders that BVI defendant companies are trustees for them of certain assets situated in Russia – defendants controlled by Russian resident and Russian speaking individuals – assets previously managed by Russian and Cypriot entities controlled by Russian resident and Russian speaking individuals – whether Russian courts available forum of competent jurisdiction and clearly more appropriate forum that BVI Court)

[1] **Bannister J [Ag]:** This is an application by the Defendants to these proceedings presented as an application challenging the Court's jurisdiction. In fact, as Ms Corbett, who appeared for the

Defendants, readily acknowledged, it is an application asking the Court to decline jurisdiction on forum grounds. There can be no issue as to jurisdiction, since each of the Defendants is a BVI registered company.

Background

[2] The first Claimant is a Bermuda registered company and the second Claimant is registered in Cyprus. In their statement of claim they describe themselves as investment funds investing in global high yield emerging market credit and debt opportunities open to sophisticated investors.

[3] The Claimants say that in 2008 they delegated management of their Russian assets to a Russian company called ZAO UK Prof ('UK Prof') whose CEO is a gentleman called Dmitry Chirakadze ('Mr Chirakadze'). It claims to carry on business as lawyers and investment advisers. Similar delegation was made in favour of a Cypriot registered company called UK Prof Limited, which I shall call 'UK Cyprus.' These delegations were effected by means of two powers of attorney, one dated 27 October 2008 being governed, the Claimants say, by Bermudan law and the other, granted on 24 October 2008, governed by the laws of Cyprus, which expired on 23 October 2009. The first was terminated on 12 October 2010. In addition to the two powers of attorney, there was a services agreement between the Claimants and UK Cyprus which the Claimants say was governed by English law. This is said to have terminated by breaches committed by UK Cyprus (a novel concept in the absence of an accepted repudiation) but in any case the Claimants rely upon a formal notice of termination delivered on 12 April 2011. UK Prof and UK Cyprus are said to have owed fiduciary duties to the Claimants.

[4] The Claimants say that in addition to Mr Chirakadze a number of other Russian individuals acted as employees or agents of UK Prof and UK Cyprus. They are described, together with Mr Chroakadze himself, as the 'Russian Fiduciaries' and some of them have been identified as being directors of some of the Defendant companies.

[5] Two schedules to the statement of claim lists the Claimants' assets alleged to have been under the management of UK Prof and the Russian Fiduciaries. They are said to comprise, in Schedule 1, non-cash assets and, in Schedule 2, cash. Although it is pleaded that these Schedules indicate which claimant is the beneficial owner of which asset, the Schedules fail to do that. The non-cash assets comprise, first, promissory notes issued by certain Russian Federation companies with

aggregate face values of some 1.02 billion roubles[1]. Most of these notes have maturity dates in 2008 and none matured later than October 2009. These promissory notes are said to have been previously held in custody accounts of the Claimants in a Moscow bank. A further list of promissory notes, for which no maturity dates are provided, are said to have been transferred to the Defendants in October 2009. These are said to have a face value of 486 million roubles.[2] In addition to these promissory notes there are said to be real estate in Nizhny Novgorod, of an unspecified realisable value, together with the proceeds of sale (as I understand it) of a winery storage and bottling facility. There are also shares in various companies, to which no value is attributed. The cash is said to have been transferred by 'the Claimant' [sic] to the second Defendant at various dates between March 2009 and May 2010. It is said to amount to US$8.7 million.

[6] It is pleaded that all of these assets were transferred to the Defendants between 2008 and 2009 pursuant to the powers of attorney or in accordance with the service agreement. It is not said whether this was done with the knowledge or consent of the Claimants.

[7] The pleading goes on to allege that in the first half of 2010 the Claimants began to complain about allegedly excessive fees being charged and inadequate reporting. It is then said that despite demands for the return of the assets and an account of their custodianship, *UK Prof and the Russian Fiduciaries* (not the Defendants) have refused to provide either. It will be noticed that neither UK Prof nor any of the Russian Fiduciaries is a defendant to these proceedings. It is then pleaded that the Defendants hold the Claimants' assets as nominees and fiduciaries on behalf of the Claimants and the Claimants claim orders for delivery up and transfer, an account of dealings, damages and the appointment of a receiver.

Procedural history

[8] The claim was issued on 7 July 2011 and on the same day an application was issued for an interim freezing order, which did not come on for hearing until 6 October 2011. At that hearing the Defendants were represented and on an undertaking from the Defendants in the interim the matter was stood over until 18 October 2011, when the Defendants made their forum application. In

[1] very roughly US$31 million at today's rates
[2] ery roughly US$14 million

breach of the new CPR 9.7A (2) the defendants had not by then acknowledged service and by consent I extended time for them to do so. I reserved judgment at that hearing and stood the matter over until 20 October 2011 on the Defendants' continued undertaking. This is my judgment.

The forum application

[9] I propose to deal with the grounds upon which the Defendants' application is based in turn. In doing so I bear in mind, without repeating *in extenso* the clear analysis of this area of law provided by Gordon JA in **IPOC International Growth Finance Limited v LV Finance Group Limited**[3].

[10] First, it is said that the assets which form the subject matter of the claim are all situated in Russia. This seems to me to be true but beside the point. The Claimants are not seeking delivery up or transfer of assets to them or to their nominees within the Russian Federation. In other words, the Claimants are not, in these proceedings, seeking to take possession within the Russian Federation of any property there situated. They ask for an order that the Defendants transfer the mass of assets which they are said to hold on the Claimants' behalf to the Claimants. This can be done without the need for anyone to travel to Russia or for anything to be done in Russia (except, possibly, the registration of transfers of the real property assets). The promissory notes can be couriered, the proceeds of the winery can be paid into a bank account of the Claimants and the same goes for the cash. The Defendants can execute transfer documents in favour of the Claimants in respect of the real property. Of course, if they do not do these things (assuming the Claimants succeed in these proceedings) the Claimants may find themselves with difficulties over enforcement, but they are not asking for anything to be done in Russia. Nor is the so called *Moçambique* rule[4] infringed, since the Claimants assert no more than an interest in equity which they say the BVI Defendants are obliged to give effect to[5].

[11] Next, it is said that the main contracting parties 'with the Claimants' are a Russian company (UK Prof) and Russian Fiduciaries. There is in fact no allegation that any of the Russian Fiduciaries had any contractual relationship with either of the Claimants and as I have already pointed out, none of these persons is a party to these proceedings and no relief is claimed against any of them. This may or may not cause difficulties for the Claimants if these proceedings continue to be

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[3] Civil Appeals 2003/20 and 2004/1 19 September 2005 at paragraph [27]

[4] **British South Africa Co v Companhia de Moçambique** [1893] AC 602

[5] **Cook Industries Inc v Galliher** [1979] Ch 439

prosecuted as presently constituted, but I have to take the claim as it stands, not as it might be. The Claimants' case is simply that the Defendants are holding assets beneficially owned by Claimants. The Defendants are here. If their directors are Russian nationals, they will have to choose whether to give evidence on behalf of the Defendants. If they do, they will have to come to this jurisdiction, or give evidence by videolink, or, possibly, give evidence on commission taken in the Russian Federation, but I see no reason why that common occurrence in litigation conducted here should mean that the Claimants should be required to go to the Russian Courts in an attempt to establish whether or not five BVI registered companies are their nominees. That issue has nothing to do with Russia.

[12] The same reasoning disposes of the argument that the remedies sought in these proceedings could all be sought in the courts of the Russian Federation. As a matter of fact, there is some considerable doubt whether a declaration that the five Defendant companies hold certain of their assets on trust for the Claimants could successfully be sought in the Russian courts (see the affidavit of Mr Kusnetsov), but even if it could be, there is no reason why a claimant seeking the answer to the question whether a BVI company is a trustee for it should be obliged to go to Moscow in an attempt to establish the fact.

[13] Then it is said that all the activities and transactions complained of took place in Russia. That seems to me to miss the point. The activity complained of (although it may be said that it is insufficiently pleaded) is the alleged failure of the Defendant companies to recognise the Claimants' title to the assets which are said to be vested in them and to transfer them to or to the order of the Claimants. If the Defendants are found to be nominees for the Claimants they will be obliged to account. If they fail to do so, the Claimants may be in some difficulty in establishing what assets they hold, but that is a problem for the Claimants, not for the Defendants. I accept that the question whether or not particular real property is vested in the respective Defendant companies will have to be established by reference to Russian property registers or by some similar means, and I accept that if that cannot be done the Claimants may be precluded by the *Moçambique* rule from challenging any title so evidenced (or not evidenced) but, again, that, it seems to me, is the Claimants' problem. As I have already said, the real question is whether the scheduled assets are held in trust for the Claimants. Their identity seems to me to be ancillary to that.

[14] The same analysis disposes of the contentions that the Claimants have, since 2002, carried out their activities in Russia.

[15] Superficially more formidable is the suggestion that many of the Russian assets are the subject of ongoing litigation in Russia. It turns out, however, that the proceedings in question relate to the insolvency of the winery company (in which it is said that the Claimants are making claims) and winding up proceedings in which it is said that the Claimants are trying to have another company which crops up in the Schedules put into liquidation in Russia. I cannot see why the existence of those proceedings needs to be taken into account, or even referred to, when determining the question whether the Claimants are the beneficial owners of the scheduled assets.

[16] Linked to this is the disingenuous suggestion that any judgment obtained by the Claimants here in the BVI is most unlikely to be recognised or enforced in Russia. I have never before heard it suggested by a defendant that proceedings should be stayed in one jurisdiction because the claimant would do much better in another, but leaving that aside, it seems to me that the place where any judgment obtained in these proceedings would require to be enforced would be the BVI. It is here that these BVI resident companies would be compellable to make the transfers sought in the prayer to the statement of claim. I accept, of course, that a receiver appointed here might not be recognised in Russia and that transfers executed under the powers contained in section 25 of the Supreme Court Act (CAP 80) might encounter similar difficulties, but, once again, that is the Claimants' problem.

[17] Ms Corbett submits that potential witnesses are all citizens of and resident in the Russian Federation. I am sure that is correct on the Defendants' side, but it is certainly not the case with respect to the Claimants. I accept, as she submits, that there will be documents in Russian that will require translating, but equally, it seems to me, there are documents in English which will require translating if the matter is to proceed in Russia. I have in any event been given no feel for the amount of documentation that will be needed in order to resolve the issues that arises in this case – which, as presently envisaged, are expected to turn on the relationship between the parties and the nature of the agreements which they made. Mr Strubel, who acts in a senior capacity on behalf of the Claimants says, which seems to me, as matters stand, to be the case, that the main issues will be the arrangements made between himself on behalf of the Claimant and Mr Chirakadze on behalf of himself and UK Prof. The powers of attorney and service agreement are

in English and (although Mr Chirakadze submits otherwise), it is plain even at this stage that none is governed by Russian law. Mr Strubel says that Mr Chirakadze speaks English, although he accepts that he prefers to speak Russian. He points to the fact that email exchanges between the parties were conducted in English. Ms Corbett names eight 'possible witnesses' who, she says, speak no English, but she gives no indication how likely it is that any particular one of them will be called or as to the length of the evidence which they are likely to give. In these circumstances, I prefer the evidence of Mr Strubel.

[18] Ms Corbett referred me to the important decision of Rawlins J (as he then was) in **Astian Group Ltd v TNK Industrial Holdings Ltd and ors**,[6] where he stayed proceedings in favour of the courts of the Russian Federation. That was a very different case. Importantly, the claim was founded on provisions of Russian statute and the Russian Civil Code which conferred certain rights upon minority shareholders. The effect of the relevant statutory provision was in dispute and it had no clear correspondence with any legal principles operating at that time in this Territory. Further, it required the claimants in that case to add as defendants certain Russian corporations which alone would be the actual recipients of any award made. Rawlins J had no difficulty in these circumstances in holding that there was available a competent forum for the dispute in the person of the Russian Arbitrazh Courts and that they were the most appropriate forum. It is also true that the learned Judge also adverted to and was influenced by the facts that the main language of the trial would be Russian and that the mass of documents would, if the trial were to proceed in the BVI, require to be translated.

[19] If I may respectfully say so, **Astian** was obviously rightly decided, but the factors influencing the decision were, as I hope may be seen from the very brief summary given above, a world away from the present case and on the language point the difficulties were plainly much more severe in **Astian** than the evidence presently indicates they are likely to be in this case.

Conclusion

[20] Before I can grant a stay I have to be satisfied that there is some other forum with competent jurisdiction which is the appropriate forum, in the sense that it is more suitable for the interests of all of the parties and the ends of justice. It is for the defendants to demonstrate that that is the

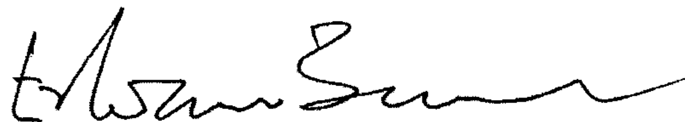
[6] BVIHCV 2003/0072 17 November 2003

case. Furthermore, the defendants must show that the alternative forum is clearly or distinctly more appropriate than this Court. In approaching this question the Court will seek to identify the natural forum, which means the forum with which the action has the most substantial or real connection (language, witness convenience and governing law being a part but not necessarily defining the limits of this inquiry). I should mention in passing that there is no suggestion here that the Claimants would not obtain a fair trial or a just result if the matter was to be heard in the Russian Arbitrazh Court.

[21] Approaching the matter in this way, it seems to me that the Russian Courts are not clearly the more appropriate forum for the resolution of this dispute. I accept that there is a Russian connection and that for Russian speaking witnesses a trial in Russia would have advantages. At the end of the day, however, the case involves establishing that the present relationship between two non-Russian claimants and four BVI (albeit Russian controlled) companies is one of beneficiary and nominee. As Mr Strubel says, that will turn on what was agreed between the various players – not on consideration of commercial transactions in Russia. With the exception of the real property, no relief is claimed which will necessitate the taking of steps in Russia. Nor am I satisfied that the Russian courts are courts of available competent jurisdiction for the trial of the issue whether the Defendants have a trustee/nominee relationship with the Claimants and, even if I were, I find the Russian courts are not clearly the more appropriate forum for this dispute, which concerns the relationship between two non-Russian Claimants and five BVI companies which are alleged to be holding assets on behalf of the Claimants. The fact that the assets in question are situated in Russia does not seem to me to render the Russian courts clearly more appropriate for the resolution of the true dispute between the parties, nor does it appear to me to make Russia the natural forum for this dispute. The fact that the Defendants' witnesses are Russian nationals and that their first language is Russian is not sufficient to persuade me to alter that conclusion.

Conclusion

[22] This application is accordingly dismissed.



Commercial Court Judge

20 October 2011