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

CLAIM NO: BVIHC (COM) 2011/0103

BETWEEN:

VTB CAPITAL PLC

Respondent/Claimant

and

(1) NUTRITEK INTERNATIONAL CORP
(a Company incorporated in the BVI)

Defendant

(2) MARSHALL CAPITAL HOLDINGS LIMITED
(a Company incorporated in the BVI)

Applicant/Defendant

(3) MARSHALL CAPITAL LLC
(a Company incorporated in Russia)

Defendant

(4) KONSTANTIN MALOFEEV

Applicant/Defendant

Appearances: Mr John Carrington for the Applicants
Mr Richard Evans for the Respondent

JUDGMENT

[2011: 1, 23 November]

(Injunction in aid of foreign worldwide freezing order – foreign injunction subject to worldwide cap – injunction granted here *ex parte* subject to same cap in the BVI – continued on return date until further order by consent – respondent applying to remove cap – whether application because injunction continued by consent – proper form of injunction in aid of foreign worldwide freezing injunction)

[1] **Bannister J [ag]:** On 5 August 2011, in the Chancery Division of the High Court of England and Wales, Roth J, on the application of the Claimant VTB Capital plc ('VTB'), made a worldwide freezing order *ex parte* against the fourth defendant to the present proceedings here in the BVI ('Mr Malofeev'). The order prevented Mr Malofeev from removing any of his assets from England and Wales up to a limit of US$200 million and from dealing (etc) with any of his assets worldwide up to the same limit (paragraph 4). By paragraph 7(1) of Mr Justice Roth's order it was provided that if Mr Malofeev had unencumbered assets in England and Wales to a value in excess of US$200 million, he could remove, deal, etc with any of those assets provided that there remained unencumbered assets in England and Wales to a value of US$200 million. By paragraph 7(2) it was provided that if the value of Mr Malofeev's unencumbered assets in England and Wales was less than US$200 million, they must remain intact within England and Wales. In that case, but subject to paragraph 7(3), Mr Malofeev was permitted to deal with assets outside England and Wales provided that the total value of unencumbered assets worldwide (when aggregated with the assets in England and Wales) remained more than US$200 million. Paragraph 7(3) provided that if the total unencumbered value of Mr Malofeev's assets in (a) England and Wales (b) the Cayman Islands (c) Cyprus and (d) the British Virgin Islands did *not* exceed US$200 million, then Mr Malofeev was not to deal with certain named assets (which appear to be Russian shareholdings) without the permission of the Court.

[2] The scheme of the order is that any assets situated in England must stay there, up to a limit of US$200 million, but if Mr Malofeev maintains an unencumbered fund, whether of English assets alone or made up of a combination of English and foreign assets with a value of not less than US$200 million, he is free to deal with non-English assets in excess of that amount as he pleases. If, however, assets in the four jurisdictions named in paragraph 7(3) are *less* than US$200,000,001, then even though he might have a total unencumbered worldwide asset base far in excess of US$200 million, he still needs the permission of the English High Court to deal with the Russian shareholdings. The thinking appears to have been that the primary aim of the order was to establish a fund of US$200 million subject to freezing orders in the four named jurisdictions. Once that had been achieved, Mr Malofeev could deal with any other assets worldwide not caught by such freezing orders. If the assets frozen in the four named jurisdictions did not amount to US$200 million, however, then even though Mr Malofeev's other assets worldwide might be vastly

in excess of that sum, he still needed the permission of the English High Court to deal with the Russian shareholdings.[1]

[3] Roth J's order was continued on its return date by Vos J in (for present purposes) the same terms.

[4] Meanwhile, on 12 August 2011 VTB issued a claim here against Mr Malofeev and three companies. On 24 August 2011 VTB applied here *ex parte* for a freezing order in aid of the injunction granted by Roth J in England and Wales. Hariprashad-Charles J granted the order. For present purposes its material provisions were that Mr Malofeev was prohibited from removing from the BVI assets situate here up to a limit of US$200 million, or from dealing with any such assets. Paragraph 7 of the order was in the same wording as paragraph 7(2) of the order made by Roth J.

[5] The return date for Hariprashad-Charles J's order was 21 September 2011. Although the order does not recite the fact, the order which she had made *ex parte* was continued by me by consent. Since the proceedings here were stayed, the consent order was expressed to continue 'until further order', the perception being that it would abide the outcome of the English proceedings.

[6] Although I did not appreciate it at the time, paragraph 7 of the BVI order is completely otiose. Its first sentence does no more than repeat the terms of paragraph 2. The second sentence is unnecessary, since, unlike the corresponding paragraph 4 of the order of Roth J and paragraph 3 of the order made by Vos J, paragraph 3 of my order[2] (correctly[3]) affected only assets situated within the BVI. In other words, the orders made here in the BVI are domestic, rather than worldwide freezing orders.

[7] On 30 September 2011 Mr Malofeev issued an application for the variation of the BVI consent order. He asked that the prohibition upon removing or dealing with assets up to a cap of US$200 million within the jurisdiction be made subject to a redrafted clause 7 which, unlike clause 7(2) in the order made by Roth J, was intended to provide that Mr Malofeev could remove assets from the

[1] this appears to have been the sense of the exchanges between Roth J and Counsel at pages 77 to 81 of the transcript of the ex parte hearing

[2] following the order made by Hariprashad-Charles J

[3] **Credit Suisse Fides Trust SA v Cuoghi** [1998] 1 QB 818 at 827 and **Banco National de Commercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA** [2007] EWCA Civ 662 at paras 27-29

Virgin Islands or deal, etc, with them provided that the 'collective unencumbered value' of his assets in England and Wales, Cyprus, Cayman Islands and the British Virgin Islands remained above US$200 million.

[8] As I have said, my order does not restrict dealings by Mr Malofeev with assets outside the jurisdiction of this Court. It appeared from the submissions of Mr John Carrington, who appeared for Mr Malofeev on this application, that Mr Malofeev's real complaint is that it is unjust that a defendant should be required to maintain a fund potentially twice the value of a claimant's putative claim in the main proceedings (US$200 million in England and Wales and worldwide and US$200 million here) although it must be said straight away that at the time of writing I have no evidence from which I can see that that is in fact the combined effect of the English and BVI injunctions. If, as may reasonably be assumed to be the case, similar injunctions have been obtained in Cayman and Cyprus, then potentially four times the protection to which VTB is entitled may have been secured.

[9] Mr Carrington submitted that it can be seen from an exchange between Counsel and Roth J when the High Court in England granted the original *ex parte* injunction[4] that it was always the intention of Roth J that only a maximum of US$200 million worldwide should be restrained. I do not accept that submission. As the dialogue between Roth J and Counsel referred to above[5] makes clear, it was not as simple as that. If Mr Malofeev maintained an unencumbered fund of US$200 million within four named jurisdictions, then it is correct to say that Roth J intended that he should be able to deal with any other assets anywhere in the world. If, however, such a fund was not maintained within the four named jurisdictions, then Mr Malofeev required the permission of the Court to deal with certain specified assets. Mr Carrington also relied upon a passage from the judgment of Vos J of 19 September 2011 in which the learned Judge described paragraph 7(3) of the order of Roth J as allowing Mr Malofeev to deal with all his assets provided he could show that either in England and Wales or in the Cayman Islands or in Cyprus or in the British Virgin Islands there was US$200 million worth of assets remaining.

[4] pages 77-81 of the transcript, referred to above
[5] see footnote 1 above

[10] At the hearing neither Counsel referred me to any authority dealing with the principles governing, and the interrelationship between, the grant of worldwide or domestic freezing orders in multiple jurisdictions. Three authorities of the Court of Appeal of England and Wales[6] appeared to me, when I had had a chance to examine them, to be of assistance and I asked Counsel, if they wished, to make written submissions upon them before I delivered judgment. I received those submissions on 16 November 2011 and was greatly assisted by them. Before going any further, I mention that Mr Carrington's written submissions pointed out that all three cases were concerned, to a greater or lesser extent, with certain provisions of English domestic law dealing with multi-jurisdictional orders and which have no counterparts in BVI legislation. That is true as a matter of fact, but I do not think that it alters the fact that the authorities contain statements of general principle which provide valuable guidance to the Courts in any common law jurisdiction attempting to reconcile potential transnational conflicts in the context of freezing injunctions.

Discussion

[11] I bear in mind, first, that the BVI order is a purely domestic order. It does not conflict with the orders of the English Court, although it may, depending upon the facts elsewhere, have the practical effect of forcing Mr Malofeev to maintain a fund with a worldwide value, or even a value within the four jurisdictions named in paragraph 6(3) of the order made by Vos J exceeding US$200 million. That is not a good reason for refusing to make it: see the judgment of Lord Bingham CL in **Credit Suisse Fides Trust SA v Cuoghi**[7]:

> 'It would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient, whether on a municipal or a world-wide basis. But it would obviously weight heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seized of the substantive proceedings ("the primary court"), or give rise to a risk of conflicting, inconsistent or overlapping orders in other court. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and

[6] **Credit Suisse Fides Trust SA v Cuoghi** [1997] EWCA Civ 1831; **Motorola Credit Corporation v Uzan** [2003] EWCA Civ 752; [2004] 1 WLR 113; and **Banco Nacional de Commercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA** [2007] EWCA Civ 662; [2007] 2 Lloyd's Rep 484

[7] (supra) (cited in **Motorola Credit Corporation v Uzan** ((supra) at para 71)

> declined. On the other hand, it may be thought to weigh in favour of granting such relief that a defendant is present in this country and so liable to effective enforcement of an order made in personam, always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case. On any application under section 25 this court must recognize that its role is subordinate to and must be supportive of that of the primary court.
>
> Since Mr Cuoghi accepts that, if this court had been the primary court, it would probably and unobjectionably have granted a world-wide Mareva injunction and disclosure order, it is unnecessary to review the judge's reasons for concluding that such an order was, on the basic facts, appropriate. Was it therefore inexpedient to grant such relief because the court had no jurisdiction in relation to the subject matter of the proceedings in question apart from section 25?
> Like the judge, I do not think so. The order which the judge made was one the Swiss court could not have made. It did not conflict with any order the Swiss court had made. It was made on terms which obviated any risk of conflict with any order made by any other court. It was made in personam against a defendant domiciled and resident here, and amenable to the enforcement of the order. It did not seek to assert jurisdiction over any person or any asset outside the territorial jurisdiction of the court. It gave rise to no jurisdictional disharmony or confusion. It promoted an object which might reasonably be assumed to find favour with the Swiss court by seeking to preserve funds which, if CSFT's claim is well-founded, Mr Cuoghi had dishonestly misappropriated and which would be needed to satisfy the judgment of the Swiss court.'

[12] What shines through that passage is the need for Courts making orders in aid of injunctions granted by a foreign home Court to ensure that their ancillary orders do not give rise to jurisdictional disharmony or confusion. There is no conflict in the fact (if it is the fact) that VTB may currently enjoy protection in excess of the limit of US$200 million. If my order stays in its present form, Mr Malofeev can always apply to the English Court for an order to the effect that that Court would be content for my order to be modified or discharged, in which case I would as a matter of comity bring my order into line with the expressed intentions of the English Court once I had been informed of them.

[13] If, however, I were to modify my order in the way that Mr Carrington asks, I would be leaving it to Mr Malofeev to self-police the order of the English High Court. Mr Carrington says that the terms of paragraphs 3 and 6 of the order of Mr Justice Vos say nothing about Mr Malofeev having to prove the extent or value of his assets, or the whereabouts of such assets, before he is entitled to deal

with assets over the US$200 million threshold. As a matter of language that is correct, but the English order imposed a strict disclosure order on Mr Malofeev. That is not something which is imposed in order to satisfy VTB's idle curiosity. It is taken, as all the freezing order authorities make clear, in order to enable the claimant and the Court to police the order. That was clearly appreciated by Vos J in paragraph 65 of the judgment upon which Mr Carrington relied:

> 'The effect of that addition was of course to allow Mr Malofeev to deal with all his assets, **provided he could show** that either in England and Wales, or in the Cayman Islands, or in Cyprus or in the British Virgin Islands, there was USD 200 million worth of assets remaining.' (emphasis added)

Mr Carrington submitted that leave given to deal with assets over the value of US$200 million was not conditional upon full compliance with the disclosure order. I do not think that that is right. The order of Vos J is a single entity and its parts are interrelated, not distinct. If I were to vary my order as Mr Carrington asks, I would indeed be making an order which would be in direct conflict with the order made by Vos J, because at a stroke it would remove the protection of disclosure, which is something peculiar to the order of the English Court and not part of the purely ancillary order which was made in this Court. That would, in the words of Lord Bingham CJ, introduce disharmony or confusion and be to proceed in a manner which disregarded the fact that in making the order which it did on 21 September 2011 the BVI Court was adopting a role subordinate to and supportive of the primary Court.

Conclusion

[14] An order in the terms sought by Mr Carrington on behalf of his Client would be calculated to defeat, to a greater or lesser extent, the order of the English High Court. For that reason I decline to make it. This means that I do not have to decide whether Mr Carrington is precluded by the principle in **Chanel Ltd v FW Woolworth**[8] from seeking to have varied an order made by consent and I say no more about that issue.

Commercial Court Judge

23 November 2011

[8] [1981] 1 WLR