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

CLAIM NO. BVIHC (COM) 103 of 2011

Applicants:

VTB Capital plc

Respondents

(1) Nutritek International Corp
(a company incorporated in the BVI)
(2) Marshall Capital Holdings Limited
(a company incorporated in the BVI)
(3) Marshall Capital LLC
(a company incorporated in the Russia)
(4) Konstantin Malofeev

Appearances: Mr Stephen Rubin QC and Mr Robert Nader for the Applicant, the Fourth Defendant
Mr Murray Rosen QC and Jerry Samuel for the Claimant

JUDGMENT

2013: 20, 27 March

(Injunction granted in aid of English freezing order – supported by proceedings brought in BVI but immediately stayed – first and second defendants resident in BVI - third and fourth defendants resident in Russia – English injunction discharged – fourth defendant applying to discharge BVI order – claimant resisting discharge on basis of pendency of BVI proceedings – alternatively seeking immediate reimposition of injunction pending hearing of claimant's application for grant of a fresh freezing order in the BVI)

[1] **Bannister J [Ag]:** This is an application by the fourth Defendant ('Mr Malofeev') for the discharge of a freezing injunction granted here to the Claimant, VTB Capital Plc ('the Bank') on 24 August 2011 and subsequently continued on 21 September 2011. The order was made in aid of an injunction in broadly similar terms made by the High Court in London on 5 August 2011 and continued there by consent on 14 September 2011. The BVI order was made, technically, in

proceedings commenced here in the BVI on 12 August 2011 pursuant to a practice that had hitherto been adopted for the purpose of making orders in aid of foreign proceedings. It was because the order was in aid of the English injunction that it was expressed to continue until further order, although the parties were given liberty to apply. The BVI proceedings, meanwhile, were stayed.

[2] In November 2011 Arnold J dealt with the inter partes hearing of the English injunction. Following six days of argument, he discharged it, on the grounds (a) that the English Courts had no jurisdiction to hear the proceedings (the appropriate forum being Russia); (b) that there was no sufficient evidence that there was any risk of dissipation; and (c) that there had been material non-disclosure. The matter went to the English Court of Appeal, which extended the freezing order until after the determination of the appeal. The Court of Appeal upheld the decision of Arnold J on the jurisdiction point but although the Court of Appeal expressed some opinions on the other reasons for Arnold J's discharge of the freezing order, it expressed no concluded view on the dissipation or non-disclosure points. The matter went to the Supreme Court, which on 6 February 2013, by a bare majority, rejected the Bank's appeal. Again, the reasoning was based upon the jurisdiction point, although the majority expressed the view that the Court of Appeal should have determined the dissipation and non-disclosure points as well. Had they done so, it was said, the likelihood was that the matter would never have reached the Supreme Court.

[3] On 6 February 2013 the Bank applied here to lift the stay on the BVI proceedings and to vary the BVI freezing order so as (1) to continue it until trial of the BVI proceedings and (2) to include additional assets ('the Tarsara assets'). Those applications were set down to be heard on 28 May 2013. On 15 February 2013 Mr Malofeev applied here for the discharge of the BVI freezing order. On 6 March 2013 the Bank issued an application asking (1) for Mr Malofeev's discharge application to come on with the Bank's application for freezing relief on 28 May 2012 or in the alternative (2) for the grant of interim freezing relief between the date of Mr Malofeev's discharge hearing (20 March 2013) and 28 May 2013, when the Bank's application to lift the stay and to continue the injunction is due to be heard over two days.

[4] I have therefore had to decide (1) whether to adjourn Mr Malofeev's discharge application; (2), if not, whether to discharge the historical BVI injunction; and (3), if so, whether to grant interim freezing relief to the Bank until 28 May 2013.

Adjournment/discharge

[5] The proceedings in support of which the BVI injunction was granted and continued having come to an end, it seems obvious to me that there can be no justification for keeping it on foot. Mr Malofeev has an absolute right to have it discharged. There is no justification for making him wait until 28 May 2013, or any other date, to have his application dealt with, nor can there be any good reason for refusing to discharge the freezing order. Some considerable time was spent in Examination of what was said to Hariprashad Charles J and contained in the material with which

she was presented about the nature and purpose of the BVI proceedings, but in my judgment, and whether or not an applicant adopting such a procedure reserves the right to turn the proceedings into main proceedings on the happening of certain events, an injunction granted in support of foreign proceedings must fall away as of right when such proceedings become abortive. The reason for this is that the juridical basis for the grant of the injunction and, with it, the Court's reason for granting it has fallen away. The point is incapable of further elaboration. I therefore decline to adjourn Mr Malofeev's application.The current injunction must be discharged. The undertakings given by VTB will remain in force

An injunction between today and the hearing of VTB's freezing order application

[6] Mr Rosen, for the Bank, insists that it wishes to continue the current proceedings to trial here in the BVI. It asks me, if I decide, as I have done, to discharge the present injunction, to grant (extended) freezing relief pending the hearing, on 28 May 2013, of its application for relief until trial.

[7] So far as the status of the current proceedings is concerned, it appears that Mr Malofeev submitted to the jurisdiction when McW Todman & Co confirmed, on 24 October 2011, that they were authorized to accept service on his behalf (but reserving the right to make a jurisdictional challenge). Paragraph 50 of an affidavit sworn on 6 February 2013 by Mr Philip Carrington ('Mr Carrington') on behalf of VTB in these proceedings says that although McW Todman has been provided with copies of all of the relevant documents, the BVI proceedings had not, at that date, 'been formally served' upon Mr Malofeev. Mr Carrington says that VTB intends formally to serve the BVI proceedings (via McW Todman) and indicates that it will also serve the proceedings on the first Defendant ('Nutritek'). There is no reason why that could not be done. The stay which has been granted must have suspended the operation of the time limits imposed by CPR 8.12 and 8.13. For the purposes of this judgment, therefore, I assume that the present proceedings are capable of galvanization back into life.

[8] Before going any further I confirm that before writing this judgment, I have as asked, read (and in part re-read) and considered all of the material referred to in paragraph 2 of the skeleton argument prepared for the hearing by Mr Rosen QC. I have also read and considered an affidavit sworn on behalf of the Bank by the Managing Director of VTB Debt Centre LLC, Mr Leonty Chemenko, on 22 March 2013.

[9] Let me say at once that I accept that the evidence in the present case establishes that there is a real risk of dissipation, if dissipation is treated as meaning (as the modern cases seem to treat it), not dissipation in its strict sense, but concealment and obfuscation. I stress that I find only a risk of dissipation. I could not make a finding about Mr Malofeev's true intentions otherwise than after a trial.

[10] I am troubled, however, by the question whether it is right in all the circumstances for this Court to entertain this application at all. I am also troubled, as will be seen, by the question whether, in the present state of affairs, it would be right in principle to grant the order sought. I accept, of course,

that there is nothing in the law of the Virgin Islands to prevent the Bank from bringing proceedings here. It has claims, albeit stayed, against two BVI registered companies and against Mr Malofeev which are well arguable. Mr Malofeev has submitted to the Court's jurisdiction. There has been no hearing formally to determine the forum question in this jurisdiction.

[11] I cannot, however, shut my eyes to the position in which the Bank now finds itself in as a result of the conclusion of the English proceedings. This Court was told in the summer of 2011 that the proceedings here were ancillary to English proceedings. In other words, the Bank was asserting here, as it asserted in England until 6 February 2013, when the Supreme Court held otherwise, that England was clearly or distinctly the appropriate forum for determination of this dispute. The Bank has now been told by the highest Court in England that England is not clearly or distinctly the appropriate forum. The English Courts have found, either expressly or by implication, that the natural forum is Russia, which is where the case, in the view of those Courts, should be tried.[1] The two members of the Supreme Court who dissented found that England was clearly or distinctly the appropriate forum. That was a finding favourable to the Bank in the English proceedings, but it is clearly unhelpful to it so far as concerns its desire to pursue the defendants here in the BVI.

[12] I appreciate that these findings are not binding upon me and that the question whether the BVI was an appropriate forum for the determination of this dispute has not been considered by the English Courts. But it remains the case that it is the view of the English Courts, up to the very highest level, that this dispute should be resolved in Russia.[2] The Supreme Court has expressed the clear view that Mr Malofeev has been enjoined for far longer than was justified, with an assumed corresponding deleterious effect upon his entrepreneurial activities. In these circumstances it seems to me that it would be verging on the perverse for this Court – certainly as things stand - to start making orders which would run contrary to the clearly expressed view of the English Courts that this dispute should be resolved in Russia and that the English injunction should be discharged.

[13] Further, the question whether the stay which affects the present proceedings should be lifted has not yet been argued, let alone decided. There are no active proceedings before me in this jurisdiction and it is uncertain whether there ever will be. It seems to me that the question whether the stay should be lifted is the most fundamental of the questions which presently face the Court. It will be the occasion when consideration will have to be given to, among other things, the consequences of the events which have taken place in, and the decisions of, the English Courts. Until that application has been dealt with it is not possible to know whether there ever will be live proceedings between these parties here in the BVI. Mr Rosen has shown me no authority to support the view that where there are no current foreign proceedings in aid of which the making of a freezing order can be considered and where there are no domestic proceedings on foot (or at any rate in respect of which an undertaking has been given to cause them to be on foot as a matter of urgency), the Court may grant freezing relief, as it were in a vacuum. It may be that, as a matter

[1] see per Lord Wilson JSC at paragraph 160 of the judgment of the Supreme Court
[2] or, in the view of the minority in the Supreme Court, in England

of pure jurisdiction, the Court has *power* to make such an order, but in my judgment it is contrary to established principle for the Court to act in such a way. Such an order must, in my judgment, be made, if at all, in support of a right which is being presently asserted in some jurisdiction. In this case, the Bank is presently asserting no right anywhere.

[14] I therefore decline to grant the so-called interim relief asked for by the Bank.

Commercial Court Judge

27 March 2013