

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 0037 OF 2013

BETWEEN:

NATALI OSETINSKAYA

Applicant

v

GOLANTE MANAGEMENT LTD

Respondent

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 0037 OF 2013

BETWEEN:

NATALI OSETINSKAYA

Applicant

v

USILETT PROPERTIES INC.

Respondent

Appearances: Mr Mungo Lowe for the Claimant/Applicant
Mr John Carrington QC for the Defendant/Respondent

JUDGMENT

(2013: 17, 25 July)

(**Black Swan** jurisdiction – whether non cause of action defendant to be enjoined where foreign Court has discharged interim injunction for material non-disclosure – whether non cause of action company defendant to be enjoined from dealing with its own shares – whether disclosure order to be made against non cause of action defendant - fortification for cross undertaking in damages where non cause of action defendant already subject to similar injunctive relief in the foreign proceedings – relevance of delay in **Black Swan** applications)

- [1] These are applications by Ms Natali Osetinskaya ('the Applicant') for freezing injunctions. They arise out of disputes between herself and Mr Sergei Kalinin ('Mr Kalinin'), Ms Marina Semich ('Ms Semich') and Mr Alexhey Slepukhin ('Mr Slepukhin') (together, 'the Respondents') over the ownership of assets originally held by two Cypriot companies in each of which the Applicant is beneficially interested but which she says have been wrongly misappropriated by the Respondents. The Respondents are as a matter of fact not the procedural respondents to these applications, but they are the real persons with whom the Applicant is in dispute and it is convenient to refer to them collectively in this way for the purposes of this judgment.
- [2] In short, the Applicant claims, first, that shares in a company previously wholly owned by a Cypriot company called Invest Port, in which the Applicant holds 46% of the shares and Ms Semich and Mr Kalinin hold the remaining 53% have been fraudulently transferred by the latter to a BVI registered company called Golante Management Ltd ('Golante'). The company whose shares were allegedly so transferred is a Cypriot company called Homerinos Management Limited ('Homerinos'). Homerinos owns a Vietnamese company called Swiss village Company Ltd ('Swiss Village'). Swiss Village holds the rights to a hotel in Vietnam, which the Applicant says are worth US\$20 million. The Golante Respondents say that they are worth only US\$3 million and that Invest Port in fact sold the Homerinos shares to Golante. In proceedings in this jurisdiction to which Golante is the sole defendant ('the Golante proceedings'), the Applicant seeks orders restraining Golante from giving effect to dealings with its own shares and from disposing of any shares in Homerinos or Swiss Village (up to a ceiling of US\$20 million).
- [3] The applicant also makes complaint against Ms Semich and Mr Slepukhin based upon their conduct in relation to the affairs of another Cypriot company called Loufrone Holdings Limited ('Loufrone'). The applicant is beneficially entitled to 50% of Loufrone. Ms Semich is beneficially entitled to the balance. The Applicant complains that a derelict hotel in Finland, which she claims to have had valued 'orally' in the sum of US\$3 million (in other words she claims that some unidentified person of unspecified qualifications has told her that the hotel is worth US\$3 million) was wrongfully transferred by the Respondents in March 2012 for the sum of US\$200,000 to a BVI registered company called Usilett Properties Inc ('Usilett'). Usilett is owned by Ms Semich and Mr Slepukhin. In proceedings to which Usilett is the only defendant ('the Usilett proceedings'), she seeks orders

restraining it from giving effect to dealings with its shares or dealing with any of its property (up to a ceiling of US\$3 million).

- [4] Although the proceedings have separate timelines, they were dealt with together at the *inter partes* stage, so that it is convenient to deal with them in one judgment. I must, however, consider them separately. I shall take the Golante proceedings first.

The Golante proceedings

- [5] The Golante proceedings have a Cypriot forensic background. On 26 April 2012 the Applicant commenced what she describes as derivative proceedings¹ in the District Court of Nicosia ('the Cyprus Court') against Invest Port, Mr Kalinin, Ms Semich and Golante, seeking judgment for US\$20 million. On the same day the Cyprus Court granted the Applicant an injunction restraining the defendants to the action, together with one of Invest Port's directors and Homerinos, from dealing with the shares in Swiss Village and restraining Mr Kalinin and Ms Semich from dealing with the shares which the Applicant alleges that they hold in Golante. On the return date on 11 March 2013 the Cyprus Court discharged the freezing order on the grounds that the Applicant had failed to disclose the facts that (a) Homerinos had bought the shares in Swiss Village from Invest Port and another company which had held them together with Invest Port for US\$2.2 million as recently as 2011; (b) that the shares had been valued by the Bank of Saigon at US\$1.3 million; and (c) that the notice of general meeting approving the sale, which the Applicant said she had never received, had in fact been sent to her registered address. I am told that there is an application before the Cyprus Court to renew the Cypriot freezing injunction, but that it is unlikely to be dealt with for some time.
- [6] On 22 March 2013 the Applicant launched the present proceedings, which seek the relief which I have described above and which are founded upon the so called **Black Swan**² jurisdiction. The application for injunctive relief came before me on the same day on an *ex parte* basis. I declined to grant the relief sought on the grounds that if the home Court did not see fit to keep in place injunctive relief which it had granted to the Applicant, there was no good reason why this Court should act where the home Court had declined to do so. I did indicate, however, that the applicant could renew her application, if so advised, on

¹ as I understand it, although she is the claimant any fruits of the Cypriot proceedings will enure to Invest Port

² **BVIHCV 2009/399**

an *inter partes* basis. That she did, and argument on that application was heard on 17 July 2013.

- [7] In my judgment relief should be refused for the same reasons that it was refused on 22 March 2013. As Mr John Carrington QC, who appeared on the *inter partes* hearing for the Respondents pointed out, nothing has changed since 22 March 2013 to make the grant of injunctive relief any less inappropriate now than it seemed to me to be on that date. I therefore refuse to grant any relief in the Golante proceedings.

The Usilett proceedings

- [8] This application is also founded upon the **Black Swan** jurisdiction. The Applicant brought proceedings in The District Court of Nicosia against Loufrome and the Respondents (tendentiously described in her supporting affidavit as 'the Fraud Defendants') on 5 December 2012, again on a derivative basis, seeking (among other heads of relief) a declaration that (in effect) Usilett holds the hotel on trust for Loufrome and judgment against all the defendants³ in the sum of US\$3 million. On the same day the Cyprus Court granted the Applicant interim injunctive relief restraining (inter alia) Usilett, which has submitted to the jurisdiction of the District Court, from dealing with the Finnish property; Ms Semich and Mr Slepukhin from disposing of their shares in Usilett; and the Respondents from making withdrawals from their combined bank accounts which would cause the aggregate balances to fall below US\$3 million. No freezing order was granted against Usilett.
- [9] On 10 May 2013 the Applicant issued the present proceedings seeking the relief to which I have already referred. The matter was argued together with the Golante application on 17 July 2013.
- [10] It seems to me that the first head of relief sought (restraining Usilett from dealing with its own shares) is badly drafted. What I think the Applicant is really seeking is an order preventing Usilett from facilitating or registering dealings with its shares. Given that the District Court has seen fit to make an order against Ms Semich and Mr Slepukhin from dealing with their shares in Usilett, it seems to me just and convenient for this Court to make an order restraining Usilett from giving effect to any dealings that might be attempted in breach of the Cyprus injunction.

³ Mr Carrington QC contended, in my view wrongly, that the money claim was directed only at the Respondents, but that is a misreading of the prayer for relief, which seeks (in paragraph (N)) judgment for US\$30 million against all of the Defendants, but then goes on (in paragraph (O)) to explain why the individuals should be liable to pay it

- [11] So far as an order is sought restraining Usilett from dealing with the Finnish property, Mr Carrington QC relies upon certain passages from the judgment of Kawaley JA in **Yukos CIS Investments v Yukos Hydrocarbons Investments Limited**⁴ as restricting the **Black Swan** jurisdiction to securing assets situated within the BVI. I do not read Kawaley JA as imposing any such restriction. It is true that he referred to 'local assets sought to be frozen' but that is the essence of the **Black Swan** jurisdiction. Where those assets are shares situate within the jurisdiction which provide the alleged foreign wrongdoers with 100% control of a BVI registered company, it will usually also be just and convenient to prevent the shares from being rendered worthless by restraining the company from disposing of its property, whether that property is situate in the BVI or abroad, at any rate where the evidence shows that it is a non-trading single asset holding company. Whether this is treated as part of or an extension of the **Chabra**⁵ jurisdiction or as implicit in the **Black Swan** jurisdiction itself, does not seem to me to matter very much. Such an order was made in **Black Swan**, restraining the respondent company from disposing of land in the Republic of South Africa and there is no reflection in any of the judgments in **Yukos** that the Court of Appeal considered that to have been an excess of jurisdiction. **Yukos** was simply not dealing with the point raised by Mr Carrington QC. In my judgment, therefore, there is nothing wrong in principle with the application seeking to restrain Usilett from dealing with the Finnish hotel.
- [12] Although Usilett is restrained in the Cyprus proceedings from disposing of the Finnish property, it seems to me just and convenient that it should also be restrained in its jurisdiction of incorporation. Further, it seems to me that the Applicant makes out a good arguable case for saying that Usilett holds the Finnish property on a title that may be voidable in favour of Loufrome. I am therefore prepared to make an order against Usilett that it must not, until further order, deal in any way with the Finnish property. The Respondents are to be free to apply at any time on two working days notice for liberty to deal with the Finnish property. The Applicant must provide a cross undertaking in damages.
- [13] In light of the fact that the Respondents are already enjoined or restricted in two other jurisdictions from disposing of the Finnish property, I do not think that any fortification of the Applicant's cross undertaking in damages is required in the circumstances of this case.

⁴ HCVAP 2010/028, 26 September 2011, at paragraphs 139, 145 and 147

⁵ **TSB Private Bank International SA v Chabra** [1992] 1 WLR 231

- [14] The Cyprus Court has made no general freezing order against Usilett and I decline to make a free standing one in this jurisdiction. In any case, the Applicant produces no evidence that Usilett owns any assets other than the Finnish property, let alone that it holds any such assets for the benefit of Loufrome.
- [15] The Applicant also seeks orders for disclosure by Usilett of details of its assets worldwide. It seems to me that that is to misunderstand the nature of the **Black Swan** jurisdiction. The **Black Swan** jurisdiction applies to prevent non cause of action defendants from disposing of identified assets which might be available to satisfy a future judgment of a foreign Court in proceedings to which the owner, or a person who is arguably the owner, of such assets is a defendant. It does not entitle the claimant in the **Black Swan** proceedings in this jurisdiction to interrogate the respondent to them about its assets generally. That will be the function of orders made in the foreign proceedings.
- [16] I have been concerned about the delay in bringing this application. The Applicant knew about the disposal of the Finnish property to Usilett as long ago as the end of October 2012. She filed her proceedings in Cyprus on 5 December 2012. The Cypriot Court, however, seems to have had no problem with delay when it granted its interim injunction. In my judgment delay in the context of the **Black Swan** jurisdiction is likely to be of only minor significance, particularly where similar relief is already in place in the foreign Court. The significance of delay in freezing order proceedings against cause of action defendants is that it tends to make claims of fear of dissipation less sustainable. Where, as here, the claimant has already established fear of dissipation to the satisfaction of the foreign Court and where, as here, it is not alleged that any prejudice has been caused by the delay in bringing these proceedings, it does not seem to me to signify that the Applicant did not launch them until 10 May of this year.



Commercial Court Judge
25 July 2013