BRITISH VIRGIN ISLANDS

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 70 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 Philip Marshall QC and Ms Arabella di Iorio for the first and second Defendants
Mr Stephen Midwinter and Mr Robert Nader for the third, fourth, ninth, twelfth, thirteenth fourteenth and sixteenth Defendants Mr Richard Evans and Mr Jerry Samuel for the Claimants

JUDGMENT

[2012: 24, 25 January; 2 February]

(Freezing order – discharge by consent – parties subsequently agreeing to stay proceedings but without agreeing further terms – whether defendants entitled to their costs of the proceedings – whether entitled to their costs of the proceedings only if showing that freezing order should not have been sought and/or was not properly applied for – whether defendants entitled to variation of costs order made against them on continuation of freezing order – whether certain defendants should be granted inquiries as to loss suffered by reason of the grant of the freezing order)

[1] **Bannister J [ag]:** On 22 July 2011 I refused the Claimants permission to serve these proceedings out of the jurisdiction on the first, second and fourth to seventeenth Defendants. They were intended to be served on the third Defendant ('Havana'), which is a BVI registered company and it was said that the prospective overseas Defendants were necessary or proper parties to a claim in conspiracy made by the Claimants in this jurisdiction against Havana. Given my decision on service, I did not need to consider the question whether I should grant the Claimants' other application, which was for a freezing order against the second to sixteenth Defendants. The factual background to the Claimants' applications is set out in my judgment of 22 July 2011 to which the reader is referred.

[2] On 9 November 2011 the Court of Appeal, on an *ex parte* application by the Claimants, reversed my decision and granted permission to serve out on all the Defendants except (obviously) Havana. The Court of Appeal also made an *ex parte* freezing order against all the Defendants other than the first Defendant bank ('the Bank') and the seventeenth Defendant (a company in liquidation in Russia owned by the first and second Claimants ('Mr Arkhangelsky' and 'Mrs Arkhangelsky'). The Claimants offered, and gave an undertaking to provide, a bank guarantee in the sum of US$3 million in fortification of their cross undertaking in damages by 8 December 2011. A return date of 5 December 2011 was appointed.

[3] When the matter came back on 5 December 2011 there was, as I understand it, no *inter partes* argument on the merits of the Claimants' applications. Instead, the injunction was continued until trial but with provision for a 'deferred' *inter partes* hearing to take place in the window between 23 and 30 January 2012. The Judge (James J) refused an application by the Bank and the second

Defendant ('Mr Savelyev') for an increase in the amount of fortification but extended Mr Savelyev time for compliance with the disclosure provisions in the freezing order.

[4] At the hearing the Claimants told James J that they had been having difficulties in providing the bank guarantee which they had undertaken to the Court of Appeal that they would provide by 8 December and said that they were 'instead arranging for payment of the same sum into court.'[1] They therefore asked for the undertaking to be modified to provide for fortification by way of payment into Court or by way of guarantee and for an extension of time in which to make the payment. In fact, the order was for fortification to be provided by means of payment into Court and time was extended from 8 December 2011 to 21 December 2011.

[5] The Bank and Mr Savelyev were refused permission to appeal James J's order and ordered to pay the Claimants' costs of the hearing. They lodged an application for permission to appeal on 14 December 2011.

[6] On 9 December 2011 Havana issued an application for a declaration that this Court should not exercise its territorial jurisdiction in respect of these proceedings, for discharge of the freezing order; and for strike out of the statement of claim.

[7] On 12 December 2012 Maples and Calder ('Maples'), for the Bank and Mr Savelyev, wrote to Conyers Dill & Pearman ('Conyers'), for the Claimants, saying that the claim by the Claimants that the BVI was an appropriate forum on the grounds that they could not obtain a fair hearing elsewhere in the world was false, because identical causes of action arising out of the same allegations of fact were being litigated by the Claimants against other parties in Cyprus. Maples suggested that the whole dispute be removed to England and Wales and invited Conyers to agree that the English Courts should have exclusive jurisdiction over it. They asked Conyers to agree to discontinue or stay these proceedings 'to ensure the agreement was implemented'. In making this proposal, Maples emphasized that their clients continued to contest the jurisdiction of the BVI Court. By another letter delivered on the same day Maples adumbrated a substantial damages claim should their application to discharge (which had yet to be served) succeed on the *inter partes* hearing and indicated that they intended to seek to have the cross undertaking in damages extended to cover the Bank (against which, it will be recalled, no freezing order had been sought or granted). In a separate letter of 13 December 2011 Forbes Hare, for the Defendants which they

[1] the quotation is from the skeleton argument submitted by the Claimants for the hearing

represented, supported Maples' suggestion as to the choice of an English forum, again reserving their clients' right to challenge the jurisdiction of the BVI Court.

[8] By letters dated 14 December 2011 Conyers accepted Maples' suggestion and agreed to stay the proceedings in the BVI and Cyprus. They indicated that they would prepare a formal consent order staying the BVI proceedings and that they would ask their Cypriot counterparts to do the same with respect to the proceedings there.

[9] On 15 December 2011 Maples wrote to Conyers making clear that unless the Claimants agreed to lift the freezing order, pay the Bank's and Mr Savelyev's costs (other than the costs which they had been ordered to pay by James J) and submit to an assessment of damages suffered by their clients as a result of the freezing order, they would have to proceed in the BVI to obtain those results through the Court, including by way of an application to have the cross undertaking in damages extended to cover the Bank and to appeal the order made by James J on 5 December 2011. An application seeking the latter relief was issued on the same day.

[10] On 20 December 2011 (nearly six weeks after leading Counsel had offered a bank guarantee in the sum of US$3 million to the Court of Appeal) the Claimants issued an application to be discharged from their (replacement) undertaking to fortify their cross undertaking by payment of US$3 million into Court. The application, which for reasons which will become apparent was never moved, was supported by a third affidavit of Mr Arkhangelsky. In it he explained how the bank which he had expected to advance the funds for the provision of the necessary fortification had been put under pressure not to do so by the second Defendant, Mr Savelyev, and had not yet decided whether to fund the fortification payment, although Mr Arkhangelsky said that the matter remained under internal consideration within the bank in question.

[11] On 30 December 2011 the Bank and Mr Savelyev issued an application, returnable before me on 11 January 2012, for the discharge (if it had not lapsed automatically upon failure to provide fortification) of the freezing injunction and its ancillary disclosure provisions and for an inquiry as to damages. The grounds were the failure to provide fortification after what it was alleged must have been deliberately misleading indications to the Court of Appeal and to James J that the Claimants would be in a position to provide it. That was rapidly followed by a further application to set aside the Court of Appeal's order granting permission for service of the proceedings upon the Bank and Mr Savelyev out of the jurisdiction. The grounds for that application were, first, that there was in

truth no real issue to be tried between the Claimants and Havana; and, secondly, that the BVI were not the appropriate forum. This second application was combined with a further application to have the freezing order set aside, this time on the additional grounds that (a) there had not been full and frank disclosure to the Court of Appeal on the question of available forum (b) that there was no serious risk of dissipation (c) that the application had been made too late (d) that there was no good arguable case against the Defendants on the merits and (e) that Mr Arkhangelsky had misrepresented the course of the proceedings in the Russian media. The application was supported by five new affidavits in addition to the two affidavits of Igor Gorchakov already filed.

[12] On 5 January 2012 the Claimants indicated that they would not oppose the discharge of the freezing order at a preliminary hearing fixed for 11 January 2012.

[13] Attempts to agree the terms of a Tomlin order dealing with all outstanding issues came to nothing and on 11 January 2012 I made an order by consent (although that is not reflected in the order as drawn up) discharging the freezing order and its ancillary disclosure provisions. The *inter partes* hearing envisaged by James J was fixed for 24 January 2012 and all outstanding matters together with the costs of the hearing of 11 January 2012 were reserved to be dealt with at that hearing.

[14] On or about 16 January 2012 a consent order was made by the Court of Appeal providing for Maples' clients' applications to appeal the order of James J to be withdrawn and for all questions of costs, including the question whether the costs order made by James J should be reversed, to be remitted to me for determination.

Orders of 25 January 2012

[15] At the *inter partes* hearing over 24 and 25 January 2012 the Bank and Mr Savelyev appeared by Mr Marshall QC and Ms Arabella di Iorio; Havana and the fourth, ninth, twelfth, fourteenth and sixteenth Defendants by Mr Stephen Midwinter and Mr Robert Nader; and the Claimants by Mr Richard Evans and Mr Jerry Samuel. I would like to commend Mr Evans in particular for the skill and grace with which he defended an extremely awkward position. At the conclusion of the hearing I ordered the Claimants to pay the represented Defendants' costs of the entire proceedings, including the costs incurred by Maples' clients at the hearing before James J, to be assessed if not agreed. I directed inquiries under paragraph (6) of Schedule B to the order of the Court of Appeal ('Schedule B') in favour of the Bank and under paragraph (1) of Schedule B in favour of Mr Savelyev and the fourteenth Defendant (the only one of Mr Midwinter's clients to seek

such an order) to ascertain whether any loss had been caused to those parties by the order of the Court of Appeal (as continued by James J) and, if so, whether they should be compensated for such loss by the Claimants. I indicated that I would give my reasons in writing, which I now do.

Costs

[16] I take the view that the Claimants have abandoned these proceedings and consented to the discharge of the freezing order and that in those circumstances they should pay the costs of the other parties to them and compensate any party proving loss flowing from the grant of the freezing order. Mr Evans said that that is not a legitimate approach. He said that there is in existence a contract between the parties, contained in the correspondence which I have referred to above, which provided that the proceedings should be stayed. That is not the same, he submits, as discontinuance and should not attract the same consequences. Further, Mr Evans submitted that the agreement for a stay was silent as to costs – or, indeed, as to anything other than a stay. It was not open, therefore, to the represented Defendants now to come back and seek orders improving upon the position reached in correspondence. They should have stipulated for costs and any other matters in the exchanges of 12 and 14 December 2011.

[17] I cannot accept this submission. Maples and Forbes Hare had expressly reserved the question of jurisdiction – i.e. the right to argue that the orders should never have been made. By the time Conyers agreed to the suggestion made in Maples' first letter of 12 December 2011 they had received Maples' second letter presaging claims under the cross undertaking and the prosecution at the 23 January fixture of an application by Maples' clients for discharge of the freezing order. Forbes Hare's discharge application of 9 December 2011 had not been withdrawn and remained pending. Nobody, including Conyers, can have been under any illusion on 14 December 2011 that the exchange of correspondence was dispositive of the entirety of the proceedings in this jurisdiction. In my judgment, that correspondence did no more than bring into being an agreement that if the matter was to be litigated further, it would be litigated in England. It did not put an end to unfinished business in the BVI. To put it another way, accrued rights and liabilities were unaffected by the stay agreement. The Claimants accepted this when they consented to the order of 11 January 2012 discharging the injunction, which expressly reserved the Defendants' rights to claim compensation and costs.

[18] The Claimants failed to put in place the security required by the Court of Appeal within the extended period provided for by the order of James J. Although the Claimants' evidence as at 20 December 2011 was that the bank from which they were seeking a loan for the purpose was said to be still considering the question of providing funds, no indication was given that the necessary funds would become available at any particular time in the future and the fact that the Claimants were applying to be released entirely from their undertaking to fortify the order speaks for itself. The Claimants were either in no position to keep the freezing order on foot and thus forced to bow to the inevitable or had decided that their interests were better served by abandoning it. Either way, they elected not to maintain it and consented to a stay of the entire proceedings. I see no good reason in those circumstances why they should not pay all the costs incurred by those against whom the proceedings were brought, including costs incurred at the hearing before James J. Even if the consent order of 16 January 2012 did not give me the jurisdiction to make an order different from that actually made by James J on that occasion, it seems to me that the circumstances under which he made it have changed so substantially since he did so that it would be unjust to let it stand. There is ample authority, to which I do not need to refer in this judgment, permitting variation of orders in those circumstances.

[19] I sensed that this approach to the question of costs, although not actually objected to by Mr Marshall QC and Mr Midwinter, was perceived by them as unscientific. They preferred to approach the matter from the other end, as it were, by demonstrating that permission to serve out should never have been granted. They submit (1) that there was never any evidence to support the claim against Havana; (2) that the Court of Appeal was misled into thinking that there was such evidence; (3) that there was as a matter of fact never a serious issue to be tried against Havana, the anchor Defendant; (I shall refer to these as 'the Havana points'); (4) that the claim against Havana was brought purely for the purposes of establishing jurisdiction and that for that reason – serious issue or no – it was not capable of supporting an application for permission to serve out (**Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd**[2] ('the Multinational Gas point')); (5) that there were material non-disclosures which concealed the fact that it was not the case that the choice for the Claimants was between a trial in the BVI and no access to justice at all ('the **Cherney v Deripaska**[3] point'); and, finally, (6) that the Court of

[2] [1983] 1 Ch 258
[3] [2008] EWHC 1530

Appeal on 9 November 2011 and James J on 5 December 2011 were misled into believing that the Claimants were in a position to provide a bank guarantee in the sum of US$3 million within a fortnight or so ('the fortification point'). There were other points based upon alleged non-disclosure of possible Russian law defences, but with respect to Mr Marshall QC and Mr Midwinter, I found them to be peripheral. It went without saying that there would be debate about the correspondence, or lack of it, between BVI and Russian law on the subject of economic torts.

[20] Complaint was also made of so-called 'aggravating features in addition to non-disclosure.' For example, that the Claimants failed to comply with their undertakings as to service given to the Court of Appeal and that the first Claimant embarked upon a campaign in part of the Russian media misrepresenting the effect of the decision of the Court of Appeal and making derogatory comments as to the impact of its order upon the value of the Bank. I am not going to say any more about those matters. The first might have been, but was not, used as grounds for applying for an immediate discharge but is irrelevant to the thrust of the represented Defendant's submissions that the freezing order should never have been obtained in the first place. The second seems to me to be wholly collateral. It may give grounds for a claim against the first Claimant, either in the context of the inquiries on the cross undertakings or in a separate action, but it, too, is irrelevant to the question whether or not the injunction was rightly granted in the first place. So I shall say no more about these matters and turn to consider the six points identified above.

The Havana points

[21] Havana was the anchor Defendant. In the amended statement of claim the Claimants say that Havana had 'actively and overtly' participated in the conspiracy by investing in the fifth Defendant[4] and contributing 50% of its share capital, where Havana knew that the fifth Defendant had no legitimate business purpose but was created purely for the purpose of receiving 'the fruits' of the alleged seizure of which the Claimants complained. In this way, it is said, Havana knowingly permitted or procured the fifth Defendant to participate in the Bank's fraud.

[22] In fact, it is now the Bank's unchallenged evidence that the fifth Defendant was incorporated in 2007 and is a trading company beneficially owned by a customer of the Bank. Ms Malysheva, a

[4] the role of the fifth Defendant was as holder of the shares in Western Terminal as part of the supposed 'Scheme' wrongfully to seize them

Deputy Chairperson of the Bank's Management Board, whose evidence that is, says she had never heard of Havana at the time of the alleged seizure. If Havana ever 'invested' in the fifth Defendant, therefore, it is to be inferred that it did so on incorporation in 2007 or when the fifth Defendant was acquired for the purposes of the businesses which the fifth Defendant has carried on. That cannot have been in furtherance of a conspiracy which did not have its genesis, according to the Claimants, until December 2008. For the same reasons, the fifth Defendant cannot have been incorporated purely for the purposes of assisting in and receiving the fruits of the supposed 'Scheme.'

[23] Thus, the pleas against Havana are shown to have had no foundation in fact. It is true that it is further pleaded that Havana knowingly permitted and/or procured the fifth Defendant to participate in the supposed fraudulent conspiracy but that cannot be extracted as a separate stand alone allegation divorced from its context in the pleading.

[24] The Court of Appeal was assured, however, by leading Counsel that these pleas were supported by *evidence* of 'active participation' (which was what was pleaded) on the part of Havana in the conspiracy. Leading Counsel told the Court that Havana allowed the relevant entity to be incorporated and to receive the fruits of fraud; that it stood by and allowed the fifth Defendant to retain the fruits of fraud and that it was simply not right *from the evidence* to say that Havana played no active role. Leading Counsel went on to say that there clearly was pleaded and *supported by the evidence a mass of material* showing active participation in the conspiracy. There was, in fact, no evidence as to any of these matters before the Court of Appeal. For whatever reason[5] the Court of Appeal was simply misled into thinking that there was a serious evidential issue to be tried against Havana when it can now be seen on the unchallenged evidence before this Court that there was not.

The Multinational Gas point

[25] The decision of the English Court of Appeal in **Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd**[6] confirmed that an action brought for no

[5] I am not, of course, suggesting that leading Counsel deliberately set out to mislead the Court of Appeal, but it is the fact that the language he used was not justified by the materials before the Court of Appeal on 9 November 2011

[6] (supra)

other purpose than to create a claim against an anchor defendant on which to hang a 'necessary or proper party' application for permission to serve foreigners out of the jurisdiction, even if it could not be struck out, will not suffice for the purposes of such an application. In the present case, the claim against Havana is now shown to be hopeless, for the reasons which I have given, but it seems to me that it also falls foul of the **Multinational Gas** principle. It is impossible to believe that so flimsy a claim can have been made for any purpose other than bringing the other Defendants within this jurisdiction. After all, the essence of the Claimants' pleaded case against Havana is that it was instrumental in creating the fifth Defendant, which was alleged to have had no purpose other than to seize and hold the deposited shares and, presumably, no independent assets, either. The idea that on those facts Havana was going to be good for substantial damages in its own right and so worth suing is absurd.

[26] This view is corroborated by the fact that in proceedings based upon exactly the same set of facts as are alleged in these proceedings brought by the Claimants in Cyprus against three Cypriot companies, there is reference to Havana as the holder of 50% of the issued shares of the fifth (BVI) Defendant. Significantly, however, Havana is not alleged in the Cypriot proceedings to have been part of the conspiracy. The Cypriot proceedings were issued in September 2011 and were mentioned at the hearing in front of the Court of Appeal on 9 November. No mention was made of the fact that they contained no allegation of conspiracy against Havana, despite the fact that Havana is named in them and despite the fact that they contain identical allegations of conspiracy against the Bank, Mr Savelyev and the fifth to eleventh Defendants in these (BVI) proceedings.

[27] Given the illusory nature of the Claimants' case against Havana the attention of the Court of Appeal should, in my judgment, have been drawn to the **Multinational Gas** case and its relevance in the light of the allegations made (or, in the case of Havana, not made) in Cyprus. Had that been done, together with a proper exposition of the complete absence of evidence in support of the pleaded case against Havana, the outcome might very well (indeed in all probability would) have been very different.

The Cherney v Deripaska point

[28] It was critical to success in front of the Court of Appeal that the Claimants (relying upon what was said by Christopher Clarke J in **Cherney v Deripaska**[7] at paragraph [256] of the report) show that they had grounds for asserting that there was no available forum for the trial of the present claim other than the BVI. The existence of the Cyprus proceedings was, as I have said, disclosed to the Court of Appeal, although it does not appear that that Court was taken to the actual pleadings. Instead, the Court of Appeal was informed by leading Counsel for the Claimants that they had started proceedings in Cyprus but that those proceedings did not contain the same causes of action as those in these proceedings. Unless leading Counsel was defining causes of action by reference to the identity of the relevant defendants, this remark, as reported, was simply wrong (see paragraph [26] above). What leading Counsel did not tell the Court of Appeal was that it would have been perfectly within the Rules of Court in Cyprus for the Claimants to have applied to join the Defendants to these BVI proceedings in the Cypriot proceedings. I was shown unchallenged evidence to that effect. That, in my judgment, was a material non-disclosure. There was also affidavit evidence before the Court of Appeal to the effect that Mr Arkhangelsky was being sued in France by the Bank upon guarantees given by him (he challenges the fact) in connection with the dealings which form the background to the claim in the present proceedings. It does not appear that the Court of Appeal was informed of that fact or of the fact that Mr Arkhangelsky could no doubt have counterclaimed against the Bank (and possibly have been given permission to bring in other defendants) in respect of the issues raised here. That, too, was a material non-disclosure. The fact is that the choice was not between a trial here and no trial at all. That fact should have been brought to the attention of the Court of Appeal. It was not.

The fortification point

[29] On 9 November 2011 leading Counsel told the Court of Appeal that the Claimants were prepared to provide a bank guarantee in the sum of US$3 million by way of fortification. If by prepared he meant that Mr Arkhangelsky was willing to do so, that may have been correct, but if 'prepared' meant ready[8] as well as willing (which is the sense in which any Court considering the grant of a

[7] (supra)

[8] ready in the sense that the Claimants had a bank ready to provide such a guarantee, always allowing a few days for the paperwork to be put in place

freezing order would understand it), then it cannot have been true. By 5 December 2011 the Claimants were having to tell the Court that no such guarantee could be provided because of unspecified difficulties in obtaining it.

[30] In their skeleton argument deployed at the hearing before James J on 5 December 2011 the Claimants referred to unidentified difficulties in providing the guarantee which had been offered through leading Counsel to the Court of Appeal. Although the skeleton argument asked for permission to provide *either* the actual cash *or* a guarantee, the order of James J was for the Claimants to pay the sum of US$3 million into Court as an alternative to a guarantee ('in its place'). Why anyone should have thought that a litigant having difficulties in getting a bank to provide a guarantee for US$3 million would have an easier time in coming up with the actual cash is a mystery which I do not have to solve, but at all events the Claimants were given fourteen days to pay the money into Court.

[31] On 20 December 2011, as I have said, Mr Arkhangelsky swore his affidavit in support of the Claimants' application that they be released from all obligation in respect of fortification, citing, for the first time, malicious interference by the Bank or Mr Savalyev with the lending decisions of the financial institution with which Mr Arkhangelsky says he had been dealing. In that affidavit Mr Arkhangelsky said that the relevant institution was still considering whether or not to provide the finance. If that is the case, Mr Arkhangelsky must have known at all times from 9 November 2011 onwards that he did not have the means to fortify the cross undertaking and could still not be sure on 5 December 2011 that he would obtain them by the renewed deadline of 21 December 2011. He was, in other words, prepared from start to finish to offer cross undertakings with which he must have known from day to day that he could not presently comply before finally owning up to the fact on 20 December 2011. In my judgment, that fact alone justifies setting aside permission to serve out and, had that not happened by consent, discharge of the freezing and ancillary orders.

Discharge

[32] If, therefore, the correct approach to take in deciding where the costs of these proceedings should fall is to ask whether permission to serve out and the freezing order should ever have been sought, then my answer, for the reasons set out under the six heads which I have discussed above, is that they should not have been. If, further, the correct approach is to ask the additional question

whether there are features going to the manner in which they were obtained which justify their discharge, then in my judgment there are, for the same reasons. For these reasons, either by way of an alternative or as an addition to the point on abandonment, it is in my judgment just and equitable that the Claimants should pay all the represented Defendants' costs of these proceedings, including costs incurred by them in and about the hearing of 5 December 2011 and the appeal from the order of James J, to be assessed if not agreed.

The cross undertaking in damages

[33] The order made by the Court of Appeal on 9 November 2011 and extended by James J on 5 December 2011 did not freeze any assets of the Bank and the cross undertaking given in paragraph (1) of Schedule B to that order did not extend to the Bank. On 15 December 2011 the Bank applied, amongst other things, for an order that that undertaking be extended to cover the Bank. That application was before the Court on 24 and 25 January 2012. Mr Evans pointed out that the injunction had already been discharged by my order of 11 January 2012 and, relying upon passages in **Gee on Commercial Injunctions**[9] he submitted that it was now too late to modify the terms of the order. Although not formally conceding the point, Mr Marshall QC, for the Bank, effectively accepted that that was the correct analysis and the application for the ambit of the undertaking to be extended was not pursued.

[34] Instead, Mr Marshall QC relied upon paragraph (6) of Schedule B, which is in the following terms:

> '(6) The Applicants will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondents' assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicants will comply with any order the court may make.'

In that regard he relied upon **Harley Street Capital v Tschigirinsky**,[10] a decision of Mr Michael Briggs, QC, as he then was, sitting as a Deputy Judge of the English Chancery Division, upon an identically worded provision in the freezing order which was in issue in that case. He held,

[9] 5th Ed at para 11.012
[10] [2005] EWHC 2471

adopting a construction of the provision advanced in **Gee**[11] that it meant what it said. If the two conditions are satisfied, (1) that the Court finds a person other than an enjoined respondent had suffered loss caused by a freezing order and (2) that the Court decides that that person should be compensated for that loss, then the applicant undertakes to comply with any order the Court may make. The loss envisaged, in other words, is not restricted to loss caused by complying with obligations or restrictions placed upon third parties by the terms of the freezing order.

[35] With respect, I think that Mr Briggs' (as he then was) construction of the provision in question is correct. Mr Evans submitted that just as it would be too late, now that the injunction has been discharged, to apply to extend or vary its terms, so it is now too late to change tack and seek to uphold a provision of Schedule B that had not been previously relied upon. I do not accept that submission, for the same reason that I consider that the provisions of the order of the Court of Appeal remain enforceable in respect of any matter occurring before discharge of the injunction and despite the fact of discharge. The fact that a party may not have sought enforcement under a particular provision until after discharge cannot, in the absence of *laches* or estoppel, make any difference. No suggestion that the Bank was affected by either was (or could have been) advanced.

[36] In my judgment, therefore, the position is that the Bank (under paragraph (6) of Schedule B) and Mr Savelyev and the fourteenth Defendant (under paragraph (1) of Schedule B) are in a position to ask the Court to exercise its discretion and grant them an inquiry as to loss which they may have suffered as a result of the grant of the injunction and, if they establish that that is the case, to invite the Court to consider whether they, or any of them, should be compensated for it.

[37] It was accepted on all sides that an inquiry as to loss or damage was not the automatic consequence of the discharge of an injunction.[12] For a start, the Court must be satisfied that there is a real possibility (at the lowest) that the person applying will be found to have suffered loss as a result of the grant of the order.[13] I am so satisfied in this case. The Bank claims to have suffered loss as a result of publication of the fact of the injunction in the media by Mr Arkhangelsky during the currency of the freezing order, which it says have depressed its share price and caused it

[11] (supra)
[12] **Cheltenham & Gloucester Building Society v Ricketts** [1993] 1 WLR 1545
[13] **Norwest Holst Civil Engineering v Polysius Ltd** CA of England and Wales, 3 July 1987, cited in **Cheltenham & Gloucester Building Society v Ricketts** at pae 1556

reputational problems in dealing with counterparties. Mr Savelyev complains about the fall in value of shares in the Bank held by him personally. The fourteenth Defendant says that it was caused loss by being prevented by the injunction from completing a particular transaction on time according to the terms of the contract. I have deliberately referred to these allegations in the vaguest of terms, because they will need to be considered in the course of the inquiries which I have ordered in order to determine (a) whether any loss is established, (b) whether it can be established, on contractual principles, to have been caused by the grant of the order and (c) whether, in all the circumstances, it is loss that the Claimants should be ordered to pay. I say absolutely nothing about any of those matters, other than that sufficient grounds are shown for the making of an order for inquiries.

[38] Mr Evans relied upon **Cheltenham v Gloucester**[14] as authority for a submission that the general practice is to defer embarking upon an inquiry as to damages until after trial, when the facts will have been established and when the Court will be better equipped in seeing where the justice lies on the question of compensation. That may be the appropriate course where an interlocutory injunction is linked to the cause of action being litigated, but, as Lord Nicholls pointed out in **Mercedes-Benz AG v Leiduck**[15], freezing orders have nothing to do with the underlying issues in the litigation in which they are granted. Where a claim, as here, is abandoned against a set of facts which shows that a freezing order should never have been obtained, there can be no justification for postponing the hearing of an inquiry as to damages – certainly not until the determination of proceedings in a foreign jurisdiction which may never even commence, let alone be prosecuted to judgment.

[39] Mr Evans submitted that an inquiry should be refused in the present case because the Bank has acted wrongfully by interfering, as the Claimants allege, with their ability to obtain funding from other sources. That might found some sort of claim on the part of the Claimants against the Bank, but I do not see why that should prevent it from recovering loss caused by the grant of an injunction which should never have been applied for and which had since been discharged by consent.[16] Even if it could, it seems to me that that is a matter to be raised at the inquiry rather than anticipated at this stage.

[14] (supra)
[15] [1996] AC 284
[16] see **Universal Thermosensors v Hibben** [1992] WLR 840 at 857,858

Conclusion

[40] For all these reasons, the order granting permission to serve out must be set aside. The Claimants must pay the represented Defendants' costs of these proceedings, including the costs of the Bank and Mr Savelyev in and about the hearing before James J and the appeal from his order, to be assessed if not agreed. There will be inquiries as to the loss, if any, suffered by the Bank and by Mr Savelyev and by the fourteenth Defendant by reason of the grant of the freezing order and as to whether any such party is to be compensated for such loss, if established. I hope that it will be possible for the parties to agree directions for the conduct of such inquiries, but, if not, I will hear Counsel on the handing down of this judgment. The proceedings themselves are stayed.

Commercial Court Judge

2 February 2012