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

CLAIM NO: BVIHC (COM) 2012/0011

BETWEEN:

(1) INNA GUDAVADZE
(2) LIANA ZHMOTOVA
(3) IYA PATARKATSISHVILI
(4) NATELA PATARKATSISHVILI

Claimants

and

(1) CARLINA OVERSEAS CORPORATION
(2) IVANE CHKHARTISHVILI
(3) AZERBAIJAN (ACG) LIMITED

Defendants

And by way of Counterclaim

AZERBAIJAN (ACG) LIMITED

Claimant by way of Counterclaim

and

(1) CARLINA OVERSEAS CORPORATION
(2) IVANE CHKHARTISHVILI
(3) INNA GUDAVADZE
(4) LIANA ZHMOTOVA
(5) IYA PATARKATSISHVILI
(6) NATELA PATARKATSISHVILI

Defendants by way of Counterclaim

Appearances: Mr Stephen Moverley Smith QC; Mr Steven Thompson; Mr Andrew Thorp; and Mr James Noble for the Claimants; Mr Stephen Atherton QC and Mr Scott Cruickshank for the first Defendant; Mr Jonathan Crow QC; Mr Stephen Midwinter and Mr Robert Nader for the second Defendant; Mr Robert Levy QC and Mr Oliver Clifton for the third Defendant

JUDGMENT

[2012: 15, 16, 17 May; 12 June]

(**Black Swan** jurisdiction – injunctions granted *ex parte* restraining dealings with shares in first Defendant company in aid of Claimants' proceedings in Republic of Georgia – effective return date – Defendants seeking discharge of injunctions and/or summary judgment – whether summary judgment appropriate remedy in **Black Swan** cases – whether injunctions should be discharged on grounds of misrepresentation or non disclosure – whether injunctions should be discharged for want of clean hands on part of Claimants' predecessor in title – whether anti suit injunction should be granted to second Defendant restraining further prosecution of Georgian proceedings – allegations that second Defendant would be arrested on trumped up charges if he returned to Georgia – allegations that proceedings in Georgia would be biased against second Defendant – **Cherney v Deripaska** and **Masri v Consolidated Contractors** considered)

[1] There are before the Court applications (1) by the second and third Defendants for the discharge of an injunction originally granted to the Claimants on 3 February 2012 and continued on 22 February until a full *inter partes* hearing (being the present hearing) could be arranged ('the injunction'); (2) by the second Defendant for summary judgment against the Claimants on their claim; (3) by the third Defendant for summary judgment on its counterclaim; (4) by the third Defendant for additional fortification of the Claimants' cross undertaking in damages given upon the grant and continuation of the injunction; and (5) by the second Defendant for an anti suit injunction restraining the Claimants from further prosecuting proceedings under way against him in the Republic of Georgia ('Georgia').

[2] Although, as was pointed out by Mr Robert Levy QC, who appeared together with Mr Oliver Clifton for the third defendant ('ACG'), there is no application by the Claimants for continuation of the injunction, Mr Moverley Smith QC, who appeared together with Mr Steven Thompson, Mr Andrew Thorp and Mr James Noble for the Claimants, addressed the Court at length with reasons why it should be continued. His submissions were responded to at similar length and it seems to me that I have to proceed on the footing that an application by the Claimants for continuation of the injunction is properly before me. That said, it seems to me regrettable that the proper procedure for seeking continuation at an *inter partes* hearing of an injunction granted *ex parte* should not have been followed in this case.

The pleaded claim

[3] The Claimants claim to be the heirs under Georgian law of Badri Patarkatsishvili ('the deceased'), a prominent Georgian businessman and politician who died unexpectedly in England in 2008.[1] As such, they say that they are beneficially entitled to 49 shares[2] in the first Defendant, a BVI registered company called Carlina Overseas Corporation ('Carlina'). These shares were allotted and issued on 10 December 2006 to the second Defendant, Ivane Chkhartishvili, who remains, as at the date of this judgment, their legal owner. The Claimants say that he holds the shares as bare nominee for them. Mr Chkhartishvili was referred to throughout the hearing as 'Vano', and I hope that he will acquit me of any disrespect if I do the same in this judgment.

[4] The claimants originally[3] pleaded that down to December 2006 one of the deceased's investments was a 60% holding in a Cypriot registered company called Krolle Services Limited ('Krolle'), which was the ultimate owner of a port and oil terminal on the black sea coast ('the terminal'). The other 40% was said to be held by a friend of the deceased called Vitaly Sepiashvili, to whom I shall refer, again without intending any disrespect, as 'Vitaly.' The statement of claim goes on to plead that in December 2006 a new joint venture was entered into between the deceased, the State Oil Company of Azerbaijan ('SOCAR'), and a company called Petro-Trans FZCO ('Petro-Trans'). This new joint venture, in which Vitaly was not intended to participate, envisaged the purchase of the terminal (as things eventually turned out) by the newly incorporated Carlina, in which the deceased was to 'retain', as it is puzzlingly put, a 24.5% shareholding. It is then said that SOCAR and an associated company of Petro-Trans objected to the deceased 'remaining' a shareholder. It was therefore proposed that an associate of the deceased called Avtandil Tsereteli ('Avto'[4]) should hold the shares on trust for him. Avto subsequently had second thoughts about this scheme and suggested that the shares be held by Vano 'on the same basis.' The deceased is said to have fallen in with this proposal and told Vano that he was looking to him to hold the shares in Carlina 'under trust in accordance with the laws of the BVI.' It is then pleaded that Vano agreed to hold the shares 'as a bare nominee' on that basis.

[5] The statement of claim alleges that on 29 December 2006 Krolle sold the subsidiaries which held the terminal to Carlina for US$239.1 million. It was common ground at the hearing that the price stated in the transactional documents was from start to finish US$230 million, with a further US$9 million being paid to reimburse a company referred to in the evidence as 'Argomar', which was under the control of Vitaly and which had held the terminal before it passed into the ownership of

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[1] at the hearing the third Defendant raised the point that the Claimants had no title to sue, but it seemed to me that they have made out a sufficiently arguable case under Georgian law that they are entitled to claim property belonging to the deceased. It may be that they are not solely entitled, but any want of parties is remediable and not, in my judgment, a proper ground for defeating the claim

[2] a holding of 24.5%

[3] an amended statement of claim was served on the final morning of the hearing. Reference will be made to it where relevant in this judgment, but what immediately follows is taken from the unamended pleading

[4] I use the familiar version of Mr Tsereteli's given name on the same basis as before

Krolle for the purposes of effecting the sale and purchase, for money which it had expended on the terminal before completion of the sale to Carlina.

[6] The statement of claim goes on to plead that the alleged price (US$239.1 million) was only 75.5% of the value of the Krolle subsidiaries which were sold to Carlina. When the arithmetic is done, it turns out that the true value being attributed to the terminal in the statement of claim is about US$317[5] million. The pleading says that the difference between this figure and the passing consideration of US$239.1 million (on that basis, US$78 million) was treated as 'a contribution' made by the deceased (to what is not stated), with the deceased 'in turn accounting to Vitaly for 40% of the difference.' It is then pleaded that a similar arrangement was made in relation to the terminal's management company, with the deceased, through Vano as his nominee, holding 24.5%, SOCAR 51% and Petro-trans 24.5% in each of the two companies. The pleading claims that in the premises Vano has held the 24.5% stake 'as nominee on bare trust' for the deceased during his lifetime and after his death for the Claimants.

[7] The pleading then alleges that the Claimants have brought substantive proceedings in Georgia seeking the transfer of the shares into their name and an account of profits wrongly obtained by Vano as trustee. It then proceeds to set out what is described as the 'Relief sought in the BVI.' Asserting that they are concerned that the Defendants may seek to deal with the shares to their prejudice, the claimants seek injunctive relief to protect those interests pending determination of the Georgian proceedings. They proceed against ACG because, it is alleged, they believe (correctly as it turns out) that it may assert a security interest in the shares. On this basis the claimants seek an injunction restraining Carlina from registering any change in the ownership of the shares and restraining Vano and ACG from dealing with them.

[8] When the injunction was originally granted the only Defendant was Carlina, but on my insistence Vano as the registered owner of the shares and ACG as chargee were joined. Both Vano and ACG agreed to submit to the jurisdiction.

The nature of the BVI proceedings

[9] I have analysed the statement of claim at some length because it makes clear that these are ancillary proceedings, under the **Black Swan**[6] jurisdiction, for relief in support of the proceedings in Georgia. No substantive relief is claimed here in the BVI. Nevertheless, the claim and defences to it have been fully pleaded out and Vano and ACG have made counterclaims.

Summary judgment

[10] It is convenient to start by considering the summary judgment applications. The evidence for the Claimants includes an affidavit from Benjamin Marson ('Mr Marson'). He is an English solicitor who says that he has been advising the Claimants in relation to the securing of the deceased's assets.

[5] the figures are rarely precisely consistent in the materials before the Court
[6] BVIHCV 2009/399 23 March 2010

Referring to some calculations done in June 2011 by a Mr David McCranor, who had advised Vitaly in the sale of the terminal, Mr Marson felt able to say that they showed that the transaction had been structured with the deceased 'retaining' a 24.5% share in the purchaser in consideration, in effect, for a reduction in the purchase price. Mr Marson says that Mr McCranor's figures also showed that the deceased was obliged to account to Vitaly for 39.56% of the reduction in the purchase price.

[11] These figures 'show' nothing of the sort. They are after the event calculations of entitlements to sale proceeds based upon the alternative hypotheses that (a) the purchase price was US$230/239[7] million as specified in the sale and purchase agreement; that (b) the price was reduced to 'pay' for the deceased to have a 24.5% shareholding in the purchaser; and (c) that the price was reduced to 'pay' for the deceased to have a 12.25% holding in the purchaser. Mr McCranor has provided his own affidavit evidence. He says that in around June 2011 he was made aware of the possibility that the deceased had 'retained an interest' in Carlina but was not aware of its size. He compiled the figures as a courtesy to Vitaly. It follows that they are not evidence of any transactional intention of any of the parties, or alleged parties, to the sale and purchase of the terminal.

[12] The other material evidence consists, first, of two affidavits from Avto. In the earlier of these, sworn on 1 February 2012, Avto says that SOCAR and Petro-Trans had originally agreed that the deceased was to have 16.5% of the eventual purchasing company, to be held by Avto on trust. He says that he signed a 'Memorandum of Intention' to that effect. The Memorandum of Intention turns out to have been a so-called Protocol, signed on 29 June 2006 by SOCAR, Petro-Trans and Avto. It refers to a 'Local Partner' as the intended holder of 16.3% in the purchasing entity. It makes no mention of the deceased, nor of any trust. Despite this, Avto is confident that the arrangement was to have been for him to hold the shares, when allotted, under a legally enforceable western style trust, such as a trust set up under the laws of the BVI. The reason advanced by Avto for the trust arrangement was reluctance upon the part of SOCAR or Petro-Trans for the deceased to be identified with the project. In fact, it appears that neither of these entities had any difficulty in the deceased's name appearing on transactional documents (unsurprisingly, since it must have been well known that he was associated with Vitaly in the terminal) and its removal from the final drafts appears to have been prompted by others.

[13] Avto goes on to say that a man called Nielsen, through his company Greenoak Holdings Limited ('Greenoak'), subsequently offered US$110 million more than the price being offered by SOCAR. Avto says he told the deceased about this. Avto says that the deceased then told SOCAR, which was, apparently, so struck by this turn of events that it offered the deceased an enlarged 'retention' of 24.5%, it can only be assumed in consideration of the deceased agreeing to suppress the existence of the offer so that Vitaly would not press for a higher price from SOCAR. Avto says that

[7] Mr McCranor adjusted the proceeds by some US$ 18.25 million to take account of a commission received by Vano from Krolle as seller

after this point Vano got involved in the deal. The dates are hopelessly confused. Greenoak's offer was made in late November, whereas Avto has Vano getting involved in June/July.

[14] For reasons unspecified Avto then got cold feet about holding the shares. He recalls the deceased asking Vano to hold the shares in trust and says that Vano agreed to hold them for the deceased 'as bare nominee' – although it was implicit, says Avto, that Vano would be paid a fee for his help.

[15] In his evidence in answer Vano rejects Avto's account as nonsense. He says that he was given a shareholding in Carlina in return for smoothing the passage of the deal with the Georgian government. The holding was increased from 16.3% to 24.5% after it turned out that the work involved was greater than originally thought. It was agreed that his shares would be pledged to ACG, an associate company of SOCAR, which was funding the purchase price. He says that he was paid a commission of US$18.25 million by Vitaly and the deceased for introducing and facilitating the sale.

[16] Avto put in an affidavit in reply. He says that he signed the Protocol of 29 June 2006 as 'bare nominee' of the deceased. This despite the admission in his first affidavit that trusts are 'difficult to establish' in Georgia. He then says that the 'bare nominee' needed to have a formal role in the structure. Hence the identification in the Protocol of functions which the 'Local Partner' would be required to perform. Contradicting his earlier evidence of the need to keep the deceased's participation in the purchasing company secret, he says that despite the fact that he, Avto, would be the Local Partner holding the shares, it would be the deceased who would be dealing with the Georgian government in the transaction.

[17] There is in evidence a so-called Local Partner Agreement ('LPA') dated 6 July 2006 and signed by each of SOCAR, Petro-Trans and Avto. Avto did not mention this document, which exists only in an English version, in his first affidavit. He says that the signature appears to be his, although he says that he would not have signed an English document that was not accompanied by a parallel translation. He does not, however, positively deny signing it. There are differences between the Protocol and the LPA, although each defines the prospective holding of the Local Partner as 16.3%. Importantly, however, the LPA contains an express provision for all three intended shareholders to pledge their shares in support of the finance for the purchase, which was to be arranged by SOCAR. That, in the event, is what happened on completion of the sale and purchase transaction, with the pledge being followed subsequently by a formal equitable charge in favour of ACG.

[18] In his second affidavit Avto also deals with an agreement dated 26 July 2006 under which Avto assigned to Vano all his rights and obligations in the purchasing company, to be incorporated in Georgia. The assignment agreement refers expressly to the LPA. Avto does not suggest that he did not understand the assignment agreement.

[19] That being the principal affidavit evidence dealing with the deceased's alleged beneficial ownership of the Carlina shares, it remains only to notice that the only document which the Claimants have

been able to find amongst the deceased's papers which relates to the terminal is the Greenoak letter of November 2006 purportedly addressed to the deceased at 'Leatherhead.' There is no copy letter asking Vano to execute a BVI law governed trust of the Carlina shares; no trust document, as supposedly anticipated in Avto's discussions with the deceased; no document dealing with the financial status or progress of the terminal; and nothing evidencing the deceased's efforts in relation to the Georgian government which Avto says he would have been conducting as the true Local Partner.

[20] In my judgment the Claimants have no prospect of sustaining their claim to the relief sought by them in these proceedings. It must be remembered that the claim is for purely ancillary injunctions preventing dealings with the 24.5% shareholding. No declaration as to beneficial ownership and no order for the transfer of the trust property from Vano to the alleged beneficiaries is asked for. Although injunctions are sought against Vano restraining dealing with the shares, there can be no doubt that, whether or not he did so in breach of trust, he charged them to ACG. Since he executed and delivered a blank transfer of the shares, he cannot deal with them (unless, which nobody suggests is going to happen, he redeems them by paying off the whole of Carlina's indebtedness – currently some US$370 million). There is therefore no need for an injunction against Vano. It follows that the only injunctions needed at all in these proceedings would be injunctions restraining ACG from dealing with its security and restraining Carlina from registering such dealings.

[21] The only question as between the Claimants and ACG can be whether Vano granted the security in breach of trust. As Mr Jonathan Crow QC, who appeared together with Mr Stephen Midwinter and Mr Robert Nader for Vano, pointed out, the Claimants have no prospect of establishing that the security was granted by Vano in breach of trust – in other words and assuming that the deceased was the beneficial owner of the shares, of proving that he did not consent to their being charged. Indeed, and even if one excludes the LPA from consideration, everything points to the fact that if he was intended to be the beneficial owner of the shares once issued, he either must have consented to their being charged or gone without them, since it is plain that the purchase by Carlina would not have proceeded unless he, or someone acting on his behalf, had agreed to that being done. Since it is part of the Claimants' case that the deceased's beneficial ownership was known to SOCAR and that SOCAR connived at its concealment,[8] it is inconceivable that, if he was the beneficial owner of the shares, it would not have obtained his consent to the granting of the security before proceeding with the transaction. Conversely, if the deceased was involved in the transaction as the beneficial owner of the shares, he would have known about the intention to use them as security and must be taken to have acquiesced in the grant. There is no one on earth who can prove that he did not.

[22] The Claimants' original pleading did not even allege that ACG took the pledge, and subsequently the charge, in the knowledge that they had been given and granted in breach of trust. The

[8] see, for example, paragraph 13 of the Claimants' further submissions of 1 June 2012

amended statement of claim belatedly plugs that gap, but the problem remains the same. Unless the Claimants can prove that the deceased did not consent to or acquiesce in the grant of security over the shares, they cannot prove that ACG took it with the knowledge that Vano had granted it in breach of trust.

[23] In my judgment, therefore, and assuming that summary judgment on a claim is an appropriate remedy at all in a **Black Swan** case, Vano, who alone of the Defendants seeks summary judgment on the claim, has shown that he is entitled to it. I see no reason why summary judgment should not be given on a claim for merely ancillary relief. It falls within the wording of CPR 15. If that is wrong, then on the analysis given above it is in any event clear that there is no case for continuing the injunctions. They should be allowed to lapse on the grounds that there is not and never will be any material available to justify their continuation. The outcome is the same whichever route is followed.

[24] I should, however, make clear what I am not deciding as between Vano and the Claimants. Given that these are **Black Swan** proceedings, it follows that the summary judgment which I am granting is a judgment to the effect that the Claimants have no real prospect of succeeding in sustaining them any further. I am not giving judgment on Vano's counterclaim.[9] There is no claim by the Claimants in these proceedings for a determination of the beneficial ownership of the shares. Indeed, they make clear that that issue is for determination in their proceedings in Georgia. In giving summary judgment in favour of Vano on the claim (as I am invited to do) I am not, therefore, deciding that the Claimants are disentitled from claiming against Vano, either in Vano's counterclaim here in the BVI, or in some other proceedings, that the deceased was the beneficial owner of the shares and that they are the persons presently entitled to any equity of redemption that may be attached to them. It follows that as between the Claimants and Vano the issue as to the deceased's beneficial entitlement to the shares is left at large by this part of my decision.

[25] So far as concerns ACG, for the reason that the Claimants are unable to show any grounds for maintaining them the injunctions will not be continued against ACG any more than they are to be continued against Vano. The position in relation to ACG is slightly different, however. ACG does not seek summary judgment on the claim. It seeks summary judgment on its counterclaim. That counterclaim seeks a variety of relief in relation to the alleged beneficial ownership of the deceased and the grant and enforcement of the security. I cannot hold on the material before me, flimsy as it is, that the Claimants have no real prospect of establishing in any trial of ACG's counterclaim that the deceased was the beneficial owner of the shares. The threshold is not a high one and I cannot decide on paper that Avto's story is devoid of any grain of truth or inherently incredible. There are significant legal hurdles in the way of the Claimants establishing, on the pleadings and affidavit evidence of Avto, that a trust of the Carlina shares in favour of the deceased, even accepting all the evidence put in on his behalf as true, was ever properly constituted and ACG has put in

[9] Vano does not seek judgment on his counterclaim, but had he done so, I would have refused to grant it on the same grounds as those upon which I am refusing to give ACG summary judgment on its counterclaim.

powerful supplementary written submissions on that point. I have come to the conclusion, however, that it would be wrong to decide that issue summarily before the facts are established at trial. ACG's application for summary judgment on its counterclaim must accordingly be dismissed.

[26] Carlina makes no application for summary judgment, but it follows from what I have said above that the injunction will not be continued against it. I will give directions as required for the further prosecution of Vano's and ACG's counterclaims. ACG's application for additional fortification is not retrospective and is made only in case the injunctions were to be continued. It therefore falls away.

Full and frank disclosure

[27] In the light of my primary conclusion on continuation of ancillary relief, I propose to deal with this aspect shortly. Mr Crow and Mr Levy have pointed out a number of respects in which the evidence in support of the initial grant of the injunction was, as they say, misleading or materially incomplete. The most significant of these was the evidence of Mr Marson, which clearly gave the impression that Mr McCranor's calculations represented considerations being taken into account and decisions made when the transaction was 'being structured.' As Mr McCranor himself later makes clear, they were in fact calculations made almost five years later to illustrate the accounting consequences on the hypothesis that the deceased had 'possibly' acquired a stake (of uncertain size) in Carlina.

[28] In my judgment, this was a serious misrepresentation. Had I not decided, for the reasons given in the preceding section of this judgment, that the injunctions should not be continued, I would have discharged them for misrepresentation and declined to reinstate them. The other alleged breaches of the duties do not strike me as sufficiently grave to justify discharge and I hope that I will be excused if I do not lengthen this judgment by dealing with them specifically.

Clean hands

[29] Mr Levy, for ACG, raised the question whether the Claimants were disentitled from claiming the assistance of equity on the grounds that the transaction upon which they rely was dishonourable. In essence, what is being said by the Claimants is that a sale of the terminal was arranged at a deliberate undervalue in consideration of which the deceased would be given shares in the purchasing company. That, if true, has at any rate the appearance of a possible fraud on Vitaly. However, in supplementary written submissions made on behalf of Vano and the more cogent for being made against selfish interest, Mr Crow urges me not to make a finding of dishonesty against Vano. I think that the submission is well founded. It would be a very strong thing on a summary judgment application to make a finding of dishonesty against a deceased person. Such a finding would require a meticulous examination of the precise relationship between Vitaly and the deceased in relation to Agromar before it could be said with any confidence that Vitaly was short changed in consequence of the deceased's alleged participation in Carlina. That cannot be done on this application. When the facts are all in the open what looks like sharp practice may have an innocent explanation and Mr Crow makes the powerful point that to date there has been no suggestion from Vitaly that he has been cheated in any way. He, after all, is the person with the

right to complain and so far he has not chosen to do so. For these reasons I do not propose to make any decisions based on conduct on this application.

Anti suit injunction

[30] Vano seeks an injunction restraining the claimants from pursuing their proceedings in Georgia. He does this on a number of grounds, but I think that I can summarise them by saying that he wishes to pursue his counterclaim here, which he says is the most appropriate forum for a dispute as to entitlement to shares in a BVI registered company, and says that he cannot properly defend the proceedings in Georgia because, he says, he has no prospect of receiving justice there. He says that he is out of favour with the present government and that he will be arrested on trumped up charges if he returns. He has been granted asylum in the UK on (broadly speaking) the latter ground. There is some evidence that the Georgian Courts are not independent of the Georgian government in cases where the government wishes to influence their decisions. Indeed, that was the burden of a submission made by the Claimants themselves to the Supreme Court of New York in an earlier dispute between themselves and a man called Kay over the right to represent the deceased's estate.

[31] The BVI is obviously an appropriate forum for the resolution of a dispute as to ultimate beneficial ownership of the shares in question, but the authorities are clear that that is not a sufficient ground for the grant of an injunction restraining a party from commencing or continuing proceedings in another jurisdiction. They are also clear that the mere fact that proceedings are on foot in different jurisdictions is not of itself a sufficient reason for granting an anti suit injunction. Generally speaking, in any application seeking the stay of foreign proceedings the party seeking the injunction must show that the BVI is clearly the most appropriate forum and that it would be vexatious or oppressive for the other party to commence or continue parallel proceedings in another jurisdiction. In general terms that means that he has the burden of establishing that justice requires that the foreign proceedings be stayed. These propositions are derived from the analysis of the authorities carried out by Toulson LJ in the Court of Appeal of England and Wales in **Deutsche Bank AG v Highland Crusader Offshore Partners LLP**.[10]

[32] Assuming, without deciding, that the BVI is clearly the most appropriate forum for the resolution of this dispute, I have to go on to ask myself what makes it vexatious and oppressive for the Claimants to continue with their proceedings against Vano in Georgia. It cannot be said that Georgia was an inappropriate jurisdiction in which to mount the claim to beneficial entitlement to the shares. A significant number of the arrangements relied upon were reached in Georgia and many (although not all) of the actors were within Georgia at the time. The terminal represented a significant item of the infrastructure of Georgia. The Claimants are currently resident in Georgia and until 2010 Vano was resident there also. On the face of it, therefore, there does not seem to

[10] [2010] 1 WLR 1023

be anything vexatious or oppressive in the Claimants having commenced, or in their continuing, their action in Georgia. The second limb of the test therefore appears to be unsatisfied.

[33] Vano says, however, that he cannot go to Georgia to defend the claim because if he does he will be arrested and imprisoned on trumped up charges. Assuming that to be true, it cannot be the rule that persons making claims abroad in the Courts of their home jurisdiction are to be restrained by foreign Courts from proceeding with them simply because the actions of a third party (in this case the Georgian government) might prejudice the defendant if he attempted to attend in person to conduct his defence.

[34] In any case, there is no evidence that it will be necessary for Vano to be physically present within Georgia in order for him to defend the claim or that the Georgian Courts would not accept evidence taken on commission or given by videolink.

[35] As for bias, even if I accept the evidence of Mr Chenciner and Professor Bowring and the findings of the Special Immigration Tribunal (all of which I have carefully considered) as both admissible and probative and assume in reliance upon it that Vano would not obtain a fair hearing in Georgia, the immediate and probable consequence is that any judgment obtained against him there would be difficult to enforce outside Georgia. As Chadwick LJ explained in **Al Bassam v Al Bassam**[11] that will, if so, be the Claimants' problem. If there are inconsistent decisions a choice will ultimately have to be made here in the BVI because, as Mr Crow points out, this Court alone has the jurisdiction to regulate the registers of Carlina.

[36] This Court plainly cannot entertain applications to restrain foreign nationals, who happen to be subject to its *in personam* jurisdiction, from taking proceedings in the Courts of their home jurisdiction on the grounds only that those Courts cannot be trusted to try cases fairly – or, for that matter, that attendance at trial by the applying party would be impossible without personal risk. Nor do I think that the position changes merely because a defendant to the foreign proceedings subsequently institutes proceedings here in the BVI, as Vano has done with his counterclaim.[12] The issue in deciding whether an anti suit injunction should be granted is not whether the applicant for the injunction will get a fair trial abroad. The issue is whether the pendency of the foreign proceedings in tandem (or, possibly, in sequence) with proceedings in the jurisdiction in which the application is made is in and of itself vexatious or oppressive, so as to create injustice. What is really happening on this aspect of the present application is that Vano is asking me to restrain the Claimants from proceeding in Georgia because he prefers to sue here and would rather not defend in Georgia. As I understand the authorities, that is not a sufficient basis for interfering, albeit indirectly, with the processes of a foreign Court.

[37] The position is different where the possibility of bias or the risk of personal danger is prayed in aid to justify a Court entertaining proceedings in circumstances where it is not otherwise clearly the

[11] [2005] EWCA 857
[12] see **Al Bassam v Al Bassam** (supra) at paragraph [46]

most appropriate and natural forum, as in **Cherney v Deripaska**.[13] But the issue in such a case is how to identify the most appropriate forum, not whether the Court should intervene with a view of bringing pending foreign proceedings to an end.

[38] Mr Crow referred me to **Masri v Consolidated Contractors**.[14] In that case the claimant had obtained money judgments against two defendants which had submitted to the jurisdiction of the English Court and which had declared that they had no intention of satisfying them and were threatening to sue in a foreign jurisdiction in an attempt to obtain inconsistent judgments. The Court of Appeal of England and Wales upheld the decision of the first instance judge granting an injunction restraining them from doing so. It was held along the way that the mere fact that the original proceedings were at an end did not deprive the English Court of jurisdiction over the defendants. The grounds for the decision were that the English Court had jurisdiction to preserve the integrity of its judgments by preventing defendants from subverting them by seeking to obtain different results abroad. That decision clearly has no application to the present case. I have held only that the Claimants are not entitled to maintain the ancillary relief which they obtained here on 3 February 2012. That decision is not a decision on the underlying merits and will not be subverted by anything done or likely to be done in the proceedings in Georgia.

[39] I can see nothing in the present state of affairs which makes it unjust, in the sense in which that word is used in the context of the anti suit jurisdiction, if the Georgian proceedings are allowed to continue. This application is therefore refused.

Conclusion

[40] The injunctions are discharged and will not be continued. There will be summary judgment (in the sense explained above) for Vano on the claim. ACG's application for summary judgment on its counterclaim is dismissed. I will give directions as to the further conduct of Vano's and ACG's counterclaims. Vano's application for an anti suit injunction is dismissed. I will hear the parties on the question of costs.

Commercial Court Judge

12 June 2012

[13] [2008] EWHC 1530 (Comm)
[14] [2008] EWCA Civ 625